

The OAU's 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

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1. Preface

The Organisation of African Unity's (OAU's) Model Law for the *Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* aims to protect Africa's common biological diversity and the livelihood systems dependent on it with a common tool. A common tool is required among countries because a species does not recognise political boundaries and it thus often occurs in many countries. On the other hand, social and political realities vary requiring flexibility in legislation to adapt the OAU's Model Law to the priorities and needs of each African nation.

This booklet aims to raise awareness and promote wider participation in the domestication into national law of the OAU's Model Law. It is written for African policy-makers, public authorities, local communities, non-governmental organisations (NGOs), lawyers and anybody with an interest in the conservation and sustainable use of Africa's rich biodiversity such that future generations can continue to enjoy its abundance. The Model Law is not a quick fix solution for Member States to apply and implement, as it is, in compliance with the obligation to the TRIPs Agreement or the Convention on Biological Diversity (CBD). It provides the necessary framework for Member States of the OAU to craft out specific national legislation consistent with their political orientation, national objective and level of socio-economic development. The debate on and public participation in the regulation of access to the continent's biodiversity at national and local levels is urgently required in order to secure the continuation and well-being of Africa's diverse livelihoods, cultures and biological wealth. This is because the growing forces of global trade are seeking to secure monopoly control over Africa's valuable biodiversity, knowledge and markets through the guise of global and bilateral trade agreements, which are intrinsically unfair.

The OAU Council of Ministers has specifically recommended that African countries develop national laws, as well as regional regimes and common negotiating positions in international law and related issues to protect Africa from this onslaught. The ultimate aim is to ensure that the majority of the peoples in developing countries, and Africa in particular, live within an open, dynamic system of exchange of biodiversity, knowledge, innovations and practices. This legislation enshrines the right to continue living according to ecologically coherent practices and to establish a boundary beyond which monopolies cannot penetrate.

Some African countries have already started this process by holding consultations involving all stakeholders in managing biodiversity. This handbook hopes to facilitate the participation of those whose rights and responsibilities are at stake (local communities, farmers and plant breeders), so that they can contribute to and help implement this legislation.

The structure is as follows: the booklet begins with an introduction giving the background and development of the OAU's Model Law, and continues with a brief analysis of the importance of biodiversity. The main section discusses 11 principles and cross-references them to the text of the Model Law. These principles are important to understand the spirit of this law and the values it embodies.

The full text of the OAU's Model Law in English and French is included in this publication in Appendix 1 and 2.

The Arabic and Portuguese versions of the Model Law can be obtained on request from the OAU General Secretariat, Conference Division, Addis Ababa, Ethiopia.

We would particularly like to thank Carolina Lasén Diaz (The Foundation for International Environmental Law and Development – FIELD) for compiling the first drafts; Tewolde Berhan Gebre Egziabher and Sue Edwards (Institute for Sustainable Development – ISD) for overseeing the final edit; and Emma Irwin (The Gaia Foundation) for helping edit and complete the final draft. We also acknowledge the following for contributing to the overall development of this booklet: Antonieta Coelho, Cecilia Oh, Charles Moguya, Cyril Lombard, George Roberts, Gurdial Singh Nijar, Henk Hobbelink, Liz Hosken, Martin von Hildebrand, Michaela Figuera, Miriam Mayet, Nancy Kgengwenyane, Rachel Wynberg, Richard Kimera, Robert Brac de la Perriere, Madam Marie Angèle Hermitte, Meriem Louanchi, Carine Pionetti, Bola Obilana.

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2. The Development of the OAU's Model Law

2.1 Introduction: Setting the Context

African societies have always been innovative and have thus developed their knowledge and technological base, adapting to changing conditions, as do all human cultures. The colonial period imposed changes over which the local peoples had no choice. The 'development paradigm' today continues to impose foreign values and priorities. However, there is growing realization and an assertion that new developments must be properly assessed and evaluated in relation to the various values and priorities of the different cultural traditions they are intended for. This is to ensure these new developments contribute to the society's quality of life, in harmony with the environment, and do not undermine and destroy the livelihoods of the rural people.

During the twentieth century, developments in western science and technology accelerated rapidly on all fronts, e.g. in transportation, computer systems and biotechnology. These have had huge impacts on the structure of global society, on political and economic power, and, above all, on the control of and access to the diverse biological resources necessary for sustainable livelihoods.

There is general agreement on the need to conserve and sustainably use biological diversity for the well being of the planet's life-support systems, on which all of humanity depends. There also exist opposing forces that are attempting to claim private monopoly rights over community biological diversity, to gain market control, through the appropriation of the rights and

resources of local communities, indigenous peoples and sovereign nations through the intellectual property rights (IPR) regime and the global trade system. These controls are imposed by international and bilateral trade agreements, and have major implications for local, national and regional food security, agriculture and rural development as well as health and the environment.

One of the central agreements of the World Trade Organisation (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), obliges its member states to adopt either patents, a *sui generis* system, or a combination of both, for the protection of new plant varieties. The patenting of living organisms or their parts or components means legally granting private monopoly control rights over them and over their offspring.

For Africa, patents or other forms of intellectual property rights on living organisms have profound implications for communal livelihoods that have sustained the continent for generations. The Convention on Biological Diversity (CBD) recognises the role and achievement of local and indigenous communities in the conservation of biological diversity and so recognises the importance of biodiversity as an essential area within which to reaffirm and protect community rights. The TRIPS Agreement however, is in direct conflict with the basic tenets of the CBD, in that it formalises the trend in which intellectual property rights confer private, individual and exclusive ownership on life forms.

There is growing consensus that current IPR regimes cannot protect indigenous technologies, innovations, practices and biodiversity. These systems encourage biopiracy and constitute a process of double theft. They steal creativity, innovations, technologies and practices of local communities by claiming collective innovations and practices to be their own, and then rob the community of the economic benefits derived from such products.

The types of rights Africa needs are not those IPRs which monopolise for commercial purposes what belongs to communities through privatisation, but those rights that recognise and protect the lives and livelihoods of local communities, including farming communities, and indigenous peoples. Local communities continue to conserve and enhance biodiversity, and maintain stable ecosystems on which human beings and other species depend for their lives. Their livelihoods provide this benefit to present and future generations, and they see this as their responsibility inherited from past generations and to be handed over to the next.

This requires developing a legal system that reflects and protects the essential nature of Africa's rich diversity of cultures so that they can continue to evolve, thrive and give all of humanity the services they have been giving it with respect to the conservation and sustainable use of its biodiversity. This system of rights should in no way restrict or impose upon the customary norms and especially biodiversity flows which have evolved over millennia. These rights should demarcate the boundary line beyond which external, dominating forces cannot intrude.

2.2 Biodiversity as the Basis of All Life

Africa is economically the least developed continent, and yet is one of the best endowed in biological resources. The continent is particularly rich in crop and medicinal plant diversity, the economic value of which has not been quantified. The knowledge and innovations that its peoples have developed to use and conserve these biological resources is based on indigenous practices developed and tested over generations. Coffee, sorghum, millet, and oil palm

are just a few examples of the vast range of useful plants of African origin, which have made a crucial contribution to the world's economic development¹.

Africa's present biological wealth is based on the innovations of successive generations of local communities, which have consistently developed and conserved their biological resources. In so doing they have accumulated knowledge, innovations and practices. The livelihoods of the local communities of farmers, hunters, fishermen and healers still depend almost exclusively on these resources, innovations, technologies and practices.

As the impact of globalising unfair trade becomes increasingly felt, this rich resource base is what must continue to provide Africa with its vitality both in maximising its advantages and in limiting adverse impacts upon its ecological, climatic and social stability. The majority of the continent's population derives its food, medicines and shelter from biodiversity. As the gap between the financially rich and poor widens, the dependence on biological diversity and on the knowledge of how to use it will become even more obvious.

The prognosis is that climate change is intensifying. The most predictable impact of climate change is the increasing unpredictability in the weather. Under the resulting erratic conditions, a rich biodiversity base will become more and more essential for options in available crops, medicines and other essential materials. This will make the way local communities have always 'hedged their bets' by planting a wide range of species and varieties of crops in order to ensure food security even more critically required.

The devastating impact which western industrial society has wrecked on species diversity is unprecedented in the history of life². The expansion of the industrial model of development through globalisation is driving even greater numbers of species to extinction. For example, through the excessive use of agrochemicals developed for war purposes during World War II, the Green Revolution has been responsible for a huge displacement of farmers' varieties of crop and their wild relatives. Now, it seems that this process will be carried on further through genetic engineering that is controlled by monopolies of transnational corporations. Extinction is forever. There is no means of reversal.

This situation directly threatens the human species, which thus risks bringing about its own extinction. This is because its survival depends on fully functional ecosystems, with their species complement. Life is a dynamic interactive process. Below a certain level of diversity, ecosystems become vulnerable, then sick and collapse.

In summary, globalisation of trade universalises biological and cultural homogeneity or uniformity, at the same time increasing the economic gap between the rich and the poor. When these two consequences converge great suffering is inevitable, as already being manifested through climatic instability, depletion of biodiversity, degrading poverty, famine and death.

Africa's biological resources are still plentiful and its cultures are still strong and vibrant. These will continue to be the basis of its wealth and security into the future. This requires that Africa define its path of economic development fully respecting its cultural norms and ecological imperatives.

2.3 The OAU's Initiatives

The OAU was established on 25 May 1963 when 32 Heads of State and Government signed its Charter. There are currently 53 Member States. Its purposes are to:

- promote the unity and solidarity of African States;
- defend the sovereignty of its members;
- eradicate all forms of colonialism;
- promote international co-operation; and
- co-ordinate and harmonise Member States' economic, diplomatic, educational, health, welfare, scientific and defence policies.

2.3.1 The OAU's Model Law on the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources

The development of the OAU's Model Law is the result of a number of initiatives from the Scientific, Technical and Research Commission of the OAU (OAU/STRC), the Ethiopian Environmental Protection Authority and the Institute for Sustainable Development in Ethiopia.

The OAU, through its Scientific, Technical and Research Commission, had identified the problem of control, conservation and utilisation of Africa's biological resources and organised a *Workshop on Medicinal Plants and Herbal Medicine in Africa: Policy Issues on Ownership, Access and Conservation*, held in Nairobi, April 1997³. The workshop recommended that:

- i) The OAU/STRC should initiate and co-ordinate the process of drafting a model law on the protection of indigenous knowledge on medicinal plants
- ii) Establish a working group of experts to deliberate, co-ordinate and harmonise existing national policies on medicinal plants and put in place a common policy on sustainable use of medicinal plants
- iii) Assist Member States to ensure that policies on ownership, access, utilisation and conservation of medicinal plants are drawn up in consultation with other member states at sub-regional and regional levels, since political boundaries are not necessarily ecological boundaries
- iv) Encourage Member States to recognise the urgent need to study the implications of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organisation (WTO) on Africa's bio-resource heritage, and the expected implementation of all the IPR regimes found in it by the year 2000 and 2005 respectively.

2.3.2 The African Common Position

The OAU initiative, mentioned above, provided the conceptual and empirical evidence for the formulation of the African Common Position discussed at the OAU Council of Ministers Meeting in Algiers (July 1999), the Meeting of Africa's Ministers of Trade in Algiers (September 1999), and Kenya's communication to the WTO on behalf of the African Group (July 1999) calling for fair trade rather than free trade, among other issues. They demanded that a sui generis system for the protection of new plant varieties should include systems that protect the rights of communities and their indigenous knowledge, as well as the rights of farmers and fishermen, and their innovations, technologies and practices. They further requested that TRIPS be harmonised with the Convention on Biological Diversity (CBD) and the

International Undertaking on Plant Genetic Resources for Food and Agriculture – (the IU) – being negotiated under the FAO's Commission on Genetic Resources. One of the most important elements of the African position was the opposition to patenting of life forms ⁴.

The impulse for this second OAU initiative came from a group of African Government negotiators, scientists, non-government and community-based organisations that had been working to develop a common negotiating position at the various biodiversity-related fora (CBD, IU, Biosafety Protocol etc.). They had also been monitoring the implementation of the TRIPS Agreement. They united forces with the OAU/STRC to work together on these issues of common concern.

Both groups found common ground for collaboration in response to the mounting pressure on developing countries in general, and Africa in particular, to comply with the CBD and legally binding agreements of the WTO. At a meeting of these groups in Addis Ababa (April 1998) a draft law on Community Rights and Access to Biological Resources, originally developed by the Environmental Protection Authority of Ethiopia, assisted by the Third World Network (TWN) and the Institute for Sustainable Development (ISD), was discussed and adopted as a draft model law (then referred to as 'draft model legislation') for Africa.

The draft model law was sponsored by the Government of Ethiopia and tabled for discussion at the 68th Ordinary Session of the Council of Ministers of the OAU held in Ouagadougou, Burkina Faso, in June 1998. The Council of Ministers of the OAU, in adopting the Model Law, recommended that Governments of Member States:

- i) give due attention as a matter of priority to the need for regulating access to biological resources, community knowledge and technologies and their implication for intellectual property rights as entrenched in the international trade regime of the TRIPS Agreement;
- ii) adopt the Draft Model Legislation on Access to Biological resources and call on Member States to initiate the process at national level involving all stakeholders in accordance with national interest and enacted into law;
- iii) initiate a process of negotiation among African countries to formulate and adopt an African Convention on Biological Diversity with emphasis on conditions for access to biological resources and protection of community rights; and
- iv) develop an African Common Position to safeguard the sovereign rights of Member States and the vital interests of our local communities and forge alliance with other countries of the South on the revision of TRIPS in 1999.

The Council of Ministers also requested the Secretary General to designate the OAU/STRC as the Focal Point for the co-ordination and follow-up activities including the convening of African regional and sub-regional meetings on issues of biological resources and community rights.

2.4 Why This Legislation is Important

The decision of the OAU Council of Ministers has put the CBD and the TRIPS Agreement on the national agenda of Member States. This decision has been followed by several workshops, seminars, expert consultations, and round table discussions. These have involved a cross-section of society in order to raise the general level of awareness and increase participation in the further development and implementation of the model law.

These activities have already had some impact in achieving a desirable level of consensus on priority issues and helping governments to fulfill their obligations.

Africa's long history, cultures, spiritual and political values have evolved during centuries of a combination of suppression and disruption to its potential development and growth. These values and the future of African societies are currently being threatened by privatisation, the unethical use of scientific and technological research, the imposition of Intellectual Property Rights (IPRs) on life forms, and on community innovations and practices. The response of those concerned with social and ecological justice in Africa consider that these imposed IPR regimes are totally at odds with its culture and tradition and therefore unacceptable. These trends are imposed from outside and promoted by those Africans and their external supporters who are driven by personal gain, at the expense of their heritage, their community and future generations.

The challenge now is to find a way of countering these imposed IPRs such that the forces motivated primarily by personal and commercial interests do not undermine the social cohesion and ecological security of the wider community.

The aim of the OAU's Model Law is to regulate this dynamic and to protect the collective social process of knowledge and technology generation. It also aims to recognise an ecologically just relationship between the human community and the other species and systems with which it coexists, and upon which it depends for its existence. These principles are enshrined in the customary laws of Africa's diverse cultures.

The further development of this legislation at the national level provides the challenging opportunity to reflect and recognise Africa's cultural heritage in the laws of the modern national state. It provides a chance for Africa to throw off the colonial yoke of western jurisprudence (law making) and develop one that most fully reflects its wealth of cultural perspectives and inherently respectful relationship with the diverse biological world with which its cultures have co-evolved.

On a more practical level, this legislation also aims to:

- i) prevent the disruption of Africa's rural life and national food production systems by stopping present trends which are threatening to erode:
 - seed and other planting material, the foundation of all agriculture;
 - traditional medicinal plants, the basis of health-care for the majority of Africa's people;
 - natural fibres and colours, the basis of the many types of arts and crafts of Africa's local communities;
- ii) promote the continuation of the socially positive, customary, community practices of sharing biodiversity and innovations, and extend this sharing to the new possibilities arising from the growing use by external interests of the biodiversity, knowledge and technologies of Africa's local communities;
- iii) safeguard the vital interests of Africans against the negative consequences of globalisation, too numerous to outline here (see Appendix 2 for useful references and further reading); and
- iv) help the OAU Member States which are also Members of the WTO meet one of their obligations in Article 27 3(b) of the TRIPS Agreement without undermining the rights of their local communities.

3. Africa's Strategy in Meeting International Obligations

The OAU's Model Law is neither rigid nor restrictive. Instead, it recognises the dynamic nature of indigenous biodiversity-rich livelihood systems, and the wealth of human heritage they represent. Laws are increasingly changed or formulated according to the interests of the powerful to control the development of others. This law, however, specifically aims to prevent encroachment into the realm of community livelihood systems. It sets up a boundary line between communal open systems and those of monopoly control and privatisation, and sets out to make it into a line of defense of the community.

The Model Law complies with the obligations of states to the CBD to respect and maintain the innovative lifestyles of local and indigenous communities, as well as obtain their consent when granting access to their biological resources, knowledge, innovations and practices. It secures for them shares of the benefits accruing to others from the access so granted. It is, therefore, a legal system to govern access, benefit-sharing and community rights, including farmers rights, as appropriate for Africa's peculiar characteristics of enormous biological and cultural diversity in dominantly rural societies.

The TRIPS Agreement of the WTO obliges countries to introduce patents or some "effective *sui generis*" system for plant varieties, as well as to patent micro-organisms. Northern countries and the UPOV Secretariat are promoting the UPOV Convention of 1991 as the appropriate *sui generis* option.

African countries are increasingly rejecting UPOV 1991, as it has proved to be a tool for allowing foreign monopolies over local biodiversity. The OAU's Model Law thus includes Plant Breeders' Rights formulated so that Africa's long tradition of community innovation and breeding is not undermined by the new norms of commercial breeding and innovation, largely by foreign interest groups and/or for foreign markets. This meets the obligations of TRIPS 27 3(b) for a *sui generis* option, while not undermining the obligations under the CBD to the majority of Africa's population.

It must be recognised that these dynamic livelihood systems will be severely eroded if crucial elements in the system, particularly farmers' innovations, breeding and access to biological resources are restricted through allowing private monopoly rights for commercial interests on plant varieties or on other living organisms or their parts or components, which is what TRIPS is trying to do globally.

Africa's rural majority are dependent for their food, medicine and shelter on the free access to and exchange of biological materials, knowledge, innovations and practices. This is a matter of livelihood security and food sovereignty, and so of survival. Africa's governments cannot allow largely foreign driven commercial interests to undermine the survival of its people for short-term gain, at the expense of the long-term food security of its own present and future generations. The right to life as enshrined in the Universal Declaration of Human Rights ⁵ and the diversity of biological organisms upon which human beings depend cannot be compromised by the globalising forces of commercial gain.

The OAU's Model Law provides a way in which countries can comply with the CBD, which gives priority to protecting the interests of Africa, and from this position, meets the requirements of TRIPS. Meanwhile the African Group position in the WTO is calling for a proper review of TRIPS; a five year transition period after the review; a *sui generis* system that allows for the

protection of community rights and practices; and the harmonisation of TRIPS with the CBD and the IU.

The challenge now is to bring about the required harmonisation through participatory processes in which the stakeholders, those whose lives are affected, are involved. Some consider that the OAU's Model Law as a whole provides for the *sui generis* option in TRIPS. Others believe that one cannot have a trade regime which promotes private commercial monopoly rights governing collective livelihood systems. Thus, the correct domain is for the Model Law to be consistent with the CBD. By making it consistent with the CBD, TRIPS will become subordinated to ethical and democratic values, and to the dictates of food security, the conservation of biological resources, and to justice. The section on Plant Breeders' Rights would then rightly fulfil the *sui generis* requirements of TRIPS.

There are also growing numbers of people who believe that elements essential for the ecological well-being and thus the survival of micro-organisms, plants and animals, including humans, cannot be governed by trade priorities and thus Article 27 3(b) of TRIPS should be entirely deleted from that Agreement.

If this were to happen, each agreement could be strengthened in its domain, the CBD in relation to biodiversity and the environment and the WTO Agreements in relation to trade. It would also be necessary to establish a proper independent dispute settlement mechanism outside both the CBD and WTO. Only then could it be possible to settle disputes fairly.

4. Core Principles Behind the OAU's Model Law

4.1 Food Sovereignty and Security

The most effective way of dominating a community is to take control of its food. Food sovereignty and security is thus an absolute right. – COAMA Programme, Colombia ⁶

Indigenous farming systems in Africa produce over 90 per cent of the food requirements of the people. These systems are based on biodiversity-rich indigenous farming practices which usually include multiple-cropping, fallowing, crop rotation, and other ecologically-based technologies for production enhancement. In particular, indigenous farming systems include the use of farm-saved and shared seed and other planting material. The livelihoods of the people depend on biodiversity for about 95 per cent of the totality of their economic activities.

Agrochemicals, homogenous seed, monocropping, and the new monopolised genetic engineering, all reduce biodiversity. The new genetic engineering, besides producing homogenous planting materials, is monopolistically controlled by big companies based in the industrialised countries. Therefore, genetic engineering as we now have it, removes local and national control over food production. The potential negative impacts on Africa's food sovereignty and security of these biodiversity-reducing systems and technologies are thus very severe.

Small farmers tend to get pushed off the land by industrial agriculture, because it is a system outside their control. They cannot afford to buy seeds and other external inputs on a regular basis.

Although the need for more food is recognised in Africa, the root cause of food shortages does not lie in low production *per se*. Food shortages arise more from shortcomings in the national economic system that are structural (political, economic, market access, investment etc.) and infrastructural (storage facilities, transportation, markets etc.). Above all, they arise from the lack of purchasing power of the hungry. The obvious solution thus lies in producing food in sufficient quantities and having the purchasing power to have access to it at the local level. Therefore, it is essential that communities maintain sovereignty over their own systems of food production, distribution and supply. Efforts at ensuring food security should, thus, focus on improving their ability to maintain food sovereignty.

Africa's role in the rapidly expanding genetic engineering industry has been mainly as a supplier of raw materials for research and commerce. The majority of crops which have been genetically engineered are resistant to the herbicides and pesticides produced by transnational agrochemical corporations. Every season, the planting material has to be bought together with the corresponding agrochemicals. The current intellectual property systems allow transnational corporations to hold patents, and thus have exclusive rights over the planting material so that they control it. This has disastrous implications for farmers, since for the first time in history they are losing control of the foundation of their livelihoods – the 'seed'.

When 'seed' becomes the property of corporations, farmers are forced to sign contracts which dictate how they should plant, what chemicals they should use and in what quantities they should apply them. The corporations also have the right to inspect farmers' fields for what they consider to be any breaches of the contracts ⁷. Farmers are thus reduced to corporate servants, where they are responsible for all risks taken, and are held liable for all that goes wrong.

This process is leading to the centralised control of the world's food production system by the few transnational agrochemical corporations which own the seed of the major staple crops (wheat, maize, soya, rape, and increasingly rice). Genetic engineering promises to make a real impact on Africa's food production, for example in producing more effective drought and viral resistance varieties ⁸. But, these have not been, and are still not on the research and development agendas of the agrochemical corporations.

Therefore, the centralisation of food production under the control of forces external to the local communities in Africa is a recipe for political and ecological disaster. Farmers and the state will become controlled by transnational corporations and will become mere tools in their agendas motivated by profits. This is why, through trade agreements, food production is being increasingly diverted to focus on export commodities at the expense of local food security.

4.1.1 The Right and Responsibility to Keep Seed Free

Genuine food security that ensures the self-reliance of communities and Nation States requires decentralisation rather than centralisation. Household food security, and especially security in planting material, is the basic building block for both community and state food security. This is achieved within a decentralised system of food production in which local communities are autonomous in the decision-making, control and management of their resources and livelihoods. This is enshrined as a fundamental human right in the Universal Declaration of Human Rights ⁸.

Biological diversity is the essential basis of household food security and food autonomy. In turn, food autonomy is the basis of political and ecological security. Given the increasing climatic instability, thanks to global warming, a strong local management and a large biodiversity base provides the best insurance for both food security and political stability.

In most local communities food security depends primarily on the knowledge and activities of women, who are the major contributors to biodiversity enhancement and management. The mechanisation of agriculture and emphasis on cash crops marginalises women and irreversibly erodes the knowledge, control and hence autonomy of traditional livelihood systems. When knowledge and traditions are lost, the reproductive capacity of these knowledge systems is destroyed, and so cultures, many of which have evolved over millennia, disappear.

The FAO defines food security *as the access of all people at all times to the food they need for an active and healthy life* ⁹. This is interpreted as access to the elements required to maintain control over the systems of food production, thereby preventing developments that create dependency. In this sense, the promotion of food security in Africa is a fundamental commitment of the OAU's Model Law.

The OAU's Model Law explicitly recognises that the regulation of access to biological resources shall not interfere with the traditional systems of access, use and exchange of biological diversity, knowledge, innovations and practices. An important objective of the Model Law is to ensure the maintenance and protection of these open systems of exchange and reciprocity.

Indigenous practices have evolved, accumulated and been refined over time by local communities, in accordance with their environment and biodiversity. These practices should not be restricted or undermined, but encouraged and enhanced, as they have provided the basis of sustainable agriculture throughout human history. Modern industrial agriculture also depends on this wealth of agrobiodiversity, generated by communities, for its products.

The customary rights of farmers to save, use, exchange and sell seed and other planting material are recognised by the OAU's Model Law, as these rights are the foundation of agricultural practices and have always been enforced by farming communities. The capacity of farmers to develop and maintain their own seed and other planting material enables them to keep control of their livelihood systems. It also enables them to continue the development and intergenerational transfer of their biodiversity and associated indigenous knowledge, innovations and practices. At the same time, this maintains their control over their livelihood systems, and hence, their ability to continue the development and intergenerational transfer of their biodiversity and associated knowledge and technologies.

The selecting, saving, developing, exchanging and selling of seed and other planting material are fundamental for the ongoing preservation, adaptation and regeneration of local biodiversity-based livelihood systems. These elements are found in all indigenous farming systems. Moreover, they provide the means by which farmers retain control over their livelihood systems. Seed security is, therefore, a foundation of food security and consequently an integral part of the OAU's Model Law.

References to food security in the OAU's Model Law can be found in:

Part I: Objectives, Sub-paragraph k)

Part VI: Plant Breeders' Rights, Article 26(3), and Article 33(1)(b)

4.2 State Sovereignty and Inalienable Rights and Responsibilities

For members of indigenous peoples, knowledge and determination of the use of resources are collective and inter-generational. No indigenous population, whether of individuals or community, nor the government can sell or transfer ownership of resources which are the property of the people and which each generation has an obligation to safeguard for the next. – Statement by the Coordinating Body of Indigenous Peoples of the Amazon Basin (COICA), 1994

The state is the legally recognised entity that represents the people. Its sovereignty and authority to govern should rest with, and be given by, the people. The state therefore has a responsibility and a duty to defend the rights of its people, and to protect them from unsolicited external interventions. The principle of the sovereign equality of states, and its associated principle of non-intervention, are embodied in Article 2 of the UN Charter.

The principle of non-intervention is also articulated in Article 3 of the CBD, which establishes that states have the sovereign right to exploit their own resources, as well as the responsibility to conserve and sustainably manage those resources.

Internally, therefore, a state should protect the cultural diversity of its people, heed their views and reconcile conflicting interests. This is its social contract with its people.

In this light, the relationship between the rights of the state and those of local communities needs to be clarified. The state should protect the rights of local communities since their socio-cultural systems inherently embody principles of sustainability, and are responsible for the generation, maintenance and protection of biodiversity¹⁰. National legislation needs to define this relationship and guarantee the rights and responsibilities of local communities over their biological resources and related practices, innovations and technologies in order to avoid undermining these services which they give to society. The rights of local communities, therefore, have to be enshrined and recognised in domestic legal systems. Given that the major forces of global trade are regulated internationally, they should also be enshrined in international conventions.

The OAU's Model Law is based on the principle that the biodiversity-related knowledge, innovations and practices of local communities are a result of the many tried and tested practices of past and present generations. In order to maintain and ensure their continuity and evolution, they must be passed on to future generations. This is a fundamental right and responsibility of each generation to the one following it. Therefore, no one has the right to appropriate, sell or monopolise any component of biological resources and the associated knowledge, innovations, and practices of local communities. In this sense, community rights are said to be *inalienable*, and cannot be taken away from those who hold them. They are inter-generational rights and responsibilities, and the individual has no personal authority to take decisions that undermine or destroy them, but instead has the duty to develop them and pass them on to future generations. These rights are thus also *imprescriptible* (i. e. cannot be given away).

The justification for sovereign states agreeing multilaterally on measures to promote community rights is twofold¹. Both Article 8(j) of the CBD and the

revised sections of the IU recognise that local and indigenous communities, including farming communities, have inalienable rights over their biological resources, their knowledge and technologies, and that these rights need formal recognition and implementation at national and international levels. This is to protect them from privatisation through IPRs, promoted internationally by TRIPS, among other agreements.

References to the sovereign and inalienable rights of the state and of local communities can be found in the following sections of the OAU's Model Law:

Preamble, first Paragraph

Part I: Objectives, Sub-paragraph a)

Part IV: Community Rights, Article 21(1)

4.3 Community Rights and Responsibilities

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interest and enable their effective participation in the achievement of sustainable development. – Principle 22 of UNCED's Rio Declaration, 1992

Human beings are social creatures. Their communities are characterised by group identity, historical continuity, common customs and norms, all of which govern their lives from generation to generation. These cultural norms are rooted in the cumulative knowledge, innovations and practices developed by living within a particular ecosystem as a human group. They ensure not only the inter-relationships among the members of the community, but also between the community and the local environment on which it depends. Human socio-cultural systems, therefore, embody detailed knowledge over time and space about the human psyche and behaviour, social dynamics and organisation, other species and complex ecosystems. A fundamental recognition of the interdependence of all living things, and so also of the balance within these dynamic interactive systems is maintained through the recognition of responsibilities towards both the human community and other species.

The need to develop community rights legislation has arisen because the fundamental requirements for livelihood security (healthy plants, animals, ecological and social systems), are being severely threatened by the forces of globalising trade, against which communities have little defence. The WTO's trade regime is enforced through legislation which intervenes in the affairs of the nation state. In the face of this offensive it is the duty of each African State to develop laws to protect the rights of their majority, who are dependent on community-based rural livelihoods.

The current socio-economic paradigm in which more and more aspects of life are being privatised and traded, and where group identity exists only at the level of the state, is just a few centuries old. This individual-centred worldview originated in Europe, and is not fully dominant elsewhere. The most widespread norms in human social structures are local and community-based. They involve mutual exchange and reciprocity. They recognise the ecological laws of nature which support life and may thus be broken only at our peril.

The OAU's Model Law (Article 1) defines 'local communities' as human populations who live in distinct geographical areas. They generate, use, manage and pass on their biological wealth, knowledge, innovations and practices, which are governed by their own customary laws, whether written

or orally transmitted. The Model Law includes a specific section on community rights.

Community rights recognise that the customary practices of local communities derive from *a priori* duties and responsibilities to past and future generations of both human and other species. This reflects a fundamental relationship with all life, and is imbued with an innate demand for respect. Despite the fact that this worldview is not commonly understood by the dominant western world, the purpose of these rights is to recognise and protect the multi-cultural nature of the human species.

Community rights and responsibilities that govern the use, management and development of biodiversity, as well as the traditional knowledge, innovations and practices relating to them, existed long before private rights over biodiversity emerged, and concepts of individual ownership and property arose. Community rights are thus regarded as natural, inalienable, pre-existing or primary rights. The OAU's Model Law recognises this *a priori* character of rights in its Preamble.

The rights of local communities over their biodiversity leads to the formalisation of their existing communal control over biodiversity. This system of rights, which enhances the conservation and sustainable use of biological diversity and promotes the use and further development of knowledge and technologies, is absolutely essential for the identity of local communities and for the continuation of their irreplaceable role in the conservation and sustainable use of this biodiversity.

Community rights are especially important for Africa's multi-ethnic nature. The Model Law provides an opportunity to recognise and sustain Africa's rich cultural heritage and biological resources by recognising the system of pre-existing rights.

The UN has recognised the collective rights of local and indigenous communities in the Draft Declaration on the Rights of Indigenous Peoples (UNDDRIP), and has recommended that all states implement these rights through their national legislations ¹².

Outside Africa, collective rights have already been incorporated into the national legislation of some states ¹³. Section 34 of the 1997 Indigenous Peoples Rights Act of the Philippines recognises that indigenous communities have rights over their biological and genetic resources, 'which are part of their ancestral domain'. Peru's Proposal for a Plan for the Protection of Collective Knowledge of Indigenous People and Access to Genetic Resources (1999) recognises that rights do not expire, but are entitlements that flow to the people as a community. Venezuela's Constitution forbids patents on traditional knowledge.

As highlighted earlier, according to international law, the state has sovereign rights over its tangible biological (natural) resources ¹⁴. However, the intangible element of the knowledge related to those resources and the technologies for using them is not protected by international law, as it is considered to be in the public domain. The CBD addresses this situation in Article 8(j) by recognising the importance of the knowledge, innovations and practices of local communities related to biodiversity conservation and of its equitable and sustainable use.

It is now necessary to recognise the collective, diverse and intergenerational nature of community rights for the majority in the planet before these are completely overrun by the powerful minority with dominating commercial

interests. The OAU's Model Law puts community rights and responsibilities at the heart of the utilisation of biodiversity and the related knowledge, innovations and practices in defence of Africa's rich heritage in biological and cultural diversity.

References to community rights in the OAU's Model Law can be found in the following:

Preamble, Second and sixth Paragraphs

Part I: Objectives, Sub-paragraph g)

Part IV: Community Rights, Article 16)

4.4 The Value of Indigenous Knowledge

80% of the South's medical needs are met by community healers using local medicine systems. – RAFI, 1997

Rural cultures embody a profound ecological knowledge that includes both specific knowledge on the diverse species, minerals, soils and seasonal cycles, as well as an understanding of the dynamics of the ecosystems with which they have co-evolved over time. Human cultures, therefore, reflect an interpretation of and an adaptation to their ecosystems¹⁵. Indigenous rural cultures have an ecologically-centred worldview which informs us that ultimately we are bound by the laws of nature like all other species. This imbues them with a respect for life's dynamic cycles and interactions as well as with a responsibility for and a capacity to be constructive within the ecosystems of which they are an integral part¹⁵.

Indigenous knowledge and technologies are developed and maintained in an open system of exchange, reciprocity and dialogue among communities and with nature. It is a dynamic system continuing across generations that determines both individual and community lifestyles.

The fifth meeting of the Conference of the Parties of the CBD (Nairobi, 15-26 May 2000) recognised that indigenous knowledge *should be valued, given the same respect and considered as useful and necessary as other forms of knowledge*¹⁷.

Any form of private monopoly right, particularly IPRs, reduces the knowledge, innovations, and practices of local communities to commodities that can be owned and controlled rather than recognising them as vital components of a vibrant system to be shared and exchanged in open interactions among humans and with nature.

The TRIPS Agreement of the WTO does not recognise the indigenous knowledge, innovations and practices of local communities or any other customary legal system. Article 8(j) of the CBD, however, asserts that the knowledge, innovations and practices of indigenous and local communities are essential for the conservation and sustainable use of biodiversity, and that they must be recognised and protected.

The OAU's Model Law provides Africa with an opportunity to protect its rich cultural wealth and, thereby, its biological wealth. The Model Law aims not only to recognise diversity in law, but to actively generate support for and strengthen the capacity of Africa's diverse cultures to continue adapting to change and developing further.

This law sets out to avoid being rigid and inflexible. It does not try to enclose or isolate local communities. Instead, it emphasises the dynamic nature of indigenous cultures to evolve and adapt on their own terms, free from the pressure of foreign agendas, so that they have the space to continue to protect and regenerate biodiversity, knowledge and technologies.

References to the protection of diversity and the value of knowledge in the Model Law can be found in:

Preamble, fourth Paragraph

Part II: Definitions, Article 1 (Community knowledge)

Part IV: Community Rights, Article 16, Paragraphs (iii) and (v), and Article 23

Part V: Farmers' Rights, Articles 24(1) and 26(1)(a)

Part VII: Institutional Arrangements, Article 60(ii)

References to traditional practices in the OAU's Model Law can be found in:

Preamble, fourth Paragraph

Part I: Objectives, Sub-paragraph a)

Part II: Definitions and Scope, Article 2(2)

Part IV: Community Rights, Article 21(2),

Part V: Farmers' Rights, Article 25, Article 26(1), Sub-paragraphs(d) and (f)

Part VI: Plant Breeders' Rights, Article 31(2)

4.5 Full Participation in Decision-Making

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. – Article 1(2) of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), 1966

One of the specific objectives of the OAU's Model Law is to ensure the effective participation of local communities in decision-making on all issues that affect their biological wealth, knowledge and technologies. The participation of indigenous and local communities in the development and implementation of plans, policies, programmes and processes that affect their lives and territories, and which are relevant to the conservation and sustainable use of biodiversity, must be ensured.

At the international level, the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) represents an important milestone¹⁸. This Convention recognises the rights of indigenous peoples to take decisions concerning their own development paths. In the case of Africa, implementation of the appropriate elements of this Convention will have an important effect on local communities. It will help them decide upon and develop their institutions, overall wellbeing and capacity to continue their biodiversity-based livelihoods.

As does the ILO Convention with regard to indigenous communities, the OAU's Model Law stresses the need for local communities to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may directly affect them. The Model Law calls on national governments to establish the means for local communities to be fully incorporated into, and participate in, the decision-making process.

Much work remains to be done in this area, as it is widely acknowledged that full participation in decision-making for local communities and indigenous peoples is still far from being a reality. It requires a commitment to finding processes for community participation that are culturally appropriate, and do not impose external agendas. In this way, equitable participation as a fundamental right must be recognised and practised on the community's own terms, so that it has the time and space necessary to come to any decision involving it.

Each tradition has its own worldview, responsible for shaping its development over the centuries. If the diversity of community traditions and knowledge is to be sustained for future generations, then the capacity of those communities to make decisions according to their cultural norms is crucial, as this is what orients their development process. Africa's cultural diversity must, therefore, be encompassed within any participatory process.

The OAU's Model Law explicitly recognises the need to ensure the effective participation of the affected communities when deciding on the distribution of benefits arising from access to, and the use of, their biological resources, knowledge and technologies. It ensures that communities have full and equitable participation, on their own terms, in decision-making processes that affect their biodiversity-based livelihoods.

References to participation in the OAU Model law are to be found in:

Preamble, sixth Paragraph

Part I: Objectives, Sub-paragraph e)

Part V: Farmers' Rights, Article 26(1)(c)

4.6 Access to Biological and Genetic Diversity

Any access to any biological resources and knowledge or technologies of local communities in any part of the country shall be subject to an application for the necessary prior informed consent and written permit. – Article 3 1 of the OAU's Model Law

There is growing pressure from a variety of external interests to gain access to Africa's biodiversity. The concept of 'access to genetic resources' comes from the CBD. The CBD aims to ensure that access is governed by fair and equitable principles, and the OAU's Model Law builds upon these principles.

Article 15 of the CBD establishes that access should be restricted to the environmentally-sound use of those resources, and also that the authority to determine access to these resources rests with national governments and is subject to national legislation. However, in all cases access must be based on the principle of prior informed consent (PIC – see next section), and on mutually agreed terms. The benefits arising from the commercial uses of the biological resources must be shared with the providers of those resources in a fair and equitable way.

A very important and key point is that the Model Law includes a provision ensuring that it will not affect traditional systems of access, use or exchange of biodiversity. Access to knowledge, innovations and practices by and among local communities is also safeguarded.

The present trend towards privatisation is to the disadvantage of local livelihood systems dependent on biological diversity. Although the commercialisation of biodiversity forms a part of many livelihood systems, the question now is to what extent and on whose terms this commercialisation

is taking place. Opportunities for local communities to benefit from this commercialisation are scarce and often not realised to their full potential. In a world of increasing interdependence at all levels, fair and equitable access to and exchange of resources increases choice, rewards co-operation and promotes diversity ¹⁹.

The OAU's Model Law refers to the regulations of access to biological diversity and to community knowledge and technologies as *the duty of the State and its people*. In this context, it is a specific objective of this Model Law to provide a system of access subject to the PIC of the concerned local communities as well as of the state.

The Model Law gives a broad definition of 'access' defining it as *the acquisition of biological resources, their derivatives, community knowledge, innovations, technologies or practices as authorised by the national competent authority*. Very detailed provisions on the requirements for access to biodiversity, community knowledge and technologies are found. These include the requirements that need to be fulfilled when applying for access, the information that needs to be provided to the national competent authority, and the process of granting access. Types of written access permits that could be given are left to the discretion of each country. PIC is at the core of the access process.

References to access in the OAU's Model Law can be found in:

Preamble, fifth Paragraph

Part I: Objectives, Sub-paragraph c)

Part II: Definitions and Scope, Article 1) ('Access' and 'Biological resources') and Article 2(2)(i)

Part III: Access to Biological Resources

Part IV: Community Rights, Articles 18), 19), 20) and 21)

Part VIII: Enabling Provisions, Article 67(2)(iii) and (v), and Article 68)

4.7 Prior Informed Consent (PIC)

The giving by a collector of complete and accurate information and, based on that information, the prior acceptance of that collector by the government and the concerned local community or communities to collect biological resources, or indigenous knowledge, or technologies. – OAU's Model Law definition of prior informed consent (PIC)

The OAU's Model Law has several provisions on PIC, including it as a specific objective and establishing it as the cornerstone of the access system. It is important to note that the Model Law requires the consent of both the State and the local communities affected before granting access to biological resources.

The CBD establishes that access to genetic resources must be conditional upon obtaining the PIC of the country of origin of those resources, unless that country of origin determines otherwise ²⁰. The CBD does not determine the PIC procedure, so it is up to each Party to the CBD to do so for itself.

In Part III of the Model Law, PIC and a written permit are needed for:

- any access to biological resources, knowledge, innovations or practices
- in any part of the country
- including in protected areas.

Each country, when developing national legislation on access, must designate a National Competent Authority to act as the focal point for receiving and processing the applications for access.

The Model Law contains specific provisions for consultation with the communities concerned on applications being made for access. It places the obligation to ensure that consultation takes place, on the National Competent Authority. Access to biological resources is considered invalid when no PIC has been granted. This is so even when permission has been granted but consultation has either not taken place or is incomplete, or does not comply with the criteria for genuine and equitable participation.

Part IV, on Community Rights, again reinforces the requirement to have the PIC of local communities before granting any access to biological resources, knowledge or technologies.

PIC outlines the processes required for ensuring genuine and equitable participation in decision-taking. In order for communities to make informed decisions they need to be informed in a manner which allows them to understand and evaluate the situation from their perspectives so that they can lay down their own terms. This requires clear information and adequate time so that they are able to process the input and come to a decision in their own customary ways. This is absolutely critical to ensure that PIC is a genuine process.

References to PIC in the OAU's Model Law can be found in:

Part I: Objectives, Sub-paragraph c)

Part II: Definitions and Scope, Article 1) ('Prior Informed Consent')

Part III: Access to Biological Resources, Article 5)

Part IV: Community Rights, Article 18)

4.8 Fair and Equitable Sharing of Benefits

The sharing of whatever accrues from the utilisation of biological resources, community knowledge, technologies, innovations or practices. – Definition from the OAU's Model Law

The OAU's Model Law recognises benefit sharing as a 'right' of local communities consistent with one of the three objectives of the CBD: ... *and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.* (CBD, Article 1).

The State must guarantee that a specific percentage (minimum 50%) of any financial benefits returns to the local community. With regard to farming communities, this right is reiterated in the section of the Model Law which deals with Farmers' Rights.

It is perhaps more important to share the non-financial than the financial benefits. These may include participation in research and development in order to build capacity, the repatriation of information on the biological resources accessed, and access to the technologies used to study and develop the biological resource.

Many current benefit sharing initiatives are turning Africa's biodiversity into another traded commodity between North and South. This usually underplays or even disregards the non-financial benefits. While clear and mandatory rules on this issue should be drawn up, more resources and energy

must be devoted to develop locally-driven initiatives to add value and quality to biodiversity products aimed at both local use and international trade ²².

4.8.1 Community Fund

One of the proposed mechanisms for financial benefit sharing by communities in the OAU's Model Law is the establishment of a Community Gene Fund (Article 66). The Fund would be established as an Autonomous Trust and derive its income from the shares due to local communities under Article 26 1(b) in Part V (Farmers' Rights). The Fund may also receive contributions from national and international bodies, and the Model Law provides that the Fund would be exempt from income tax.

The Fund *shall be used to finance projects developed by the farming communities* (Article 66 4). These projects can include, but are not restricted to, the development, conservation and sustainable use of agricultural genetic resources.

The challenge here is for countries to develop processes and structures through which communities can access these funds in an equitable way. The development should involve community consultation and participation throughout the process.

References to benefit sharing in the OAU's Model Law can be found in:

Preamble, sixth Paragraph

Part I: Objectives, Sub-paragraph d)

Part III: Access to Biological Resources, Article 12)

Part IV: Community Rights, Article 22)

Part V: Farmers' Rights, Article 26(1)(b)

Part VII: Institutional Arrangements, Article 66)

4.9 Plant Breeders Rights

Plant breeders' rights and recent applications of patent law further assert that a vast array of living things are also the product of human genius, subject to private monopoly controls. – J. Christie and P. Mooney, in UNEP, 1999

In Africa, the management and use of biodiversity (including seed and other planting material), knowledge and technologies are usually held collectively. In contrast, industrial agriculture is based on monocropping with purchased seed, high chemical inputs, and usually also irrigation. Farm-saved seed represents about 90% of the total planted seed on the African continent, but commercial plant breeders see this as a serious constraint to the expansion of their commercial seed market. Through structural adjustment programmes, virtually every African government is under pressure to privatise state-owned seed supply systems with grave implications for traditional farming systems ²³. The OAU's Model Law recognises the rights of breeders over the varieties they develop, while promoting commercial plant breeding adapted to Africa's farming systems. In this respect, the Model Law dedicates an extensive section to Plant Breeders Rights (Articles 28 to 56). The Model Law recognises that farmers are, and have always been, breeders and it aims to ensure that exclusively commercial breeders do not impinge on the customary practices of farmers.

The section of the Model Law concerned with Plant Breeders' Rights (Part VI) satisfies the requirement of Article 27 3(b) of the TRIPS Agreement for a *sui*

generis system for plant varieties. Farmers' rights are, however, a part of community rights, and do not aim to fulfil any requirements of TRIPS.

The aim of this section of the Model Law is to recognise both individual and institutional efforts and investments in developing new varieties of plants by providing both recognition and economic rewards. The plant breeder gets the exclusive rights to produce and sell the new variety developed. However, these rights are to be protected in harmony with the Farmers' Rights provisions of the Model Law. This means that farmers can save, use, exchange and sell farm-saved seed and other planting material.

Farmers are also entitled to use new varieties protected by Plant Breeders' Rights to develop their own farmers' varieties. The Model Law is thus consistent with the UPOV Convention of 1961 and 1978, which allows governments to provide this as an exemption. This exemption is not in the 1991 revision of UPOV.

In addition to this, the OAU's Model Law includes detailed provisions on both exemptions (Article 31) and restrictions (Article 33) to the rights of breeders. It also has detailed rules on applying for, and on the granting and registering of Plant Breeders' Rights, as well as provisions on dispute settlement procedures in cases of commercial infringement of these rights.

References to Plant Breeders' Rights in the OAU's Model Law can be found in:
Part I: Objectives, Paragraph b)
Part II: Definitions and Scope, Article 2(1)(v)
Part V: Farmers' Rights, Article 26(3)
Part VI: Plant Breeders' Rights, Articles 28) to 56)

4.10 No Patents on Life Forms

The task force believes that the privatisation of life forms through any intellectual property rights (IPR) regime violates the basic right to life and goes counter to the African sense of respect for life. – Declaration by the OAU/STRC Task Force on Community Rights and Access to Biological Resources, 1998 ²⁴

The OAU's Model Law shares the same concerns expressed in the common position of the African Group regarding the TRIPS Agreement and the review of Article 27 3(b). The Model Law is very clear in this respect, both in its Preamble and in Part III on Access, where it states that patents over life forms and biological processes are not recognised and are, therefore, not applicable.

Contrary to many claims by defenders of the IPR system, naturally occurring living organisms are not mechanical 'inventions' or 'creations' of the human mind. However, despite being known and used by local communities for millennia, outsiders are taking these resources, patenting them and acquiring exclusive commercial rights over them. Moreover, all organisms bred by humans are still governed by natural processes, and successive generations cannot, thus, be claimed to have been invented. The exclusion of micro-organisms, plants and animals from patentability has also a strong ethical argument to support it. The Model Law considers the patenting of life a violation of the fundamental right to life, as well as of the principle of respect for all forms of life.

The joint African position in the TRIPS Council included the prohibition of patents on *plants and animals, as well as micro-organisms and all other living organisms and their parts*. It also states that natural processes that produce plants, animals and other living organisms should not be patented.

Parts of organisms (e. g. cells, genes) are considered to be biological resources ²⁵ and, as such, are subject to both the provisions of the CBD and the OAU's Model Law. This is related to the use made of 'derivatives' of plants, animals or micro-organisms. According to the Model Law, derivatives are products developed or extracted from a biological resource and may include products such as plant varieties, oils, resins, etc.

The Model Law, therefore, represents a significant step in subjecting access to biological resources to the condition that patents cannot be taken out on the accessed material, biological processes or any of their derivatives.

References in the OAU's Model Law can be found in:
Preamble, last Paragraph
Part III: Access to Biological Resources, Article 9)

4.11 Towards Gender Equality – A Cross-Cutting Principle

Indigenous women have the right to control and use the biological diversity in our territories and to be included in decision-making processes at all levels, in accordance to the cultural principles of indigenous peoples. As long as there are no mechanisms for effective and full protection of our rights, we will call for a moratorium on the illegitimate access and use of genetic resources and traditional knowledge. – From the opening statement of Second Meeting of Indigenous Women and Biodiversity to the Ad-Hoc Open-Ended Inter-Sessional Working Group on Article 8(j), 2000 ²⁶.

The text of the OAU's Model Law includes provisions throughout aimed at ensuring appropriate recognition of women's contribution to biodiversity conservation. Women play a major and vital role within local and farming communities. In the framework of Farmers' Rights, the contribution of women farmers in all regions of the world is also recognised in the Model Law. Their contribution is crucial in all biodiversity-rich countries, and African countries are no exception.

Formal laws and decision-making procedures often undermine the customary role of women in the processes that affect them. The OAU's Model Law reverses this by formally recognising their customary rights and their right to full participation.

The Model Law specifically requires women to be consulted and involved when taking decisions during the PIC process, as full and equal members of the 'concerned local communities'. Women's interests are also addressed regarding the sharing of benefits from biological diversity, as those benefits channelled to the local community must be distributed 'in a manner that treats men and women equitably'.

References to women's essential role and contribution to biodiversity conservation can be found in all sections of the Model Law. Achieving gender equality lies in the success of implementation of the Model Law by integrating this key concern into all aspects of national law.

References in the OAU's Model Law can be found in:
Preamble, third Paragraph
Part I: Objectives, Sub-paragraphs (e) and (h)
Part III: Access to Biological Resources, Article 5(1)(ii)
Part IV: Community Rights, Articles 18) and 22)
Part V: Farmers' Rights, Article 24(1)

Notes

¹ R. Wynberg, *Privatising the means for survival: the commercialisation of Africa's biodiversity*, Gaia/GRAIN Briefing, May 2000

² Further information on, for example, rates of species extinction, can be obtained from IUCN, UNEP, The Gaia Foundation, TWN, RAFI, GRAIN.

³ Mshana, R. N., Ndoye, M. and Ekpere, J. A. (Eds) OAU/STRC/DEPA/KIPO Workshop on Medicinal Plants and Herbal Medicine in Africa: Policy Issues on Ownership, Access and Conservation, Nairobi 14-17 April 1997. For further information contact OAU or Institute for Sustainable Development, Ethiopia

⁴ For further information contact the Institute for Sustainable Development, Ethiopia; TWN; GRAIN; The Gaia Foundation

⁵ Article 3 of the Universal Declaration of Human Rights

⁶ For further information contact COAMA

⁷ For example, the case of Canadian farmer Percy Schmeiser, who is currently involved in a precedent-setting legal battle against an agro-biotechnological corporation. This is the result of the corporation using brutal tactics and wrongfully accusing him of stealing their seed, which he had never had anything to do with. For further information about this case please contact Percy Schmeiser or The Gaia Foundation

⁸ See for example Articles 3, 19 and 29 of the Universal Declaration of Human Rights (1949)

⁹ Contact FAO for further information

¹⁰ For further information about how local communities enhance and maintain biodiversity see for example, UNEP *The Cultural and Spiritual Values of Biodiversity*; 2000

¹² The UNDDRIP promotes community rights, and includes specific reference to indigenous peoples right to have access to fair procedures for the resolution of conflicts and disputes with states, as well as to effective remedies for all infringements of their individual and collective rights.

¹³ For example, 1991 Colombian Constitution; and 1967 Bolivian Constitution, as amended in 1994

¹⁴ Article 3 of the CBD

¹⁵ The Resolution of Rome on Guidelines for the Protection of Cultural Diversity 1998, recommends that governments and the international community recognise the fact that *'traditional knowledge of aboriginal, indigenous peoples and local communities is an essential part of the knowledge base which countries have available to ensure the wise and sustainable use of the natural environment'*

¹⁶ See for example, UNEP, *The Cultural and Spiritual Values of Biodiversity*; and, IUCN, *Indigenous Peoples and Sustainability*

¹⁷ Decision V/16, Annex (Programme of work on the Implementation of Article 8(j)), Section I (General Principles)

¹⁸ Convention 169 of the UN International Labour Organisation (ILO), adopted on 27 June 1989, revised the earlier ILO Convention 107. It entered into force in 1991, but as yet has only been ratified by 13 states.

¹⁹ GRAIN publication: SEEDLING, *Last Chance for an Open Access Regime?* June 2000

²⁰ Article 15(5) of CBD

²² R Wynberg, Gaia/GRAIN Briefing, May 2000

²³ R Wynberg, Gaia/GRAIN Briefing, May 2000

²⁴ 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

²⁵ 'Biological resources' are defined as including *genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.* (Article 2 of the CBD and Article 1 of the Model Law)

²⁶ Text from the Opening Statement by the Fourth International Indigenous Forum to the Working Group on Article 8(j) and Related Provisions. Indigenous women regard their participation in decision-making as a priority, as they agreed at the Second Meeting of Indigenous Women and Biodiversity, held in Seville (Spain), 24-26 March 2000, as part of the fourth meeting of the Ad-Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the CBD

APPENDIX 1

Text of the OAU's Model Law

AFRICAN MODEL LAW FOR THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES

PREAMBLE

Whereas, the State and its people exercise sovereign and inalienable rights over their biological resources;

Whereas, the rights of local communities over their biological resources, knowledge and technologies that represent the very nature of their livelihood systems and that have evolved over generations of human history, are of a collective nature and, therefore, are a priori rights which take precedence over rights based on private interests;

Whereas, the vital role that women play in the generation, conservation, and sustainable use of biological diversity and associated knowledge and technologies is self evident, and it thus becomes essential to make it possible for their full participation at all levels of policymaking and implementation in relation to biological diversity, and associated knowledge and technologies;

Whereas, it is necessary to protect and encourage cultural diversity, giving due value to the knowledge, technologies, innovations and practices of local communities with respect to the conservation, management and use of biological resources;

Whereas, it is the duty of the State and its people to regulate access to biological resources and to community knowledge and technologies;

Whereas, the State recognizes the necessity of providing adequate mechanisms for guaranteeing the just, equitable and effective participation of its citizens in the protection of their collective and individual rights and in making decisions which affect its biological and intellectual resources as well as the activities and benefits derived from their utilization;

Whereas, there is the need to promote and support traditional and indigenous technologies for in the conservation and sustainable use of biological resources and to complement them by appropriately developed modern technologies;

Whereas, there is the need to implement the relevant provisions of the Convention on Biological Diversity, in particular Article 15) on access to genetic resources, and Article 8(j) on the preservation and maintenance of knowledge, innovations and practices of indigenous and local communities;

Whereas, all forms of life are the basis for human survival, and, therefore, the patenting of life, or the exclusive appropriation of any life form or part or derivative thereof violates the fundamental human right to life;

Now, therefore, it is hereby legislated as follows:

PART I

OBJECTIVES

The main aim of this legislation shall be to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies in order to maintain and improve their diversity as a means of sustaining all life support systems.

The specific objectives of this legislation shall be to:

- a) recognize, protect and support the inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies;
- b) recognize and protect the rights of breeders;
- c) provide an appropriate system of access to biological resources, community knowledge and technologies subject to the prior informed consent of the State and the concerned local communities;
- d) promote appropriate mechanisms for a fair and equitable sharing of benefits arising from the use of biological resources, knowledge and technologies;
- e) ensure the effective participation of concerned communities, with a particular focus on women, in making decisions as regards the distribution of benefits which may derive from the use of their biological resources, knowledge and technologies;
- f) promote and encourage the building of national and grassroots scientific and technological capacity relevant to the conservation and sustainable use of biological resources;
- g) provide appropriate institutional mechanisms for the effective implementation and enforcement of the rights of local communities, including farming communities and breeders, and the conditions of access to biological resources, community knowledge and technologies;
- h) promote the conservation, evaluation and sustainable utilisation of biological resources with a particular focus on the major role women play;
- i) promote improvements in the productivity, profitability, stability and sustainability of major production systems through yield enhancement and maintenance of biological diversity;
- j) promote the supply of good quality seed/planting material to farmers; and
- k) ensure that biological resources are utilised in an effective and equitable manner in order to strengthen the food security of the nation.

PART II

DEFINITIONS AND SCOPE

1. Definitions

The use of the following terms shall take the meanings in this legislation, as defined below:

Access is the acquisition of biological resources, their derivatives, community knowledge, innovations, technologies or practices as authorised by the National Competent Authority.

Benefit Sharing is the sharing of whatever accrues from the utilisation of biological resources, community knowledge, technologies, innovations or practices.

Biological resource includes genetic resources, organisms or parts thereof, populations, or any other component of ecosystems, including ecosystems themselves, with actual or potential use or value for humanity.

Collector is any natural or legal person, entity or agent obtaining access to biological resources, local practices, innovations, knowledge or technologies under authority given by the National Competent Authority.

Community Intellectual Rights are those rights held by local communities over their biological resources or parts or derivatives thereof, and over their practices, innovations, knowledge and technologies.

Community Knowledge or indigenous knowledge is the accumulated knowledge that is vital for conservation and sustainable use of biological resources and/or which is of socio-economic value, and which has been developed over the years in indigenous/local communities.

Derivative is a product developed or extracted from a biological resource; a derivative may include such products as plant varieties, oils, resins, gums, proteins etc.

Ex Situ Condition is the condition in which a biological resource is found outside its natural habitat Under the present law, any lineage that is cultivated within its country of origin is not considered to be in an *ex situ* condition.

Innovation is any generation of a new, or an improvement of an existing, collective and/or cumulative knowledge or technology through alteration or modification, or the use of the properties, values or processes of any biological material or any part thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing .

In Situ Condition is the condition in which a biological resource is found in its ecosystem or natural habitat In the case of a domesticated or cultivated variety, its condition is *in situ* when that variety is found in the cultural context in which its specific properties have been developed.

Local Community is a human population in a distinct geographical area, with ownership over its biological resources, innovations, practices, knowledge, and technologies governed partially or completely by its own customs, traditions or laws.

National Competent Authority is the entity authorised by the State to supervise and watch over the implementation of one or more of the components of the present law.

Prior Informed Consent (PIC) is the giving by a collector of complete and accurate information, and, based on that information, the prior acceptance of that collector by the government and the concerned local community or communities to collect biological resources, or indigenous knowledge, or technologies.

2. Scope

- 1) This legislation applies to:
 - i) Biological resources in both *in situ* and *ex situ* conditions;
 - ii) The derivatives of the biological resources;
 - iii) Community knowledge and technologies;
 - iv) Local and indigenous communities; and

- v) Plant breeders.
- 2) This legislation shall not affect the following:
 - i) The traditional systems of access, use of exchange of biological resources
 - ii) Access, use of exchange of knowledge and technologies by an between local communities;
- 3) The sharing of benefits upon the customary practices of the concerned local communities, provided that the provisions of Paragraph 2 shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of biological resources.

PART III

ACCESS TO BIOLOGICAL RESOURCES

3. Application for Access to Biological Resources and to the Knowledge and Technologies of Local Communities

- 1) Any access to any biological resources and knowledge or technologies of local communities in any part of the country shall be subject to an application for the necessary prior informed consent and written permit.
- 2) Any access to any biological resource in a protected area shall be subject to an application for the necessary prior informed consent and written permit.
- 3) All applications for the necessary consent and written permit to access any biological resource, community knowledge or technology, shall be directed to the National Competent Authority unless otherwise explicitly provided for by law.

PRIOR INFORMED CONSENT (PIC)

4. Prior Informed Consent (PIC)

- 1) In making an application for access as provided in Article above, the following information shall be provided by the applicant:
 - i) the identity of the applicant and the documents that testify to her/his legal capacity to contract, including, where appropriate, the identity of all partners with the contracting party;
 - ii) the resources to which access is sought, including the sites from, its present and potential uses, its sustainability and the risks which may arise from access to it;
 - iii) whether any collection of the resource endangers any component of biological diversity and the risks which may arise from the access;
 - iv) the purpose for which access to the resource is requested including the type and extent of research, teaching or commercial use expected to be derived from it;
 - v) description of the manner and extent of local and national collaboration in the research and development of the biological resource concerned;
 - vi) the identification of the national institution or institutions which will participate in the research and be in charge of the monitoring process;
 - vii) the identity of the location where the research and development will be carried out;
 - viii) the primary destination of the resource and its probable subsequent destination(s);
 - ix) the economic, social, technical, biotechnological, scientific, environmental or any other benefits that are intended, or may be likely to, accrue to the country and local communities providing the biological

- resource as well as the collector and the country or countries where he/she operates;
- x) the proposed mechanisms and arrangements for benefit sharing;
 - xi) description of the innovation, practice, knowledge or technology associated with the biological resource; and
 - xii) an environmental and socio-economic impact assessment covering at least the coming three generations, in cases where the collection is in large quantities.
- 2) Nothing in Paragraph 1) shall prevent the National Competent Authority requesting for any other information, which it may deem necessary for the effective implementation of this legislation.

5. Requirement of Consultation and Prior Informed Consent (PIC)

- 1) Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of:
 - i) the National Competent Authority; as well as that of:
 - ii) the concerned local communities, ensuring that women are also involved in decision making.
- 2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid and shall be subject to the penalties provided in this legislation or any other legislation that deals with access to biological resources.
- 3) The National Competent Authority shall consult with the local community or communities in order to ascertain that its/their consent is sought and granted. Any access granted without consultation with the concerned community or communities shall be deemed to be invalid and in violation of the principle and requirement for prior informed consent as required under this Article.

6. Placement of Completed Application Form in Public Registry

- 1) Upon completion of the application, the National Competent Authority shall place or cause to be placed, the said application in a public registry or gazette, or cause it to be published in a newspaper that is reasonably accessible to the public for a duration of x days.
- 2) Any person may consult the public registry and comment on the application.
- 3) The National Competent Authority shall cause the wide and effective dissemination of the relevant information to the communities concerned and to other interested parties.

7. Granting of Access

- 1) The granting of an access permit shall be carried out by the National Competent Authority or any person duly Authorized to do so under the provisions of this legislation within a specified time limit.
- 2) Any access permit shall be granted through a signed written agreement, between the National Competent Authority and the concerned local community or communities on the one hand, and, the applicant or collector on the other hand.
- 3) The access permit shall only be valid if there is a written prior informed consent.

8. Contents of the Agreement

- 1) The agreement referred to in Article 7) shall contain commitments undertaken or to be undertaken by the collector, as follows.

- i) to adhere to a limit set by the National Competent Authority on the quantity and specification of the quality of the biological resource that the collector may obtain and/or export;
 - ii) to guarantee to deposit duplicates of, with complete field information on, each specimen of the biological resource or the records of community innovation, practice, knowledge or technology collected with the duly designated governmental agencies and, if so required, with local community organizations;
 - iii) to inform immediately the National Competent Authority and the concerned local community or communities of all findings from research and development on the resource;
 - iv) not to transfer the biological resource or any of its derivatives or the community innovation, practice, knowledge or technology to any third party without the authorization of the National Competent Authority and the concerned local community or communities;
 - v) not to apply for any form of intellectual property protection over the biological resource or parts or derivatives thereof and not to apply for intellectual property rights protection over a community innovation, practice, knowledge or technology without the prior informed consent of the original providers;
 - vi) to provide for the sharing of benefits;
 - vii) access shall be conditioned upon a commitment to contribute economically to the efforts of the State and concerned local community or communities in the regeneration and conservation of the biological resource, and the maintenance of the innovation, practice, knowledge or technology to which access is sought;
 - viii) submit to the National Competent Authority a regular status report of research and development on the resource concerned and where the biological resource is to be collected in large quantities on the ecological state of the area; and
 - ix) abide by the relevant laws of the country particularly those regarding sanitary control, biosafety and the protection of the environment as well as by the cultural practices, traditional values and customs of the local communities.
- 2) All efforts should be made for the research to be done in the country and in a manner that facilitates the participation of actors in the country of the provider of the biological resource.

9. Patents over Life Forms and Biological Processes

- 1) Patents over life forms and biological processes are not recognized and cannot be applied for.
- 2) The collector shall, therefore, not apply for patents over life forms and biological processes under this legislation or under any other legislation relevant to the regulation of access and use of a biological resource, community innovation, practice, knowledge and technology, and the protection of rights therein.

10. Approval of Granting of Access

The National Competent Authority shall approve the granting of access to the biological resource or the community innovation, practice, knowledge or technology in question with any conditions it may deem necessary. In granting access the National Competent Authority shall ensure that all the requirements under this legislation have been fulfilled.

11. Conditions Pertaining to Academic and Research Institutions, Public Agencies and Inter-governmental Institutions

- 1) The National Competent Authority shall subject all applications for access to a biological resource, a community innovation, practice, knowledge or technology to the prior informed consent of the concerned community or communities.
- 2) The National Competent Authority shall determine the appropriate conditions to be met under the written agreement referred to in Article 8), by academic and research institutions, public agencies and inter-governmental institutions.
- 3) The application for access for research purposes shall clearly state the objective of the research and the relation of the applicant to industry. Neither the sample nor the associated information shall be transferred without a material transfer agreement reserving the prior rights of the State and/or community or communities.
- 4) Where the institutions referred to in this Article change their activities to be predominantly the commercialisation of a biological resource, the National Competent Authority shall cause the conditions and terms to be varied accordingly.

12. Benefit Sharing

- 1) The access permit should be subject to the payment, made before commencement of collection, of a fee the sum of which will depend on whether or not the collection is to be used for commercial purposes, and the number of samples, the area of collecting, the duration of collection and whether or not the collector is granted exclusive rights.
- 2) The State and the community or communities shall be entitled to a share of the earning derived from when any biological resource and/or knowledge collected generates, directly or indirectly, a product used in a production process.

13. Types of Permit to be Granted for Access

- 1) Having ascertained that the conditions set by the prior informed consent procedure have been fulfilled, the National Competent Authority shall grant the applicant/collector the appropriate permit for access. This may be an academic research permit, a commercial research permit, or a commercial exploitation permit.
- 2) No person shall be in possession of and use two types of permit at the same time for the same resource unless granted written permission to do so.
- 3) Nothing in this Article shall be deemed to limit the National Competent Authority's power to issue any other type of access permit.

14. Revocation of Access Permit

- 1) The National Competent Authority may unilaterally withdraw consent and repossess the written permit under the following conditions:
 - i) when there is evidence that the collector has violated any of the provisions of this legislation;
 - ii) when there is evidence that the collector has failed to comply with the agreed terms; and
 - iii) when there is failure to meet any of the conditions of access;
 - iv) for reasons of overriding public interest; or
 - v) for the protection of the environment and biological diversity.

- 2) Any termination or withdrawal of consent shall be done in consultation with the concerned local community or communities.

15. Restrictions on Activities Related to Access or Introduction of Biological Resources

The National Competent Authority should establish restrictions to or prohibitions on those activities which are directly or indirectly related to access to or introduction of a biological resource, particularly in cases of:

- i) endangered taxa;
- ii) endemism or rarity;
- iii) adverse effects upon human health or upon the quality of life or the cultural values of local communities;
- iv) environmental impacts which are undesirable or difficult to control;
- v) danger of genetic erosion or loss of ecosystems, their resources or their components, which arise from undue or uncontrolled collection of biological resources;
- vi) non-compliance with rules on biosafety or food security; and
- vii) use of resources for purposes contrary to national interest and to relevant international agreements entered into by the country.

PART IV

COMMUNITY RIGHTS

16. Recognition of the Rights of Local and Indigenous Communities

The State recognizes the rights of communities over the following:

- i) their biological resources;
- ii) *the right to collectively benefit from the use of their biological resources;*
- iii) their innovations, practices, knowledge and technologies acquired through generations;
- iv) the right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies;
- v) their rights to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity;
- vi) the exercise of collective rights as legitimate custodians and users of their biological resources;

17. Application of the Law on Community Rights

The State recognizes and protects the community rights that are specified in Article 16) as they are enshrined and protected under the norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities, whether such law is written or not.

18. Prior Informed Consent (PIC) of Local

Any access to a biological resource, innovation, practice, knowledge or technology, shall be subject to the prior informed consent (pic) of the concerned community or communities ensuring that women fully and equitably participate in decision-making.

19. Right to Refuse Consent and Access

Local communities have the right to refuse access to their biological resources, innovations, practices, knowledge and technologies where such access will be detrimental to the integrity of their natural or cultural heritage.

20. Right to Withdraw or Place Restrictions on Consent and Access

Local communities shall have the right to withdraw consent or place restrictions on the activities relating to access where such activities are likely to be detrimental to their socio-economic life, or their natural or cultural heritage.

21. Right to Traditional Access, Use and Exchange

- 1) Local communities shall exercise their inalienable right to access, use, exchange or share their biological resources in sustaining their livelihood systems as regulated by their customary practices and laws.
- 2) No legal barriers shall be placed on the traditional exchange system of the local communities in the exercise of their rights as provided for in Paragraph 1) above and in other rights that may be provided by the customary practices and laws of the concerned local communities.

22. Right to Benefit

- 1) The State shall ensure that at least fifty per cent of benefits provided for in Article 12 (2) shall be channeled to the concerned local community or communities in a manner, which treats men and women equitably.
- 2) The sharing the benefits in Paragraph 1) above shall involve the full participation and approval of the concerned local community or communities.

23. Recognition of Community Intellectual Rights

- 1) The Community Intellectual Rights of the local communities, including traditional professional groups, particularly traditional practitioners, shall at all times remain inalienable, and shall be further protected under the mechanism established by this legislation.
- 2) An item of community innovation, practice, knowledge or technology, or a particular use of a biological or any other natural resource shall be identified, interpreted and ascertained by the local communities concerned themselves under their customary practice and law, whether such law is written or not.
- 3) Non-registration of any community innovations, practices, knowledge or technologies, is not to mean that these are not protected by Community Intellectual Rights.
- 4) The publication of a written or oral description of a biological resource and its associated knowledge and information, or the presence of these resources in a gene bank or any other collection, or its local use, shall not preclude the local community from exercising its community intellectual rights in relation to those resources.

PART V

FARMERS' RIGHTS

24. Recognition of Farmers' Rights

- 1) Farmers' Rights are recognized as stemming from the enormous contributions that local farming communities, especially their women members, of all regions of the world, particularly those in the centres of origin or diversity of crops and other agro-biodiversity, have made in the conservation, development and sustainable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production; and
- 2) For farmers to continue making these achievements, therefore, Farmers' Rights have to be recognized and protected.

25. Application of the Law on Farmers' Varieties

- 1) Farmers' varieties and breeds are recognized and shall be protected under the rules of practice as found in, and recognized by, the customary practices and laws of the concerned local farming communities, whether such laws are written or not.
- 2) A variety with specific attributes identified by a community shall be granted intellectual protection through a variety certificate, which does not have to meet the criteria of distinction, uniformity and stability. This variety certificate entitles the community to have the exclusive rights to multiply, cultivate, use or sell the variety, or to license its use without prejudice to the Farmers' Rights set out in this law.

26. Farmers' Rights

- 1) Farmers' Rights shall, with due regard for gender equity, include the right to:
 - a) the protection of their traditional knowledge relevant to plant and animal genetic resources;
 - b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources;
 - c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources;
 - d) save, use, exchange and sell farm-saved seed/propagating material of farmers' varieties;
 - e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from gene banks or plant genetic resource centres; and
 - f) collectively save, use, multiply and process farm-saved seed of protected varieties.
- 2) Notwithstanding Sub-paragraphs c) and d), the farmer shall not sell farm-saved seed/propagating material of a breeders' protected variety in the seed industry on a commercial scale.
- 3) Breeders' Rights on a new variety shall be subject to restriction with the objective of protecting food security, health, biological diversity and any other requirements of the farming community for propagation material of a particular variety.

27. Certification of Farmers' Varieties

- 1) Any product derived from the sustainable use a biological resource shall be granted a certificate or label of recognition.
- 2) A certificate of fair trade shall be granted to a product derived from a biological resource or knowledge or technology, when a significant part of the benefits derived from the product go back to the local community.

PART VI

PLANT BREEDERS' RIGHTS

28. Recognition of Plant Breeders Rights

Plant Breeders' Rights stem from the efforts and investments made by persons/institutions for the development of new varieties of plants, as defined in Article 41), being the basis for providing recognition and economic reward.

29. Characteristics of New Varieties

A variety will be considered new if it:

- a) is, by reason of one or more identifiable characteristics clearly distinguishable from all varieties the existence of which is a matter of common knowledge at the effective date of application for the grant of a Plant Breeders' Rights;
- b) is stable in its essential characteristics, in that after repeated reproduction or propagation or, where the applicant has defined a particular cycle of reproduction or multiplication, at the end of each cycle, remains true to its description;
- c) is, having regard to its particular features of sexual reproduction or vegetative propagation, a sufficiently homogenous variety or is a well-defined multi-line.

30. Rights of Plant Breeders

- 1) A Plant Breeders' Rights, in respect of a new variety, is:
 - a) the exclusive right to sell, including the right to license other persons to sell plants or propagating material of that variety;
 - b) the exclusive right to produce, including the right to license other persons to produce, propagating material of that variety for sale;
- 2) A Plant Breeders' Rights in respect of a plant variety is subject to the conditions provided in Part V, the Farmers' Rights Part of this Act.

31. Exemptions to the Rights of Breeders

- 1) Notwithstanding the existences of Plant Breeders' Rights in respect of a plant variety, any person or farmers' community may:
 - a) propagate, grow and use plants of that variety for purposes other than commerce;
 - b) sell plants or propagating material of that variety as food or for another use that does not involve the growing of the plants or the propagation of that variety;
 - c) sell within a farm or any other place at which plants of that variety are

- d) grown any plants or propagating material of that variety at that place; use plants or propagating material of the variety as an initial source of variation for the purpose of developing another new plant variety except where the person makes repeated use of plants or propagating material of the first mentioned variety for the commercial production of another variety;
 - e) sprout the protected variety as food for home consumption or for the market
 - f) use the protected variety in further breeding, research or teaching;
 - g) obtain, with the conditions of utilization, such a protected variety from gene banks or plant genetic resources centres;
- 2) Farmers will be free to save, exchange and use part of the seed from the first crop of plants which they have grown for sowing in their own farms to produce a second and subsequent crops subject to conditions specified in Part V, the Farmers' Rights Part of this Act.

32. Application of Breeders' Rights

- 1) Subject to this Act, a breeder of a new plant variety may make an application to the National Competent Authority for a Plant Breeders' Rights in respect of the variety.
- 2) A breeder of a new variety, or his successor, has the right to make an application for a Plant Breeders' Rights in respect of that variety, whether or not the breeder is a citizen or foreigner, or is resident or not and whether the variety was bred locally or abroad.
- 3) Where two or more persons are entitled to make an application for a Plant Breeders' Rights in respect of a new variety, whether by reason that they bred the plant variety jointly or independently or otherwise, those persons or some of those persons may make a joint application for those Rights.
- 4) Where two or more persons breed a new plant variety jointly, one of those breeders or a successor of one of those breeders shall not make an application for a Plant Breeders' Rights in respect of that variety otherwise than jointly with, or with the consent in writing of, the other person, or each other person, entitled to make an application for those Rights.
- 5) In the case of both public-financed and private institutions, the application can be made in the name of the institution.

33. Restrictions to Plant Breeders' Rights

- 1) Where the Government considers it necessary, in the public interest, the Plant Breeders' Rights in respect of a new variety shall be subject to conditions restricting the realization of those rights, These restrictions may be imposed, *inter alia*:
 - a) where problems with competitive practices of the Rights holder are identified;
 - b) where food security or nutritional or health needs are adversely affected;
 - c) where a high proportion of the plant variety offered for sale is being imported;
 - d) where the requirements of the farming community for propagating material of a particular variety are not met; and
 - e) where it is considered important to promote public interest for socio-economic reasons and for developing indigenous and other technologies;
- 2) Where restrictions are imposed on a Plant Breeders' Rights:
 - a) the grantee shall be given a copy of the instrument setting out the conditions of the restriction;
 - b) a public notice shall be given;

- c) the compensation to be awarded to the holder of the Rights shall be specified;
 - d) the Rights-holder may appeal against the compensation award.
- 3) In particular, and without prejudice to the generality of the foregoing provisions, the relevant Government authority shall have the right to convert the exclusive Plant Breeders' Rights granted under this Act to non-exclusive Plant Breeders' Rights (compulsory licence of right).

34. Duration of Plant Breeders Rights

Subject to this Act, a Plant Breeders' Rights in respect of a plant variety shall exist for a period of 20 years in the case of annual crops and 25 years in the case of trees, vines and other perennials commencing on the day on which the successful application for a Plant Breeders' Rights in respect of the plant variety was accepted.

35. Dispute Settlement

Where conflicts arise on whether a plant variety qualifies as a new plant variety under the Act, they will be handled administratively through the National Competent Authority, an ad hoc tribunal and finally through the court of law.

36. Infringements of Plant Breeders' Rights

- 1) An action or proceedings for an infringement of a Plant Breeders' Rights may be instituted in writing in a court or, if agreeable to both parties, it may be submitted to a binding arbitration.
- 2) A defendant in an action or proceeding for an infringement of a Plant Breeders' Rights in respect of a variety may apply by way of counter-claim for the revocation of that Plant Breeders' Rights:
 - a) on the grounds that the variety was not a new plant variety;
 - b) on the grounds that facts exist which, if known to the National Competent Authority before the grant of that Plant Breeders' Rights, would have resulted in the refusal of the grant.
- 3) If, in an action or proceedings for an infringement of a Plant Breeders' Rights in respect of a plant variety in which a defendant has applied by way of counter-claim for the revocation on the grounds referred to in Paragraph 2)a) or b), the court is satisfied that the grounds exist, the court may revoke that Plant Breeders' Rights.
- 4) Where, in an action or proceedings for an infringement of a Plant Breeders' Rights, the court, on an application by the defendant by way of counter-claim, revokes the Plant Breeders' Rights, the court shall order the defendant to serve on the National Competent Authority a copy of the order revoking that Plant Breeders' Rights.

37. National Competent Authority

The State shall designate or establish a National Competent Authority which shall implement and enforce the provisions on Plant Breeders' Rights in this Act.

38. Registration of Plant Breeders' Rights

The National Competent Authority shall:

- a) receive and examine applications for the registration of Plant Breeders' Rights;
- b) carry out the required trials for testing the applicant's variety;
- c) register and issue certificates for Plant Breeders' Rights;
- d) publish applications for Plant Breeders' Rights in the Official Gazette;
- e) hear opposition on the registration of any Plant Breeders' Rights;
- f) maintain the Register for Plant Breeders' Rights.

39. Register of Plant Breeders Rights

The National Competent Authority shall keep a National Register of Plant Breeders' Rights in which shall be entered particulars required by this Act or regulations.

40. Plant Genetic Resources Centres

The Government shall declare or gazette specified plant genetic resources centre(s), as suitable centre(s) for storage and maintenance of germplasm material for the purpose of this Act

41. Filing of Applications

- 1) Where an application is filed in respect of a Plant Breeders' Rights:
 - a) the application is accepted if the National Competent Authority is satisfied that:
 - i) the application complies with the requirements of Article 29); and
 - ii) the specified fees have been paid; or
 - b) the application is rejected if the National Competent Authority is satisfied that it does not fulfill the prescribed requirements.
- 2) Where the National Competent Authority accepts an application it shall, within 30 days after accepting the application, give written notice to the applicant stating that the application has been accepted and it shall give public notice of the application.
- 3) Where the National Competent Authority rejects an application, it shall, within 30 days after rejecting the application, give written notice to the applicant stating that the application has been rejected and stating the grounds for rejection.

42. Uniform Testing and Assessment Procedures

- 1) On the acceptance of an application, the National Competent Authority shall stipulate the quantity of seed/planting material that should be made available by the applicant for trials and testing.
- 2) The National Competent Authority shall arrange to get statistically valid trials conducted to evaluate the suitability of the variety for national release.
- 3) The assessment criteria shall include important economic, physiological, ecological and nutritive quality attributes.
- 4) The fees with respect to a Plant Breeders' Rights shall be fixed on the basis of the administrative and examination costs incurred.

43. Characteristics of Plant Varieties Originating from Outside the Country

For the purpose of this Act, where a plant variety in respect of which an application has been accepted has originated from outside the country, the variety shall not be taken to have a particular characteristic unless:

- a) statistically valid, multi-locational, variety trials carried out in the country for at least three growing seasons have demonstrated that the variety has the specific characteristic as claimed by the applicant; or
- b) an exceptional crises in food production so requires and the National Competent Authority is satisfied that:
 - i) statistically valid trials on the variety carried out outside the country have demonstrated that the variety has that specified characteristic; and
 - ii) the natural environment outside the country under which the statistically valid trials were carried is similar to the environment in the country.

44. Plant Varieties Trials

- 1) Where, in dealing with an application in respect of a plant variety, the National Competent Authority considers it necessary that there should be a statistically valid trial or a further statistically valid trial of the variety, trials shall be carried out:
 - a) for the purpose of determining whether the plant variety is distinct, homogenous or stable;
 - b) for the purpose of determining whether the variety will, if grown in the country, exhibit the claimed distinctiveness, homogeneity and stability;
 - c) requiring the applicant to supply sufficient seed or propagation material of the variety, as the case requires, and with any necessary information, to enable the variety to be test grown for the purpose so specified.
- 2) After the completion of the trials on a plant variety, any plants or propagation material of plants used in, or resulting from, the trials that are capable of being transported shall be removed by the applicant for a Plant Breeders' Rights in respect of that plant variety.

45. Withdrawal of Application

- 1) An application may be withdrawn by the applicant at any time before the publication of the application.
- 2) Where an application is withdrawn after its publication in the Official Gazette, but before the granting of a Plant Breeders' Rights, the National Competent Authority shall forthwith publicise that withdrawal.

46. Provisional Protection

- 1) Where an application for a Plant Breeders' Rights in respect of a plant variety has been accepted, the applicant shall be deemed to be the owner of a Plant Breeders' Rights in respect of that plant variety during the period commencing on the date of filing of the application and ending on whichever of the dates specified in a) and b) occurs first:
 - a) when the application is disposed of; or
 - b) where the National Competent Authority has given the applicant a notice at the expiration of the prescribed period, after the notice is given.
- 2) Steps to protect genetic materials of new varieties under testing will be taken, so as to prevent their use for non-research purposes.

47. Opposition to Grant of Plant Breeders' Rights

- 1) Where official gazettelement of an application for a Plant Breeders' Rights in respect of a plant variety or of the variation of such a variety is given, any person who considers that:
 - a) commercial or public interests would be negatively affected by the grant of those rights to the applicant;
 - b) the application in relation to that variety does not fulfil the prescribed criteria for granting a Plant Breeders' Rights; may within 6 months after publication of the application, or any further time before the application is disposed of, lodge with the National Competent Authority a written objection to the granting of the Rights setting out the particulars of the objection.
- 2) Where an opposition to the grant of a Plant Breeders' Rights is lodged under Paragraph 1), the National Competent Authority shall cause a copy of that opposition to be given to the applicant for that Plant Breeders' Rights.
- 3) Any person may inspect an application, or an opposition lodged, at any reasonable time and is entitled, upon payment of such fee as is prescribed, to be given a copy of the application or of the opposition.

48. Grant of Plant Breeders' Rights

- 1) Subject to this Article, an application for a Plant Breeders' Rights in respect of a plant variety is granted if the National Competent Authority is satisfied that:
 - i) there is such a plant variety;
 - ii) the plant variety is a new plant variety;
 - iii) the applicant is entitled to the application;
 - iv) the grant of those rights to the applicant is not prohibited by this Act;
 - v) those rights have not been granted to another person;
 - vi) there has been no earlier application for those rights that has not been withdrawn or otherwise disposed of; and
 - vii) all fees payable under this Act in relation to the application have been paid;
- 2) If the National Competent Authority is not satisfied that the conditions in Paragraph 1) above have been fulfilled, the National Competent Authority shall refuse to grant that Plant Breeders' Rights to the applicant.
- 3) The National Competent Authority shall not grant, or refuse to grant, a Plant Breeders' Rights in respect of a plant variety unless a period of six (6) months has elapsed since the publication of the application in the official gazette, or, if the application has been varied in a manner that the National Competent Authority considers to be significant, a period of 6 months has elapsed since the publication of particulars of the variation, or of the last such variation, as the case requires.
- 4) The National Competent Authority shall not refuse to grant a Plant Breeders' Rights unless it has given the applicant for that Plant Breeders' Rights a reasonable opportunity to make a written submission in relation to the application.
- 5) Where an opposition to the grant of a Plant Breeders' Rights has been lodged, the National Competent Authority shall not grant the Plant Breeders' Rights unless it has given the person who lodged the opposition a reasonable opportunity to make a written submission in relation to the objection.
- 6) A Plant Breeders' Rights shall be granted and issued by the National Competent Authority to the applicant in the form specified in its regulations.
- 7) Where a Plant Breeders' Rights over one variety is granted to persons, that Plant Breeders' Rights shall be granted to those persons jointly.

- 8) Where a Plant Breeders' Rights is granted to a public or private institution, it shall accrue to the institution represented by the designated person or persons.
- 9) Where the National Competent Authority refuses to grant a Plant Breeders' Rights in respect of a plant variety, the National Competent Authority shall, within 30 days after refusing, give written notice of the refusal to the applicant clearly setting out the grounds for the refusal.

49. Entry of Plant Breeders Rights in the Register

- 1) When the National Competent Authority grants a Plant Breeders' Rights in respect of a plant variety, it shall enter in the Register:
 - a) a description, or a description and photograph, of the plant variety;
 - b) the name of the variety;
 - c) the pedigree of the variety (where possible);
 - d) the name of the grantee;
 - e) the name and address of the breeder;
 - f) the address for the service of documents on the grantee for the purpose of this Act, which is shown on the application for the Rights;
 - g) the date on which the Plant Breeders' Rights was granted;
 - h) a description of the communities/localities in the country entitled to Farmers' Rights in relation to the variety;
 - i) such other particulars relating to the grant as the National Competent Authority considers appropriate.

50. Publication of Grant of Plant Breeders Rights

Where a Plant Breeders' Rights has been granted, the National Competent Authority shall, within 30 days after granting, publish that Plant Breeders' Rights in the official gazette. The publication will also make reference to the entitlements under Farmers' Rights.

51. Effect of Grant on Certain Persons

- 1) Where a Plant Breeders' Rights in respect of a plant variety has been granted to a person, another person who was entitled to make an application for that Plant Breeders' Rights, whether or not a person who developed that variety independently of the breeder, or the successor of such another person, is not entitled to any interest in that Plant Breeders' Rights because of the entitlement to make the application or because of the grounds of the entitlement, but nothing in this Article prevents a person from applying to the National Competent Authority for the revocation of that Plant Breeders' Rights or from instituting proceedings before a court in respect of that Plant Breeders' Rights.
- 2) Where:
 - a) a Plant Breeders' Rights in respect of a new plant variety has been granted to a person, and
 - b) another person (in this Paragraph referred to as the eligible person) was entitled, at a law or in equity to have the right to make an application for that Plant Breeders' Rights assigned to the eligible person, then the eligible person is entitled to have that Plant Breeders' Rights assigned to her/him.

52. Nature of Plant Breeders' Rights

- 1) A Plant Breeders' Rights is personal property and, subject to any conditions imposed under other Paragraphs, is capable of assignment or of transmission by will or by operation of law.
- 2) An assignment of a Plant Breeders' Rights does not have effect unless it is in writing, signed by or on behalf of the assignor.

53. Assignment of Plant Breeders' Rights

- 1) Where a Plant Breeders' Rights is assigned or transmitted to a person, that person shall, within 30 days after acquiring it, inform the National Competent Authority in writing that the person has acquired that Plant Breeders' Rights, giving particulars of the manner in which it was acquired, and the National Competent Authority, if satisfied that the Plant Breeders' Rights has been so assigned or transmitted, shall enter the name of that person on the Register as the grantee of that Plant Breeders' Rights.
- 2) Where in accordance with Paragraph 1), the National Competent Authority enters on the Register as the grantee of a Plant Breeders' Rights the name of a person who claims to have acquired that Plant Breeders' Rights, it shall, within 30 days after entering the name in the Register, give written notice to the person newly entered and to the person who was the grantee before the new entry was made stating that the entry has been made.
- 3) Where the National Competent Authority is not satisfied that a Plant Breeders' Rights has been assigned or transmitted to a person who has informed the National Competent Authority in accordance with Paragraph 1) that that Plant Breeders' Rights has been thus assigned or transmitted to the claimant, the National Competent Authority shall forthwith:
 - a) give written notice to the claimant:
 - i) stating that the National Competent Authority is not satisfied; and
 - ii) setting out the grounds on which the National Competent Authority is not so satisfied; and
 - b) give written notice to the grantee of those rights:
 - i) setting out particulars of the information given by the claimant;
 - ii) stating that the National Competent Authority is not satisfied; and
 - iii) setting out the grounds on which it is not so satisfied.
- 4) A person who informs the National Competent Authority in accordance with Paragraph 1) that a Plant Breeders' Rights has been assigned or transmitted to her/him shall give written notice to the National Competent Authority of an address in the country for the service of documents in accordance with this Act; and
 - a) where the National Competent Authority enters the name of that person on the Register in accordance with Paragraph 1) and that address is different from the address already entered in the Register, it shall amend the Register so that the address so given is entered in the Register as the address for service of documents on the grantee for the purpose of this Act; or
 - b) where the National Competent Authority is not satisfied that those rights have been assigned or transmitted to that person, the notice to that person under Paragraph 3)a) shall be given by being posted.

54. Supply of Propagating Material

- 1) A Plant Breeders' Rights in respect of a plant variety is subject to the condition that the grantee of the Rights shall comply with any notice given to her/him by the National Competent Authority.

- 2) Where a Plant Breeders' Rights are granted in respect of a plant variety, the National Competent Authority may give the grantee of the Plant Breeders' Rights written notice requiring the grantee, within 14 days of the giving of the notice or any other time that is allowed, to cause a specified quantity of propagating material of that variety to be delivered, at the expense of the grantee, to a specified plant genetic resources centre and a herbarium.
- 3) The quantity of the propagating material of a variety specified in a notice under Paragraph 2) shall be the quantity that the National Competent Authority considers would be sufficient to enable that variety to be kept in existence if there were no other propagating material of that variety.
- 4) Where the propagating material is delivered to a plant genetic resources centre in accordance with the conditions imposed on Plant Breeders' Rights by Paragraph 1), the National Competent Authority shall, subject to Paragraph 6), cause that material to be stored at a specified plant genetic resources centre.
- 5) The delivery and storing of the propagating material in accordance with this Paragraph does not affect the ownership of the material but that the material shall not be dealt with otherwise than for the purposes of this Act.
- 6) The propagating material stored at a plant genetic resources centre may be used by the National Competent Authority for the purposes set out in this Act.
- 7) Without limiting Paragraphs 5) and 6), where, the propagating material is stored at a plant genetic resources centre as gazetted by the Government according to Article 39) of this Act, the material shall not form part of the national collection, and shall not be used for the purposes of that collection, until a decision on the application for a Plant Breeders' Rights is taken. Once the variety is accorded recognition, the propagating material can be provided for purposes of further research and breeding under the intimation of the depositor of the material.

55. Revocation of Plant Breeders' Rights

- 1) The National Competent Authority shall revoke a Plant Breeders' Rights in respect of a plant variety if
 - a) it is satisfied that the plant variety was not new or that facts exist which, if known before the grant of that Plant Breeders' Rights, would have resulted in the refusal of the grant; or
 - b) the grantee has failed to pay a prescribed fee payable in respect of that Plant Breeders' within 90 days after having been notified that the prescribed fee was due for payment.
- 2) The National Competent Authority may revoke a Plant Breeders' Rights if it is satisfied that:
 - a) the grantee has failed to comply, in relation to that Plant Breeders' Rights, with the prescribed conditions; or
 - b) a person to whom that Plant Breeders' Rights has been assigned or transmitted has failed to comply with the provisions of this Act.
- 3) Where the National Competent Authority revokes a Plant Breeders' Rights in respect of a plant variety in accordance with this Article, it shall, within 7 days after the decision is taken, give written notice of the revocation to the grantee setting out the grounds for the revocation.
- 4) The National Competent Authority shall not revoke a Plant Breeders' Rights in accordance with this Article unless and until it has given the grantee and any person to whom it believes that Plant Breeders' Rights has been assigned or transmitted, particulars of the grounds for the proposed revocation and given the grantee and any such person a reasonable opportunity to make a written submission in relation to the proposed revocation.
- 5) The revocation of a Plant Breeders' Rights in respect of a plant variety in accordance with this Article takes effect:

- a) subject to Paragraph 4), at the expiration of the period within which an application may be made to a court for a review of the revocation; or
 - b) if such an application is made to the court, at the time when the application is withdrawn or finally determined by a court.
- 6) Nothing in this Article shall be taken to affect the powers or the legal system.
 - 7) Any person whose interests are affected by the granting of a Plant Breeders' Rights in respect of a plant variety may apply to the National Competent Authority for the revocation of that Plant Breeders' Rights in accordance with this section.
 - 8) The National Competent Authority shall consider any application under Paragraph 7) for the revocation of a Plant Breeders' Rights. The decision of the National Competent Authority not to revoke the Plant Breeders' Rights shall be communicated to the applicant by a written notice within 7 days after the decision is taken, setting out the grounds for the decision.

56. Surrender of Plant Breeders Rights

- 1) Subject to Paragraph 2) of Article 34), a grantee of a Plant Breeders' Rights may at any time, by giving notice to National Competent Authority, offer to surrender that Plant Breeders' Rights: the National Competent Authority, after giving public notice of the offer and giving all interested parties an opportunity to make a written submission in relation to the offer, may, if it finds fit, accept the offer and revoke those rights
- 2) Where an action or proceeding in respect of a Plant Breeders' Rights is pending in a court, the National Competent Authority shall not accept an offer for the surrender of, or revoke, that Plant Breeders' Rights, except by leave of the court or by consent of the parties to the action or proceeding.

PART VII

INSTITUTIONAL ARRANGEMENTS

57. Establishment of the National Competent Authority

The State shall designate or establish a National Competent Authority which shall implement and enforce the provisions of this legislation. Its duties shall include those set out in Article 29).

58. Duties of the National Competent Authority

The duties of the National Competent Authority are, while ensuring gender equity, to:

- i) create and operate a regulatory mechanism that will ensure effective protection of Community Intellectual Rights and Farmers' Rights, and the regulation of access to biological resources;
- ii) carry out the process of consultation and participation of local communities, including farming communities, in the identification of their rights as provided for under the customary practices and laws of the communities;
- iii) identify types of Community Intellectual Rights and Farmers' Rights;
- iv) identify and define the requirements and procedures necessary for the recognition of Community Intellectual Rights and Farmers' Rights;
- v) develop criteria and mechanisms to standardise procedures;

- vi) develop a system of registration of items protected by Community Intellectual Rights and Farmers' Rights according to their customary practices and law;
- vii) issue licenses for the exploitation and commercialisation of biological resources, including protected species, varieties or lineages, and community innovations, practices, knowledge and technologies;
- viii) identify relevant technical institutions that will assist local communities, including farming communities, in the categorisation and characterisation of their biological resources, innovations, practices, knowledge and technologies.

59. Establishment of National Inter-Sectoral Co-ordination Body

A National Inter-Sectoral Co-ordination Body at the highest level, composed of representatives from relevant public sectors, scientific and professional organizations, non-governmental and local community organizations, shall be created as a body to co-ordinate and follow-up the proper implementation of this legislation by the National Competent Authority.

60. Functions of the National Inter-Sectoral Co-ordination Body

The functions of the National Inter-Sectoral Coordination Body shall be to:

- i) ensure that the minimum conditions for agreements with collectors are strictly observed and complied with;
- ii) ensure that the rights of local communities, including farming communities, are protected, with due regard for gender equity, wherever the activities relating to the accessing, collection or research on biological resources, community innovations, practices, knowledge and technologies are conducted, including verifying that the requirements of prior informed consent by the local communities are complied with;
- iii) recommend policies and laws on the sustainable use of biological resources including new laws on intellectual property rights, Community Intellectual Rights and Farmers' Rights over their biological resources, innovations, practices, knowledge and technologies; and
- iv) perform such other functions as may be necessary for the effective implementation of this legislation.

61. Composition of the National Inter-Sectoral Co-ordination

The National Inter-Sectoral Co-ordination Body shall be composed of the following persons:

Here the functional composition of the body can be outlined the qualifications, fields of expertise or specialisation, public interest qualities, industry, community based organizations and persons from relevant areas and fields with due regard for gender equity. This section seeks to fulfil the requirements set out in Article 29) above.

62. Appointment of Technical Advisory Body

It is hereby appointed a body to be known as the Technical Advisory Body to support the work of the National Inter-Sectoral Co-ordination Body.

63. Functions of the Technical Advisory Body

The functions of the Technical Advisory Body shall be to:

- i) formulate policy options that promote the protection of Community Intellectual Rights, Farmers' Rights, gender equity and the regulation of access to biological resources;
- ii) prepare lists of taxa threatened by deterioration and/or extinction and of the places threatened by serious loss of biological diversity;
- iii) monitor and evaluate, at regular intervals, the implementation of this legislation or actual or potential threats to biological diversity and the likely impacts on the pursuit towards sustainable development;
- iv) develop and recommend a mechanism to enable the identification and dissemination of information regarding threats to biological resources; and
- v) perform such other functions as may be necessary to implement this legislation.

64. Establishment of a National Information System

- 1) It is hereby established that there shall be a National Information System with regard to biological resources, which includes the activities set out in the following Article.
- 2) Local communities may also establish databases on their biological resources together with their components and derivatives, and the knowledge and technologies of those communities.
- 3) Access to information in the National Information System and databases shall be regulated by a charter setting out the rights of the owners of the data.

65. Activities of the National Information System

The activities of the National Information System shall include *inter alia* the following:

- i) the compilation and documentation of information on Community Intellectual Rights, Farmers' Rights, gender equity and access to biological resources, community innovations, practices, knowledge and technologies;
- ii) the maintenance of an up-to-date system of information about research and development activities on biological resources and community innovations, practices, knowledge and technologies; and
- iii) the compilation of information on piracy of biological resources, community innovations, practices, knowledge and technologies, and the disseminating of this information to all relevant and concerned bodies.

66. Establishment of a Community Gene Fund

- 1) The Community Gene Fund shall be established as an autonomous Trust. A Director shall be appointed to administer the Fund. The Director shall report to the National Competent Authority.
- 2) There shall be an autonomous Trust to administer a Community Gene Fund deriving its funds from the shares due to local farming communities under Article 27 1(b) in Part V on Farmers' Rights. The Fund, which will be exempted from income tax, can receive contributions from national and international bodies and others interested in strengthening genetic conservation by local communities.
- 3) A royalty to be fixed by the National Competent Authority based on the gross value of the Breeders' Rights protected seeds sold shall be credited to the Community Gene Fund for the benefit of farming communities whose farmers' varieties have been the basis for the breeding of breeders' varieties.

- 4) The gene fund shall be used to finance projects developed by the farming communities, ensuring equity for women, with or without the participation of experts to help them, aimed at solving their felt problems, including, but not restricted to, the development, conservation and sustainable use of agricultural genetic resources.
- 5) All salaries and administrative expenses relating to the establishment and administration of the Community Gene Fund will be met by the Government, in order to ensure that the entire proceeds of the Fund go to the farming local communities.
- 6) The Community Gene Fund will have a Fund Management Committee, comprising representatives of farming local communities, professionals, non-governmental organizations, and the public and private sector.

PART VIII

ENABLING PROVISIONS

67. Sanctions and Penalties

- 1) Without prejudice to the existing agencies and authorities, the State shall establish appropriate agencies with the power to ensure compliance with the provisions of this law.
- 2) Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of this legislation and subsequent regulations, sanctions and penalties to be provided may include:
 - i) written warning;
 - ii) fines;
 - iii) automatic cancellation/revocation of the permission for access;
 - iv) confiscation of collected biological specimens and equipment;
 - v) permanent ban from access to biological resources, community knowledge and technologies in the country.
- 3) The violation committed shall be publicized in the national and international media and shall be reported by the National Competent Authority to the secretariats of relevant international agreements and regional bodies.
- 4) When the collector conducts his/her operations outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the cooperation of the government under whose jurisdiction the collector operates based on the guarantee that the latter has provided.

68. Appeals

Decisions on approval, disapproval or cancellation of agreements regarding access to biological resources, community knowledge or technologies may be appealed through appropriate administrative channels. Recourse to the courts shall be allowed after exhaustion of all administrative remedies.

APPENDIX 2

Organisation de l'Unité Africaine

Législation Modèle Africaine pour la Protection des Droits des Communautés Locales, des Agriculteurs et des Obtenteurs et pour les Règles d'Accès aux Ressources Biologiques

Première partie	–	Objectifs
Deuxième partie	–	Définitions et champ d'application
Troisième partie	–	Accès aux ressources biologiques
Quatrième partie	–	Droits des communautés
Cinquième partie	–	Droits des agriculteurs
Sixième partie	–	Droits des obtenteurs
Septième partie	–	Arrangements institutionnels
Huitième partie	–	Dispositions diverses

Considérant que l'Etat et son peuple exercent des droits souverains et inaliénables sur leurs ressources biologiques;

Considérant que les droits des communautés locales sur leurs ressources biologiques, connaissances et technologies, qui constituent l'essence même des modes d'existence et qui ont évolué de génération en génération tout au long de l'histoire humaine, sont de nature collective et sont donc des droits imprescriptibles ayant de ce fait prééminence sur les droits fondés sur les intérêts particuliers;

Considérant que le rôle vital des femmes dans la production, la conservation et l'utilisation durable de la diversité biologique et les connaissances et technologies qui leur sont associées, est évident, et qu'il est donc essentiel de rendre possible leur participation totale à tous les niveaux de décision et de mise en oeuvre des politiques relatives à la diversité biologique et aux connaissances et technologies qui leur sont associées;

Considérant qu'il est nécessaire de protéger et d'encourager la diversité culturelle, en reconnaissant la valeur réelle des connaissances, technologies, innovations et pratiques des communautés locales en matière de conservation, gestion et utilisation des ressources biologiques;

Considérant qu'il est du devoir de l'Etat et de son peuple de contrôler l'accès aux ressources biologiques et aux connaissances et technologies des communautés;

Considérant que l'Etat reconnaît la nécessité d'offrir des mécanismes adéquats pour garantir la participation juste, équitable et réelle de ses citoyens dans la protection de leurs droits collectifs et individuels et dans la prise de décision relative aux ressources biologiques et intellectuelles ainsi qu'aux activités et avantages issus de leur exploitation;

Considérant qu'il est nécessaire de promouvoir et soutenir les technologies traditionnelles et autochtones pour la conservation et l'utilisation durable des ressources biologiques et de les compléter par des technologies modernes appropriées;

Considérant qu'il est nécessaire d'appliquer les dispositions prévues par la Convention sur la Diversité Biologique, en particulier l'Article 15) relatif à l'accès aux ressources génétiques, et l'Article 8(j) relatif à la préservation et à la pérennité des connaissances, innovations et pratiques des communautés autochtones et locales;

Considérant que toutes les formes de vie sont à la base de la survie humaine et que, par conséquent, la brevetabilité du vivant ou l'appropriation exclusive de toute forme de vie, y compris toute partie ou dérivée, viole le droit fondamental de la personne humaine à la vie;

Il est donc décidé ce qui suit:

PREMIERE PARTIE

Objectifs

L'objectif principal de cette législation est d'assurer la conservation, l'évaluation et l'utilisation durable des ressources biologiques, y compris les ressources génétiques agricoles, et des connaissances et des technologies pour préserver et améliorer leur diversité dans l'optique de pérenniser les systèmes entretenant la vie.

Les objectifs spécifiques de cette législation sont de:

- a) Reconnaître, protéger et garantir les droits inaliénables des communautés locales, y compris des communautés agricoles sur leurs ressources biologiques et leurs connaissances et leurs technologies;
- b) Reconnaître et protéger les droits des obtenteurs;
- c) Proposer un système approprié d'accès aux ressources biologiques, aux connaissances et technologies des communautés sous réserve d'un consentement donné en connaissance de cause de l'Etat et des communautés locales concernées;
- d) Promouvoir des mécanismes appropriés pour un partage juste et équitable des avantages tirés de l'utilisation des ressources biologiques, des connaissances et des technologies;
- e) Garantir la participation effective des communautés concernées et des femmes en particulier, dans la prise de décision concernant la répartition des bénéfices qui peuvent être tirés de l'utilisation de leurs ressources biologiques,

- connaissances et technologies;
- f) Promouvoir et encourager, à l'échelle nationale et à la base, le renforcement des capacités scientifique et technologique pertinentes pour l'évaluation, la conservation et l'utilisation durable des ressources biologiques;
 - g) Proposer des mécanismes institutionnels appropriés pour la mise en œuvre effective et l'application des droits des communautés locales, y compris les droits des communautés agricoles et des obtenteurs, et pour la régulation des conditions d'accès aux ressources biologiques, aux connaissances et aux technologies d'une communauté;
 - h) Promouvoir la conservation, l'évaluation et l'utilisation durable des ressources biologiques, en tenant particulièrement compte du rôle prépondérant joué par les femmes;
 - i) Promouvoir les améliorations de la productivité, de la rentabilité, de la stabilité et de la durabilité des principaux systèmes de culture par le biais d'un meilleur rendement et le maintien de la diversité génétique au champ;
 - j) Promouvoir l'approvisionnement des agriculteurs en matériel de multiplication de bonne qualité et;
 - k) Veiller à l'utilisation efficace et équitable des ressources phytogénétiques afin de renforcer la sécurité alimentaire nationale.

DEUXIEME PARTIE

Définitions et champ d'application

1. Définitions

Aux fins de la présente législation, on entend par:

Accès: l'acquisition de ressources biologiques, de leurs produits dérivés, de connaissances, d'innovations, de technologies ou de pratiques des communautés telles qu'elle est autorisée par l'autorité compétente nationale.

Autorité compétente nationale: l'entité autorisée par l'Etat à superviser et à contrôler l'application de l'une ou de plusieurs dispositions de la présente législation.

Collecteur: toute personne physique ou morale, institution ou agent qui obtient l'accès aux ressources biologiques, pratiques locales, innovations, connaissances ou technologies avec l'autorisation de l'autorité compétente nationale.

Communauté locale: une population humaine dans une zone géographique donnée qui jouit de la propriété sur ses ressources biologiques, innovations, pratiques, connaissances et technologies partiellement ou totalement gouvernées par ses propres coutumes, traditions ou lois.

Condition *ex situ*: condition d'une ressource biologique se trouvant en dehors de son habitat naturel. Aux fins de la présente législation, toute lignée qui est cultivée dans sa zone d'origine n'est pas considérée comme étant en condition *ex situ*.

Condition *in situ*: condition d'une ressource biologique se trouvant dans son écosystème ou son habitat naturel. Dans le cas d'une variété domestiquée ou cultivée, elle est considérée *in situ* quand elle se trouve dans le contexte culturel où ses propriétés spécifiques se sont développées.

Connaissances des communautés, ou connaissances autochtones:

connaissances accumulées qui sont vitales pour la conservation et l'utilisation durable des ressources biologiques ou ayant une valeur socio-économique, et qui se sont développées au fil des années dans les communautés autochtones ou locales.

Consentement donné en connaissance de cause: le fait pour le collecteur de donner une information complète et précise et, sur la base de cette information, d'obtenir l'accord préalable du gouvernement et de la ou des communautés locales concernées, lui permettant de collecter des ressources biologiques ou des connaissances ou technologies autochtones.

Dérivé: produit élaboré ou extrait à partir d'une ressource biologique; il s'agit entre autres des variétés végétales, huiles, résines, gommes, protéines, etc.

Droits intellectuels des communautés: droits détenus par des communautés locales sur les ressources biologiques, y compris parties ou dérivées et sur leurs pratiques, innovations, connaissances et technologies.

Innovation: se dit de la production de toute connaissance ou technologie nouvelle, ou améliorée par rapport à ce qui existait, collective et/ou cumulative, réalisée à travers l'altération ou la modification ou l'usage de propriétés, de valeurs ou de procédés de tout matériel biologique ou de l'un quelconque de ses éléments, documentée, enregistrée, orale, écrite ou établie d'une quelconque manière.

Partage des bénéfices: le partage de toute amélioration retirée de l'utilisation des ressources biologiques, des connaissances, des technologies, innovations ou pratiques des communautés. Ressources biologiques: comprend les ressources génétiques, les organismes ou éléments de ceux-ci, les populations ou tout autre élément biotique des écosystèmes, y compris les écosystèmes eux-mêmes, ayant une utilisation ou une valeur effective potentielle pour l'humanité.

2. Champ d'application

- 1) Cette législation s'applique aux:
 - i) ressources biologiques tant en conditions in situ qu'ex situ;
 - ii) produits dérivés des ressources biologiques;
 - iii) connaissances et technologies des communautés;
 - iv) communautés locales et autochtones; et
 - v) obtenteurs de variétés végétales.
- 2) Cette législation ne doit pas affecter:
 - i) les systèmes traditionnels d'accès, d'utilisation et d'échange des ressources biologiques;
 - ii) l'accès, l'utilisation et l'échange de connaissances et de technologies par et entre les communautés locales.
- 3) Le partage des bénéfices est fondé sur les pratiques coutumières des communautés locales concernées, étant entendu que les dispositions prévues au Paragraphe 2) ne s'appliquent pas à une ou plusieurs personnes n'observant pas le mode de vie traditionnel et coutumier adapté à la conservation et l'utilisation durable des ressources biologiques.

TROISIEME PARTIE

Accès aux ressources biologiques

3. Demande d'accès aux ressources biologiques et aux connaissances et technologies des communautés locales

- 1) L'accès à toute ressource biologique et connaissance ou technologie des communautés locales dans toute partie du pays devra être soumis à une demande en vue d'obtenir le consentement donné en connaissance de cause.
- 2) L'accès à toute ressource biologique dans une zone protégée sera soumis à une demande pour obtenir les consentements donnés en connaissance de cause et une autorisation écrite.
- 3) Toute demande en vue d'obtenir une autorisation écrite contenant les consentements nécessaires permettant l'accès à toute ressource biologique, connaissance ou technologie des communautés sera adressée à l'autorité compétente nationale sauf en cas de disposition contraire explicitement prévue par la loi.

4. Conditions de la demande d'accès aux ressources biologiques

- 1) Pour toute demande d'accès faite conformément à l'Article 3) ci-dessus, le demandeur devra fournir les informations suivantes:
 - i) l'identité du demandeur et les documents attestant de sa capacité juridique à contracter y compris l'identité des partenaires;
 - ii) les ressources auxquelles il/elle cherche à accéder, notamment les sites où elles seront collectées, les utilisations présentes et potentielles et la durabilité de ces ressources, ainsi que les risques qui peuvent découler d'un tel accès;
 - iii) le danger que peut présenter la collecte d'une ressource pour tout élément de la diversité biologique et les risques que peuvent entraîner un tel accès;
 - iv) l'objectif de la collecte, notamment le type et l'étendue de la recherche, l'utilisation universitaire ou l'exploitation commerciale prévue;
 - v) la description de la méthode et de l'étendue de la collaboration à l'échelon local et national dans la recherche et le développement de la ressource biologique concernée;
 - vi) l'identification de l'institution ou des institutions nationales qui participeraient à la recherche et jouent un rôle de surveillance et de suivi;
 - vii) la localisation du site où la recherche et le développement seront effectués;
 - viii) la destination initiale de la ressource et sa ou ses autres destinations possibles;
 - ix) les avantages économiques, sociaux, techniques, biotechnologiques, scientifiques, environnementaux ou autres attendus ou probables pour le pays et les communautés locales fournissant l'accès aux ressources biologiques ainsi que pour le collecteur et le ou les pays où il/elle travaille;
 - x) les mécanismes et méthodes de partage des bénéfices;
 - xi) une description de l'innovation, pratique, connaissance ou technologie en rapport avec la ressource biologique et;
 - xii) une évaluation de l'impact environnemental et socio-économique sur au moins les trois générations suivantes, dans le cas où la collection représente un volume important.
- 2) Aucune disposition du Paragraphe 1 n'empêchera l'autorité compétente nationale de demander toute information supplémentaire qu'elle jugera nécessaire à l'application de la présente législation.

5. Conditions de la consultation et du consentement donné en connaissance de cause

- 1) Tout accès aux ressources biologiques, connaissances ou technologies des communautés locales devra être soumis par écrit au consentement donné en connaissance de cause:
 - i) l'autorité nationale compétente; ainsi que
 - ii) des communautés locales concernées, en vérifiant que les femmes sont aussi impliquées dans la prise de décision.
- 2) Tout accès obtenu sans le consentement donné en connaissance de cause de l'autorité compétente et de la ou des communautés locales concernées entraînera la nullité, et fera l'objet de pénalités prévues par la présente législation ou toute autre législation régulant l'accès aux ressources biologiques.
- 3) L'autorité compétente nationale consultera la ou les communautés locales pour s'assurer que le consentement a été demandé et octroyé. Tout accès accordé sans consultation préalable de la ou des communautés concernées sera considéré illégal et violant le principe incontournable du consentement donné en connaissance de cause prévu par cet Article.

6. Inscription des demandes dans un registre public

- 1) L'autorité nationale compétente qui sera saisie d'une demande d'accès, inscrira ou fera inscrire la dite demande dans un registre public ou au journal officiel ou la fera publier dans un journal raisonnablement accessible au public dans des délais à déterminer.
- 2) Toute personne peut consulter le registre public et faire ses commentaires sur la demande.
- 3) L'autorité compétente nationale devra assurer une large et optimale diffusion des informations pertinentes vers les communautés concernées et vers toute autre partie intéressée.

7. Autorisation d'accès

- 1) Une autorisation d'accès sera attribuée, pour une durée déterminée, par l'autorité compétente nationale ou toute personne dûment autorisée à le faire dans le cadre de la présente législation, pour une durée déterminée
- 2) L'accès sera organisé dans le cadre d'un accord écrit, conclu entre l'autorité nationale compétente et les communautés locales concernées d'une part, et le demandeur ou collecteur d'autre part.
- 3) L'autorisation sera nulle si les consentements n'ont pas été obtenus.

8. Contenu de l'accord

- 1) L'accord mentionné à l'Article 7) doit faire apparaître au minimum les obligations suivantes de la part du demandeur:
 - i) respecter les limites qualitatives et quantitatives fixées par l'autorité compétente nationale sur la ressource biologique que le collecteur peut obtenir et exporter;
 - ii) s'engager à déposer le double de chaque spécimen de ressource biologique, avec des informations de terrain complètes, ou l'enregistrement de toute innovation, pratique, connaissance ou technologie ayant été collectée dans une communauté, auprès des agences gouvernementales dûment désignées à cet effet et, le cas échéant, auprès des organisations des communautés locales;
 - iii) informer immédiatement l'autorité compétente nationale et la ou les

- communautés locales concernées de tous les résultats de recherche et de développement effectués à partir de la ressource;
- iv) ne transférer à un tiers ni la ressource biologique, ni aucun de ses dérivés, ni aucune innovation, pratique, connaissance ou technologie d'une communauté sans l'autorisation de l'autorité compétente nationale et de la ou des communautés concernées;
 - v) ne pas déposer de demande pour toute forme de protection intellectuelle sur une ressource biologique, y compris sur une de ses parties ou dérivés, et ne pas déposer de demande pour toute protection d'un droit de propriété intellectuelle sur des innovations, pratiques, connaissances ou technologies;
 - vi) prévoir le partage des bénéfices;
 - vii) l'accès est conditionné par un engagement à contribuer économiquement aux efforts de l'autorité compétente et de la ou des communautés locale concernées dans la régénération et la conservation des ressources biologiques et pour le maintien de l'innovation, des pratiques, connaissances ou technologies pour lesquelles l'accès est sollicité;
 - viii) soumettre régulièrement à l'autorité compétente ou à la ou les communautés locales concernées un rapport sur les activités de recherche - développement sur la ressource et, dans le cas où de grandes quantités sont prélevées, un relevé sur l'état écologique du site; et
 - ix) obéir aux lois en vigueur dans le pays, notamment celles qui concernent les contrôles sanitaires, la biosécurité et la protection de l'environnement, ainsi que les pratiques culturelles, les valeurs et les coutumes traditionnelles des communautés locales.
- 2) Tout doit être mis en oeuvre pour que la recherche soit effectuée dans le pays du fournisseur de la ressource biologique et pour faciliter la participation des acteurs de ce pays.

9. Brevets sur le vivant et sur les procédés biologiques

- 1) Les brevets sur toute forme de vie et sur les procédés biologiques ne sont pas reconnus et ne peuvent pas faire l'objet d'une demande.
- 2) Le collecteur ne pourra donc pas déposer de demande de brevet sur des formes de vie et sur des procédés biologiques aux termes de la présente législation ou de toute autre législation qui régit l'accès et l'utilisation des ressources biologiques, des innovations, pratiques, connaissances et technologies des communautés, et qui protège leurs droits.

10. Autorisation d'accès

L'autorité compétente nationale devra donner son autorisation d'accès aux ressources biologiques ou aux innovations, pratiques, connaissances ou technologies des communautés concernées, autorisation assortie de toutes les conditions jugées nécessaires. Avant d'autoriser l'accès, l'autorité compétente nationale devra vérifier que toutes les conditions spécifiées dans cette législation ont été remplies.

11. Conditions s'appliquant aux instituts académiques et de recherche, aux organismes publics et organisations inter-gouvernementales

- 1) L'autorité compétente nationale soumettra toutes les demandes d'accès à une ressource biologique, innovation, pratique, connaissance ou technologie des communautés au consentement donné en connaissance de cause, de la ou des communautés concernées.
- 2) L'autorité compétente nationale doit déterminer les conditions appropriées à remplir, selon les termes de l'accord écrit mentionné à l'Article 8, par les instituts académiques et de recherche, les organismes publics et les organisations intergouvernementales.
- 3) La demande de collecte à but académique doit faire apparaître l'objet de la recherche et les liens du demandeur avec l'industrie. Aucun échantillon ni aucune connaissance telle une évaluation ou caractérisation, ne pourra être transféré sans être accompagné d'un MTA (Material Transfer Agreement) réservant les droits de l'Etat fournisseur et des communautés locales.
- 4) Si les institutions mentionnées ci-dessus changent leurs activités et s'engagent de façon prédominante dans la commercialisation d'une ressource biologique, l'autorité compétente nationale pourra modifier les conditions et les termes en conséquence.

12. Partage des bénéfices

- 1) Autorisation de collecte pourra être subordonnée au paiement d'un droit d'entrée, payable avant le début de la collecte. Le montant dépendra notamment du but commercial ou non commercial de la collecte, du nombre d'échantillons à prélever, de l'étendue du territoire dévolu à la collecte, de la durée de l'opération, de l'exclusivité de collecte éventuellement accordée au demandeur.
- 2) Lorsque l'utilisation d'une ressource biologique et/ou d'un savoir associé débouche directement ou indirectement sur un produit utilisé dans un processus de production, un pourcentage du chiffre d'affaires de ce produit sera reversé à l'Etat et aux communautés locales.

13. Types de permis d'accès

- 1) Après s'être assuré que les conditions requises par la procédure du consentement donné en connaissance de cause ont été respectées, l'autorité compétente nationale délivrera au demandeur ou collecteur le permis d'accès approprié. Il peut s'agir d'un permis de recherche académique, d'un permis de recherche commerciale ou d'un permis d'exploitation commerciale.
- 2) Personne ne doit être en possession de deux types de permis pour la même ressource, ni les utiliser simultanément, sauf s'il lui a été délivré une autorisation écrite spéciale.
- 3) Aucune disposition de cet Article ne pourra servir à limiter le pouvoir de l'autorité compétente nationale de délivrer tout autre type de permis.

14. Révocation du permis d'accès

- 1) L'autorité compétente nationale se réserve le droit de retirer unilatéralement son consentement, et de reprendre son autorisation écrite dans les cas suivants:
 - i) s'il est prouvé que le collecteur a violé l'une des dispositions de cette législation;
 - ii) s'il est prouvé que le collecteur a manqué aux termes de l'accord; et
 - iii) s'il ne respecte pas les conditions d'accès;

- iv) pour des raisons de défense de l'intérêt public; ou
 - v) de protection de l'environnement et de la diversité biologique.
- 2) La révocation ou le retrait de l'autorisation sera effectuée d'un commun accord avec la ou les communautés locales concernées.

15. Restrictions portant sur l'accès ou sur l'introduction de ressources biologiques

L'autorité compétente nationale doit limiter ou interdire des activités directement ou indirectement liées à l'accès ou à l'introduction de ressources biologiques, en particulier dans le cas de:

- i) taxons en danger;
- ii) endémisme ou rareté;
- iii) effets nocifs sur la santé humaine ou sur la qualité de la vie ou les valeurs culturelles des communautés locales;
- iv) impacts environnementaux indésirables ou difficiles à maîtriser;
- v) danger d'érosion génétique ou perte d'écosystèmes, de leurs ressources ou de leurs composants, dus à une collection abusive ou incontrôlée des ressources biologiques;
- vi) manquement aux règles de la biosécurité ou de la sécurité alimentaire; et
- vii) utilisation des ressources contraire à l'intérêt national et aux accords internationaux dont le pays est partie prenante.

QUATRIEME PARTIE

Droits des communautés

16. Reconnaissance des droits des communautés locales et autochtone

L'Etat reconnaît les droits des communautés sur les points suivants:

- i) leurs ressources biologiques;
- ii) le droit de profiter collectivement de l'utilisation de leurs ressources biologiques;
- iii) leurs innovations, pratiques, connaissances et technologies acquises au fil des générations;
- iv) le droit de profiter collectivement de l'utilisation de leurs innovations, pratiques, connaissances et technologies;
- v) le droit d'exploiter leurs innovations, pratiques, connaissances et technologies pour la conservation et l'utilisation durable de la diversité biologique;
- vi) l'exercice de droits collectifs en tant que détentrices et utilisatrices légitimes de leurs ressources biologiques.

17. Application de la loi pour les droits des communautés

L'Etat reconnaît et protège les droits des communautés spécifiés à l'Article 16 tels qu'ils sont inscrits et protégés dans les normes, les pratiques et les lois coutumières existant au sein des communautés locales et autochtones et reconnues par elles, que ces lois soient écrites ou non.

18. Le consentement donné en connaissance de cause des communautés locales

Tout accès à une ressource biologique, une innovation, pratique, connaissance ou technologie devra être soumis au consentement donné en connaissance de cause de la ou des communautés concernées, avec la participation entière et égale des femmes dans la prise de décision.

19. Droit de refuser le consentement et l'accès

Les communautés locales ont le droit de refuser l'accès à leurs ressources biologiques, innovations, pratiques, connaissances et technologies si un tel accès doit être octroyé au détriment de l'intégrité de leur patrimoine naturel ou culturel.

20. Droit de retirer le consentement ou de restreindre l'accès

Les communautés locales ont le droit de retirer leur consentement ou de restreindre des activités découlant de l'accès si ces activités risquent d'être nuisibles à leur vie socio-économique ou à leur patrimoine naturel ou culturel.

21. Droit d'accès, d'utilisation et d'échange traditionnels

- 1) Les communautés locales exerceront leurs droits inaliénables à l'accès, l'utilisation, l'échange ou le partage de leurs ressources biologiques pour le maintien de leurs modes d'existence et dans le respect de leurs pratiques et lois coutumières.
- 2) Aucune barrière légale n'entravera le système d'échange traditionnel des communautés locales dans l'exercice de leurs droits prévus au Paragraphe 1) ci-dessus et des autres droits qui peuvent être inhérents aux pratiques et lois coutumières des communautés locales concernées.

22. Droit aux bénéfices

- 1) L'Etat veillera à ce que cinquante pour cent au moins des bénéfices mentionnés à l'Article 12 (2) soient acheminés vers la ou les communautés locales concernées avec un souci de répartition équitable entre les hommes et les femmes.
- 2) Le partage des bénéfices prévu au Paragraphe ci-dessus sera effectué avec la pleine participation et l'accord de la ou des communautés locales concernées.

23. Reconnaissance des droits de propriété intellectuelles des communautés

- 1) Les communautés locales et les communautés traditionnelles professionnelles, notamment les tradipraticiens, jouissent de droits intellectuels collectifs, inaliénables et imprescriptibles et devront être protégés conformément à la présente législation.
- 2) Toute innovation, pratique, connaissance ou technologie des communautés ou toute utilisation particulière d'une ressource biologique ou de toute autre ressource naturelle devra être identifiée, interprétée et constatée par les communautés locales concernées elles-mêmes, selon leurs pratiques et lois coutumières, qu'elles soient écrites ou non écrites.
- 3) Le non enregistrement de toute innovation, pratique, connaissance ou technologie des communautés ne signifie pas que celle-ci n'est pas protégée par les droits intellectuels communautaires.

- 4) La description écrite ou orale des ressources biologiques et des connaissances associées, la présence de ces ressources dans des banques de gènes ou des collections, leur usage local ne sont pas susceptibles de s'opposer à l'exercice des droits intellectuels des communautés locales.

CINQUIEME PARTIE

Droits des agriculteurs

24. Reconnaissance des droits des agriculteurs

- 1) La reconnaissance des droits des agriculteurs se fonde sur l'énorme contribution des communautés agricoles locales, en particulier celle des femmes, dans toutes les régions du monde, notamment dans les centres d'origine de la diversité des plantes cultivées et des autres formes d'agro-biodiversité, pour la conservation, le développement et l'utilisation durable des ressources génétiques végétales ou animales qui sont à la base de la sélection pour les productions alimentaire et agricole; et
- 2) Pour la pérennité de ces contributions, les droits des agriculteurs doivent être reconnus et protégés.

25. Champ d'application de la loi sur les variétés des agriculteurs

- 1) Les variétés, les populations, les cultivars et les races animales des agriculteurs sont reconnus et protégés conformément aux pratiques et lois coutumières en vigueur dans les communautés agricoles locales concernées, qu'elles soient écrites ou non.
- 2) Un cultivar ou une population, identifiés par une communauté locale et présentant de manière stable des caractéristiques précises pourront être protégés par un droit d'obtention végétale spécifique, qui ne répond pas nécessairement aux critères de distinction, uniformité et stabilité définis à l'Article 56). Ce titre de protection donne à son titulaire le droit exclusif de multiplier, cultiver, utiliser et vendre le cultivar ou d'en concéder l'exploitation dans le respect des droits des agriculteur.

26. Droits des agriculteurs

- 1) Les droits des agriculteurs, dans le respect de l'égalité des sexes, comprennent le droit à:
 - a) la protection de leurs connaissances traditionnelles liées aux ressources génétiques végétales ou animales;
 - b) la répartition équitable des bénéfices tirés de l'utilisation des ressources génétiques végétales ou animales;
 - c) la participation à la prise de décision, y compris au niveau national, sur les questions liées à la conservation et à l'utilisation durable des ressources génétiques végétales ou animales;
 - d) la conservation, l'utilisation, l'échange et la vente de semences traditionnelles, et de matériel de multiplication issus de l'exploitation;
 - e) l'utilisation d'une nouvelle variété sélectionnée par un obtenteur et protégée par la présente loi dans la création de variétés locales, y compris les variétés protégées des banques de gènes ou des centres de ressources végétales;
 - f) conserver une partie de la récolte issue de semences protégées par un droit d'obtention végétale, pour en réaliser le tri et la multiplication sur l'exploitation ou dans le cadre de structures collectives de villages, afin de

- réutiliser la semence pour des récoltes ultérieures.
- 2) Sans préjudice des points c) et d) ci-dessus un agriculteur ne pourra pas vendre des semences ou du matériel de multiplication issus d'une sélection industrielle protégée dans un but commercial.
 - 3) Si l'autorité nationale compétente le juge nécessaire dans l'intérêt public, le droit d'obtenteur sur une nouvelle variété peut être soumis à des restrictions en vue de protéger la sécurité alimentaire, la santé, la diversité biologique, l'approvisionnement en matériel génétique utile au développement de l'agriculture.

27. Système de certification des productions d'agriculteurs

- 1) L'exploitation durable des ressources biologiques peut être attestée par un certificat d'exploitation durable apposé sur les produits issus de ressources biologiques exploitées d'une manière qui ne porte pas atteinte à leur caractère renouvelable et assure la protection de l'environnement et de la santé.
- 2) Le partage équitable des bénéfices peut être attesté par un certificat de commerce équitable apposé sur tout produit issu des ressources biologiques et des connaissances des communautés locales, lorsqu'une part importante des bénéfices revient aux communautés locales.

SIXIEME PARTIE

Le droit d'obtenteur

28. Reconnaissance du droit d'obtenteur

Le droit d'obtenteur découle des efforts et des investissements effectués par des personnes ou des institutions pour élaborer de nouvelles variétés végétales, telles qu'elles sont définies à l'Article suivant, et constitue la reconnaissance et la récompense économique de ces efforts.

29. Caractéristiques d'une nouvelle variété

Une variété sera considérée comme nouvelle si:

- a) elle a une ou plusieurs caractéristiques identifiables qui permettent de la distinguer clairement de toutes les variétés communément reconnues à la date à laquelle la demande de droit d'obtenteur est déposée;
- b) elle est stable dans ses caractéristiques essentielles, c'est-à-dire si après un nombre répété de reproductions ou de multiplications ou, si le demandeur a défini un cycle particulier de reproduction ou de multiplication, à la fin de chaque cycle, ses caractéristiques essentielles restent fidèles à la description;
- c) elle reste, en fonction de ses caractéristiques de reproduction sexuelle ou de reproduction végétative, suffisamment homogène ou constitue une multilignée bien définie.

30. Le droit d'obtenteur

- 1) Le droit d'obtenteur sur une nouvelle variété concerne:
 - a) Le droit exclusif de vendre ou d'accorder une licence pour la vente de matériel de reproduction ou de multiplication de la variété;
 - b) Le droit exclusif de produire ou d'accorder une licence pour la production de matériel de reproduction ou de multiplication de cette variété destinée

à la vente.

- 2) Le droit d'obtenteur sur une variété végétale est soumis au respect des conditions prévues dans la cinquième partie de la présente législation sur les droits des agriculteurs.

31. Limites du droit d'obtenteur

- 1) Nonobstant l'existence d'un droit d'obtenteur sur une variété végétale, toute personne ou communauté d'agriculteurs peuvent:
 - a) multiplier, cultiver et utiliser des plantes de cette variété dans un but non commercial;
 - b) vendre des plants ou matériel de multiplication de cette variété comme produit alimentaire ou pour tout autre usage que la culture des plants ou la multiplication de cette variété;
 - c) vendre sur place, c'est-à-dire au champ ou sur tout autre lieu de culture, tout plant ou matériel de multiplication d'une variété cultivée à cet endroit;
 - d) utiliser du matériel de reproduction ou de multiplication d'une variété dans le but d'élaborer une nouvelle variété végétale sauf si la personne fait une utilisation répétée du matériel de reproduction ou de multiplication de la première variété pour la production commerciale d'une autre variété;
 - e) cultiver la variété protégée comme produit alimentaire destiné à la consommation personnelle ou à la vente;
 - f) utiliser la variété protégée pour mener à bien des activités de sélection, de recherche ou de formation;
 - g) obtenir avec les conditions d'utilisation une telle variété protégée dans une banque de gènes ou dans des centres de ressources génétiques végétales.
- 2) Les agriculteurs pourront librement conserver, échanger et utiliser une partie des semences d'une première récolte pour ensemercer leurs champs et ainsi produire de nouvelles récoltes en respectant les conditions prévues dans la cinquième partie concernant les droits des agriculteurs de ce présent acte.

32. Demande d'un droit d'obtenteur

- 1) Conformément au présent acte, un obtenteur d'une nouvelle variété de plante peut faire une demande auprès de l'autorité compétente nationale pour obtenir un droit d'obtenteur pour cette variété.
- 2) Un obtenteur d'une nouvelle variété, ou son ayant droit, peut formuler une demande de droit d'obtenteur pour cette variété, que l'obtenteur soit national ou étranger, résident ou non résident et que la variété ait été créée sur place ou à l'étranger.
- 3) Quand deux personnes ou plus sont en droit d'introduire une demande de droits d'obtenteur pour une nouvelle variété, que ce soit parce qu'ils ont créé la variété végétale conjointement ou indépendamment, ou pour une autre raison, ces personnes ou certaines de ces personnes peuvent faire une demande conjointe.
- 4) Quand deux personnes ou plus créent une nouvelle variété de plante conjointement, l'un de ces obtenteurs, ou l'ayant droit de l'un de ces obtenteurs, ne pourra pas introduire une demande de droit d'obtenteur pour cette variété si ce n'est conjointement, ou avec l'accord écrit de l'autre personne, ou de chacune des autres personnes en droit d'introduire une telle demande.
- 5) Dans le cas d'institutions publiques ou privées, la demande peut être introduite au nom de l'institution.

33. Limitation de l'exercice du droit d'obtenteur

- 1) Si le gouvernement le juge nécessaire, dans l'intérêt public, le droit d'obtenteur sur une nouvelle variété peut être soumis à des restrictions. Ces restrictions peuvent être imposées notamment:
 - a) si le détenteur du droit pose des problèmes de pratiques concurrentielles;
 - b) quand la sécurité alimentaire, nutritionnelle ou la santé sont menacées;
 - c) en cas d'importation massive de la variété végétale mise en vente;
 - d) pénurie du matériel de multiplication d'une variété; et
 - e) dans l'intérêt public, pour des raisons socio-économiques et pour promouvoir les technologies autochtones ou autres.
- 2) Lorsque des restrictions sont imposées sur le droit d'obtenteur:
 - a) une copie de l'instrument déterminant les conditions de la restriction sera adressée au détenteur du droit;
 - b) un avertissement public sera donné;
 - c) la compensation à accorder au détenteur du droit sera déterminée;
 - d) le détenteur du droit pourra faire appel du montant de la compensation.
- 3) En particulier, et sans préjudice des généralités des dispositions ci-dessous, l'autorité gouvernementale compétente pourra transformer les droits exclusifs de l'obtenteur garantis par le présent acte en droits non exclusifs (droit de licence obligatoire).

34. Durée du droit d'obtenteur

Conformément à cet acte, le droit d'obtenteur sur une variété végétale aura une durée de 20 ans pour les cultures annuelles et de 25 ans dans le cas d'arbres, de vignes et d'autres espèces pérennes à compter du jour où le droit d'obtenteur est reconnu.

35. Règlement des litiges

Au cas où un litige concernant la qualification d'une nouvelle variété végétale conformément aux dispositions du présent acte apparaîtrait, il sera examiné par l'administration représentée par l'autorité compétente nationale, par un tribunal compétent et finalement par la cour de justice.

36. Violations du droit d'obtenteur

- 1) En cas de violation du droit d'obtenteur, une action ou une procédure peut être engagée par écrit auprès d'un tribunal ou, si les deux parties sont d'accord, soumise à un arbitrage.
- 2) Le défendeur dans une telle action ou procédure peut en réponse introduire une demande reconventionnelle pour la révocation du droit d'obtenteur:
 - a) Au motif que la variété végétale n'est pas nouvelle;
 - b) S'il existe des faits qui auraient entraîné le rejet de la demande de droit d'obtenteur s'ils avaient été connus auparavant par l'autorité compétente nationale.
- 3) Au cas où la cour reconnaît le bien fondé de la demande reconventionnelle, le droit d'obtenteur peut être révoqué.
- 4) Si, à la suite d'une demande reconventionnelle, le droit d'obtenteur est révoqué, la cour ordonnera au défendeur d'en informer l'autorité compétente nationale.

37. Autorité compétente nationale

L'Etat devra désigner ou établir une autorité compétente nationale chargée d'appliquer et d'exécuter les dispositions relatives aux droits d'obtenteur

prévues par le présent acte.

38. Enregistrement du droit d'obtenteur

L'autorité compétente nationale aura pour tâche de:

- a) recevoir et examiner les demandes d'enregistrement de droit d'obtenteur;
- b) effectuer les examens nécessaires pour tester la variété du demandeur;
- c) enregistrer et publier les certificats de droits d'obtenteur;
- d) publier les demandes de droits d'obtenteur au journal officiel;
- e) examiner toute objection à un droit d'obtenteur;
- f) garder à jour un Registre relatif aux droits d'obtenteur.

39. Registre des droits d'obtenteur

L'autorité compétente nationale conservera un Registre national des droits d'obtenteur où seront mentionnées les informations requises par le présent acte ou d'autres règlements.

40. Centres de ressources génétiques végétales

L'autorité nationale compétente devra désigner le ou les centres de ressources génétiques végétales, qui pourront servir au stockage et à la conservation du matériel génétique comme prévu par le présent acte .

41. Formulaire de demande

- 1) Quand une demande de droit d'obtenteur est déposée:
 - a) la demande est acceptée si l'autorité compétente nationale estime que:
 - i) la demande est en conformité avec les obligations prévues à l'Article 29); et
 - ii) les taxes prévues ont été payés; ou
 - b) la demande est rejetée si l'autorité compétente nationale estime que la demande ne remplit pas les conditions spécifiées.
- 2) En cas d'acceptation d'une demande, l'autorité compétente nationale doit en informer par écrit le demandeur dans un délai de 30 jours, et rendre publique cette demande.
- 3) En cas de rejet l'autorité compétente nationale doit en informer par écrit le demandeur dans un délai de 30 jours, et expliquer les raisons du rejet.

42. Procédures de vérification et d'évaluation

- 1) Si une demande est acceptée, l'autorité compétente nationale stipulera la quantité de graines ou de matériel de multiplication que le demandeur doit fournir pour les tests et examens.
- 2) L'autorité compétente nationale élaborera une procédure d'essais statistiquement valables pour évaluer l'intérêt de la variété au niveau national.
- 3) Les qualités économiques, physiologiques, écologiques et nutritives entreront dans les critères d'évaluation.
- 4) Les taxes à payer pour le droit d'obtenteur seront fixées au prorata des coûts administratifs et expérimentaux.

43. Caractéristiques des variétés végétales d'origine étrangère

Dans le cadre du présent acte, on ne considérera pas qu'une variété végétale étrangère pour laquelle une demande a été acceptée a des caractéristiques particulières sauf si:

- a) des essais variétaux statistiquement valables, multi-sites, effectués dans le pays pendant au moins trois cycles de culture ont démontré que la variété possède les caractéristiques spécifiques décrites par le demandeur; ou
- b) une crise exceptionnelle de la production alimentaire l'exige et que l'autorité compétente nationale estime que:
 - i) des essais statistiquement valables effectués à l'étranger ont démontré que la variété possède ces caractéristiques spécifiques; et
 - ii) les conditions naturelles au champ du pays où les essais statistiquement valables ont été effectués ressemblent à celles du pays.

44. Essais des variétés végétales

- 1) Si, lorsque lors de l'examen d'une demande, l'autorité compétente estime qu'il est nécessaire de procéder à un ou plusieurs essais statistiquement valables, le ou les essais devront être réalisés:
 - a) pour déterminer si la variété végétale est distincte, homogène ou stable;
 - b) pour déterminer si la variété, si elle était cultivée dans le pays, montrerait les mêmes caractéristiques de distinction, d'homogénéité et de stabilité;
 - c) en priant le demandeur de fournir une quantité suffisante de matériel de multiplication de la variété, semences, graines ou boutures, selon le cas, ainsi que toutes les informations nécessaires à la culture de la variété en condition d'examen.
- 2) Une fois l'examen d'une variété végétale effectué, le demandeur devra récupérer tout le matériel de reproduction ou de multiplication utilisé pour, ou résultant des essais, dans la mesure où celui-ci est transportable.

45. Retrait d'une demande

- 1) Une demande peut être retirée à tout moment par le demandeur, avant la publication de la demande.
- 2) Si une demande est retirée après sa publication dans le journal officiel, mais avant l'octroi du droit d'obtenteur, l'autorité compétente nationale devra rendre public le retrait sur le champ.

46. Protection provisoire

- 1) Quand une demande de droit d'obtenteur sur une variété végétale est introduite, le demandeur sera considéré comme le propriétaire du droit d'obtenteur sur cette variété végétale à compter du moment où la demande est introduite et jusqu'à l'un des deux événements suivants – a) ou b):
 - a) lors de l'examen de la demande; ou
 - b) après expiration du délai prescrit, notifié par l'autorité compétente nationale au demandeur.
- 2) Des mesures devront être prises pour protéger le matériel génétique des nouvelles variétés testées pour éviter qu'elles servent à d'autres fins que la recherche.

47. Opposition à la délivrance de droit d'obtenteur

- 1) Dès la publication officielle d'une demande de droit d'obtenteur pour une variété végétale ou une variation d'une telle variété, toute personne qui considère que:
 - a) l'intérêt commercial ou public serait menacé par l'attribution de ces droits;
 - b) la demande ne correspond pas aux critères prévus pour l'attribution du droit d'obtenteur; peut dans les six mois qui suivent la publication de la demande, ou à tout autre moment avant l'examen de la demande, faire une réclamation écrite auprès de l'autorité compétente nationale en spécifiant bien le motif de la réclamation.
- 2) Lorsqu'une réclamation est déposée conformément aux dispositions du Paragraphe 1), l'autorité compétente nationale devra adresser une copie de cette réclamation au demandeur du droit d'obtenteur.
- 3) A tout moment, quelqu'un peut vérifier une demande ou une réclamation déposée, et est en droit, à condition de payer les frais prévus, d'obtenir une copie de la demande ou de la réclamation.

48. Octroi du droit d'obtenteur

- 1) Conformément à cet Article, le droit d'obtenteur relatif à une variété végétale est octroyé si l'autorité compétente nationale estime que:
 - i) la variété végétale existe réellement;
 - ii) c'est une variété végétale nouvelle;
 - iii) le demandeur a la capacité juridique de faire la demande;
 - iv) l'octroi de ce droit au demandeur n'est pas interdit par le présent acte;
 - v) ce droit n'a pas été octroyé à une autre personne;
 - vi) aucune demande pour ce droit n'a été retirée ou examinée auparavant;
 - et
 - vii) toutes les taxes prévues au terme du présent acte ont été payées.
- 2) Si l'autorité compétente nationale estime que les conditions énoncées au Paragraphe 1) ci-dessus n'ont pas été remplies, elle refusera l'octroi du droit d'obtenteur au demandeur.
- 3) L'autorité compétente nationale ne pourra pas statuer sur une demande de droit d'obtenteur pour une variété végétale avant un délai de six mois, à compter de la publication de la demande au journal officiel ou, si la demande a été assez nettement modifiée d'après l'autorité compétente, une période de six mois à partir du moment de la publication des caractéristiques de la variété, ou de la dernière variation de la dite variété.
- 4) L'autorité compétente nationale ne pourra pas refuser l'octroi d'un droit d'obtenteur avant d'avoir donné au demandeur, la possibilité de répondre par écrit à l'objection.
- 5) En cas de réclamation, l'autorité compétente nationale ne pourra pas octroyer de droit d'obtenteur au demandeur sans avoir donné la possibilité au réclamant de d'expliquer par écrit les raisons de sa réclamation.
- 6) Le droit d'obtenteur doit être octroyé et délivré au demandeur par l'autorité compétente nationale conformément au présent règlement.
- 7) Le droit d'obtenteur accordé à plusieurs personnes est octroyé conjointement.
- 8) Quand le droit d'obtenteur est octroyé à un organisme public ou privé, il est acquis par l'institution, représentée par une ou plusieurs personnes dûment nommées.
- 9) En cas de refus, l'autorité compétente nationale devra, dans un délai de trente jours à partir de la date du refus, en informer par écrit le demandeur en explicitant les motifs du refus.

49. Inscription du droit d'obtenteur dans le registre

- 1) Quand l'autorité compétente nationale accorde un droit d'obtenteur pour une variété végétale, elle inscrira dans un Registre:
 - a) une description, ou une description et une photographie, de la variété végétale;
 - b) le nom de la variété;
 - c) le pedigree de la variété (si possible);
 - d) le nom du titulaire;
 - e) le nom et l'adresse de l'obtenteur;
 - f) l'adresse officielle du titulaire telle qu'elle est mentionnée sur le formulaire de demande;
 - g) la date d'octroi du droit d'obtenteur;
 - h) une description des communautés ou localités du pays pour lesquelles s'appliquent les droits des agriculteurs;
 - i) toute autre information relative à l'octroi jugé bon par l'autorité compétente nationale.

50. Publication de l'octroi d'un droit d'obtenteur

Lorsqu'un droit d'obtenteur a été octroyé, l'autorité compétente nationale doit publier ce droit dans le journal officiel dans un délai de trente jours. Cette publication désignera aussi les obligations découlant des droits des agriculteurs.

51. Effets de l'octroi sur certaines personnes

- 1) Quand un droit d'obtenteur pour une variété de plante a été octroyé à quelqu'un, nulle autre personne qui aurait pu introduire une telle demande, qu'elle ait élaboré ou non cette variété indépendamment de l'obtenteur, ou l'ayant droit d'une telle personne, ne peut jouir du droit d'obtenteur pour cette variété végétale, du fait de son droit à introduire une demande ou du fait des motifs de la demande; mais rien dans le présent Article n'interdit à une personne de demander à l'autorité compétente nationale de révoquer le droit d'obtenteur ou de lancer une procédure judiciaire relative à ce droit d'obtenteur.
- 2) Quand:
 - a) un droit d'obtenteur relatif à une nouvelle variété végétale a été octroyé à quelqu'un, et
 - b) qu'une autre personne (appelée dans ce Paragraphe «personne éligible») a la capacité, juridique ou autre, de faire une demande de cession de ce droit d'obtenteur, alors la personne éligible a le droit de se voir céder le droit d'obtenteur.

52. Nature du droit d'obtenteur

- 1) Le droit d'obtenteur est une propriété privée et, sous certaines conditions prévues par les Paragraphes suivants, il peut être cédé ou transmis par testament ou par la loi.
- 2) La cession du droit d'obtenteur sera nulle si elle n'est faite par écrit, et signée par le cédant ou en son nom.

53. Cession du droit d'obtenteur

- 1) En cas de cession ou de transmission du droit d'obtenteur, l'acquéreur devra dans un délai de trente jours à partir de la date d'acquisition, en informer l'autorité compétente nationale par écrit, donner les modalités d'acquisition, et si l'autorité compétente nationale considère que le droit d'obtenteur a bien été cédé ou transmis, elle devra enregistrer le nom du nouveau propriétaire du droit d'obtenteur.
- 2) Conformément au Paragraphe 1), l'autorité compétente nationale enregistre en tant que titulaire du droit d'obtenteur le nouvel acquéreur; elle devra, dans un délai de trente jours à compter de la date d'inscription, notifier par écrit l'ancien et le nouveau titulaire pour les informer que la nouvelle inscription est faite.
- 3) Si l'autorité compétente nationale ne considère pas que le droit d'obtenteur a été réellement cédé ou transmis à la personne qui a informé l'autorité compétente nationale conformément au Paragraphe 1) de la cession ou la transmission du droit d'obtenteur, elle devra:
 - a) adresser une notification écrite au réclamant pour:
 - i) l'informer que l'autorité compétente nationale a des doutes sur la réalisation de la transaction;
 - ii) donner les raisons de ses doutes et
 - b) notifier par écrit le titulaire du droit pour:
 - i) vérifier les informations données par le réclamant;
 - ii) l'informer que l'autorité nationale compétente a des doutes sur la réalité de la transaction; et
 - iii) donner les raisons de ses doutes.
- 4) Une personne qui informe l'autorité compétente nationale conformément au Paragraphe 1) qu'un droit d'obtenteur lui a été cédé ou transmis devra informer par écrit à l'autorité nationale compétente, et adresser au greffe toutes les informations nécessaires conformément aux dispositions du présent acte; et
 - a) quand l'autorité compétente nationale enregistre le nom de cette personne, conformément aux dispositions du Paragraphe 1) et que l'adresse est différente de l'adresse indiquée sur le registre, elle devra procéder à une modification sur le registre pour que l'adresse donnée enregistrée corresponde à l'adresse du greffe concerné; ou
 - b) quand l'autorité compétente nationale sur la réalité de la cession ou de la transmission, elle en enverra une notification à la personne visée au Paragraphe 3a) par la poste.

54. Approvisionnement en matériel de multiplication

- 1) Le droit d'obtenteur pour une variété végétale implique que le titulaire respecte les demandes émises par l'autorité compétente nationale.
- 2) Quand un droit d'obtenteur est délivré pour une variété végétale, l'autorité compétente nationale peut informer par écrit le titulaire du droit d'obtenteur qu'il a un délai de 14 jours à partir de la date de la notification, ou tout autre délai autorisé, pour faire livrer à ses propres frais une quantité déterminée de matériel de multiplication à un centre de ressources génétiques végétales et à un herbier.
- 3) La quantité de matériel de multiplication, ainsi demandée au Paragraphe 2), d'une variété devra être suffisante pour permettre la continuité de la variété en cas de pénurie du matériel de multiplication de cette variété.
- 4) Si le matériel de multiplication est livré dans un centre de ressource génétique, l'autorité compétente nationale fixera, en vertu du Paragraphe 1), le centre de ressources génétiques végétales qui devra stocker le matériel de multiplication conformément aux dispositions du Paragraphe 6).

- 5) La livraison et le stockage du matériel de multiplication dans un centre de ressources génétiques n'affectent en rien la propriété du matériel de multiplication, cependant, ce matériel ne sera pas utilisé à d'autres fins que celles spécifiées par le présent acte.
- 6) Le matériel de multiplication stocké dans un centre de ressources génétiques végétales, doit uniquement servir aux objectifs visés par le présent acte.
- 7) Sans limiter la portée des Paragraphes 5) et 6), quand le matériel de multiplication est stocké dans un centre de ressources génétiques végétales, sur décision de l'autorité nationale compétente en vertu de l'Article 39) du présent acte, le matériel de multiplication ne fera pas partie de la collection nationale et ne sera pas utilisé pour cette collection, jusqu'à ce que l'autorité nationale compétente ait statué sur la demande de droit d'obtenteur. Une fois qu'une variété est reconnue, le matériel de multiplication peut servir à des recherches ou à un travail de sélection ultérieurs après notification du dépositaire du matériel de multiplication.

55. Révocation du droit d'obtenteur

- 1) L'autorité compétente nationale peut révoquer un droit d'obtenteur sur une variété végétale si:
 - a) elle estime que cette variété végétale n'est pas nouvelle ou s'il existe des faits qui, s'ils avaient été connus avant l'octroi du droit d'obtenteur, auraient conduit au rejet de la demande; ou
 - b) si le titulaire n'a pas payé les taxes prévues dans un délai de 90 jours après notification de recouvrement.
- 2) L'autorité nationale compétente peut révoquer un droit d'obtenteur si elle considère que:
 - a) le titulaire n'a pas rempli ses obligations relatives à son droit d'obtenteur; ou
 - b) une personne à qui un droit d'obtenteur a été cédé ou transmis n'a pas rempli ses obligations déterminées par le présent acte.
- 3) Si l'autorité nationale compétente révoque un droit d'obtenteur pour une variété végétale conformément au présent Article, elle devra, dans un délai de sept jours à partir de la révocation, en informer par écrit le titulaire en expliquant les motifs de la révocation.
- 4) L'autorité compétente nationale ne pourra pas révoquer un droit d'obtenteur en vertu du présent Article si elle n'a pas préalablement informé le titulaire ou toute personne à qui elle croit que le droit a été cédé ou transmis, les raisons de la révocation prévue et donné au titulaire ou à toute personne de fonction équivalente la possibilité de répondre par écrit à la révocation prévue.
- 5) La révocation d'un droit d'obtenteur pour une variété végétale prend effet:
 - a) en vertu du Paragraphe 4), à l'expiration du délai pendant lequel une demande peut être adressée à un tribunal pour un réexamen de la révocation; ou
 - b) si une telle demande est adressée à un tribunal, au moment où la demande est rejetée ou finalement examinée par le tribunal.
- 6) Aucune disposition de cet Article ne peut affecter le pouvoir ou le système judiciaire.
- 7) Toute personne dont les intérêts sont menacés par l'octroi d'un droit d'obtenteur sur une variété végétale peut demander à l'autorité compétente nationale la révocation du droit d'obtenteur conformément aux présentes dispositions.
- 8) L'autorité compétente nationale examinera toutes les demandes de révocation d'un droit d'obtenteur. La décision de ne pas révoquer le droit d'obtenteur devra être notifiée au réclamant par écrit dans un délai de 7 jours à partir du moment où la décision est prise, en expliquant les motifs de la décision.

56. Abandon du droit d'obtenteur

- 1) Conformément au Paragraphe 2) de l'Article 34), le titulaire d'un droit d'obtenteur peut à tout moment, abandonner son droit d'obtenteur après avoir informé l'autorité compétente nationale: celle-ci peut, après avoir rendu publique l'information et donné à toutes les parties intéressées la possibilité de faire une proposition écrite, si elle le juge bon, accepter l'offre et révoquer ce droit.
- 2) Quand une action ou une procédure relative à un droit d'obtenteur est en suspens devant une cour, l'autorité compétente nationale ne pourra pas accepter une offre d'abandon ni révoquer ce droit d'obtenteur, sauf si cela est expressément autorisé par la cour ou avec le consentement de toutes les parties concernées par l'action ou procédure.

SEPTIEME PARTIE

Arrangements institutionnels

57. Etablissement de l'autorité compétente nationale

L'Etat devra désigner ou établir une autorité compétente nationale qui appliquera et exécutera les dispositions de la présente législation mentionnées à l'Article suivant.

58. Fonctions de l'autorité compétente nationale

Les fonctions de l'autorité compétente nationale, exercées dans le souci du concept de genres, sont les suivantes:

- i) création et mise en service de mécanismes garantissant la protection réelle des droits intellectuels des communautés et des droits des agriculteurs et les règles d'accès aux ressources biologiques;
- ii) mise en place d'un processus de consultation et de participation des communautés locales, y compris des communautés agricoles, pour identifier leurs droits tels qu'ils se définissent dans les pratiques et lois coutumières des communautés;
- iii) identification des différents droits intellectuels des communautés et des agriculteurs;
- iv) identification et définition des obligations et procédures visant à reconnaître les droits intellectuels des communautés et des agriculteurs;
- v) élaboration de critères et mécanismes de standardisation des procédures;
- vi) mise en place d'un système d'enregistrement de tout ce qui est protégé par les droits intellectuels des communautés et des agriculteurs inscrits dans les pratiques et lois coutumières;
- vii) délivrance de licences d'exploitation et de commercialisation des ressources biologiques, parmi lesquelles les espèces, variétés ou souches protégées, ainsi que les innovations, pratiques, connaissances et technologies communautaires;
- viii) identification des institutions techniques compétentes qui assisteront les communautés locales, y compris agricoles, à catégoriser et caractériser leurs ressources biologiques, innovations, pratiques, connaissances et technologies.

59. Etablissement d'une coordination nationale intersectorielle

Une coordination nationale intersectorielle au plus haut niveau, composée des représentants des secteurs concernés publics, d'organisations scientifiques et professionnelles, d'organisations non gouvernementales et de communautés locales, devra être créée par l'autorité compétente nationale pour assurer la coordination et le suivi de la mise en œuvre de la présente législation.

60. Rôle de l'organe de coordination nationale intersectorielle

Le rôle de l'organe de coordination nationale intersectorielle sera de:

- i) s'assurer que les conditions minimales des accords passés avec les collecteurs sont strictement observées et respectées;
- ii) s'assurer que les droits des communautés locales, y compris des communautés agricoles, sont protégés, et l'égalité des sexes respectée, partout où sont conduites des activités liées à l'accès, la collection ou la recherche sur des ressources biologiques ou sur des innovations, pratiques, connaissances et technologies des communautés, et s'assurer que les conditions du consentement donné en connaissance de cause par les communautés locales sont respectées;
- iii) faire des recommandations sur les politiques et des lois relatives à l'utilisation durable des ressources biologiques, en particulier des nouvelles lois sur les droits de propriété intellectuelle, les droits intellectuels des communautés et les droits des agriculteurs sur leurs ressources biologiques, innovations, pratiques, connaissances et technologies; et
- iv) assurer tout autre rôle nécessaire à l'application appropriée de la présente législation.

61. Composition de l'organe de coordination nationale intersectorielle

L'organe de coordination nationale intersectorielle sera composé des personnes suivantes:

Ici la composition du corps peut être ébauchée en tenant compte des qualifications, domaines d'expertise ou de spécialisation, de l'intérêt public, des organisations industrielles ou communautaires et des personnes des zones ou domaines concernés, tout en respectant l'égalité des sexes. Ses membres seront nommés pour remplir les obligations prévues à l'Article 29) ci-dessus.

62. Nomination d'un organe de conseil technique

Il sera nommé un organe de conseil technique qui aura pour tâche de faciliter le travail de l'organe de coordination intersectorielle nationale.

63. Fonctions de l'organe de conseil technique

Le rôle de l'organe de conseil technique sera de:

- i) élaborer une politique visant à promouvoir les droits intellectuels des communautés, les droits des agriculteurs, l'égalité des sexes, et l'accès aux ressources biologiques;
- ii) préparer la liste des taxons menacés de détérioration ou d'extinction et les zones où la diversité biologique est gravement menacée;

- iii) vérifier et évaluer, à intervalle régulier, l'application de la présente législation ou les menaces réelles ou potentielles sur la diversité biologique et les impacts probables sur le développement durable;
- iv) élaborer et recommander un mécanisme qui permette l'identification et la diffusion de l'information concernant les menaces pesant sur les ressources biologiques; et
- v) réaliser tout autre rôle nécessaire à la réalisation de la présente législation.

64. Etablissement d'un réseau d'information national

- 1) Il est ainsi établi un réseau d'information national relatif aux ressources biologiques dont les activités sont prévues à l'Article suivant.
- 2) Les communautés locales ont aussi la possibilité d'établir des bases de données sur leurs ressources biologiques, sur leurs composants et leurs dérivés, leurs connaissances et leurs technologies.
- 3) L'accès à l'information contenue dans le réseau d'information national et dans les bases de données est régulée par une Charte établissant les droits des détenteurs des données.

65. Activités du système d'information national

Le réseau d'information national aura notamment les tâches suivantes:

- i) compilation et documentation de l'information sur les droits intellectuels des communautés, les droits des agriculteurs, l'égalité des sexes et l'accès aux ressources biologiques, aux innovations, pratiques, connaissances et technologies des communautés;
- ii) mise à jour régulière de l'information sur les activités de recherche et développement sur des ressources biologiques et des innovations, pratiques, connaissances et technologies des communautés; et
- iii) compilation de l'information sur la piraterie des ressources biologiques, des innovations, pratiques, connaissances et technologies des communautés et la diffusion de ces informations à tous les corps concernés.

66. Etablissement d'un Fonds communautaire pour les ressources génétiques

- 1) Le Fonds communautaire pour les ressources génétiques sera constitué en société autonome. Un directeur sera nommé pour administrer ce fonds. Le directeur sera responsable devant l'autorité compétente nationale.
- 2) Une société autonome sera chargée d'administrer le Fonds génétique communautaire qui sera financé par les parts dues aux communautés agricoles locales conformément à l'Article 27 1(b) de la cinquième partie sur les droits des agriculteurs. Le Fonds, qui ne sera pas soumis à l'impôt sur le revenu, peut recevoir des contributions provenant d'organisations nationales ou internationales et de tout autre organe souhaitant favoriser la conservation génétique par les communautés locales.
- 3) Des redevances fixées par l'autorité nationale compétente au prorata des ventes de variétés protégées par un droit d'obtention végétale seront allouées au Fonds communautaire pour les ressources génétiques au bénéfice des communautés agricoles dont les variétés agricoles ont été utilisées dans la sélection des nouvelles variétés.
- 4) Le Fonds servira à financer des projets élaborés par les communautés agricoles, tout en garantissant l'égalité des sexes, avec ou sans l'aide d'experts. Ces projets auront pour objectif de résoudre des problèmes identifiés par les communautés, liés notamment mais pas exclusivement au développement, à la conservation et l'utilisation durable des ressources génétiques agricoles.

- 5) Tous les salaires et toutes les dépenses administratives liés à l'installation et à l'administration du Fonds communautaire pour les ressources génétiques seront payés par l'autorité nationale compétente, de telle sorte que l'intégralité du Fonds profite aux communautés agricoles locales.
- 6) Le Fonds sera géré par un conseil d'administration composé de représentants des communautés agricoles locales, des professionnels, des organisations non gouvernementales et du secteur public et privé.

HUITIEME PARTIE

Dispositions diverses

67. Sanctions et pénalités

- 1) Sans préjudice des agences et des autorités existantes, l'Etat établira des agences appropriées dotées du pouvoir de faire appliquer les dispositions de la présente législation.
- 2) Sans préjudice de l'exercice d'actions civiles et pénales relatives aux violations des dispositions de la présente législation et des règlements subséquents, les sanctions et pénalités suivantes peuvent être prévues:
 - i) avertissement écrit;
 - ii) amendes;
 - iii) annulation ou révocation automatique des autorisations d'accès;
 - iv) confiscation des spécimens biologiques collectés et des équipements;
 - v) interdiction permanente d'accéder aux ressources biologiques, aux connaissances et technologies des communautés du pays.
- 3) Les violations commises seront publiées dans les médias nationaux et internationaux et seront annoncées par l'autorité compétente nationale aux secrétariats des conventions internationales et aux organismes régionaux concernés.
- 4) Les infractions commises par un collecteur opérant en dehors de sa juridiction nationale seront poursuivies en vertu des accords de coopération passés avec son pays d'origine.

68. Appels

Il peut être fait appel des décisions d'autorisation, d'interdiction ou d'annulation des accords relatifs à l'accès aux ressources biologiques, des connaissances et technologies des communautés auprès des administrations compétentes. Le recours aux tribunaux sera autorisé après l'échec de toutes les voies administratives.

APPENDIX 3

1. African Countries Members of the WTO, as of 30 November 2000, and Date of Membership

Angola	23 November 1996
Benin	22 February 1996
Botswana	31 May 1995
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cameroon	13 December 1995
Central African Republic	31 May 1995
Chad	19 October 1996
Congo	27 March 1997
Côte d'Ivoire	1 January 1995
Democratic Republic of the Congo	1 January 1997
Djibouti	31 May 1995
Egypt	30 June 1995
Gabon	1 January 1995
Gambia	23 October 1996
Ghana	1 January 1995
Guinea Bissau	31 May 1995
Guinea	25 October 1995
Kenya	1 January 1995
Lesotho	31 May 1995
Madagascar	17 November 1995
Malawi	31 May 1995
Mali	31 May 1995
Mauritania	31 May 1995
Mauritius	1 January 1995
Morocco	1 January 1995
Mozambique	26 August 1995
Namibia	1 January 1995
Niger	13 December 1996
Nigeria	1 January 1995
Rwanda	22 May 1996
Senegal	1 January 1995
Sierra Leone	23 July 1995
South Africa	1 January 1995
Swaziland	1 January 1995
Tanzania	1 January 1995
Togo	31 May 1995
Tunisia	29 March 1995
Uganda	1 January 1995
Zambia	1 January 1995
Zimbabwe	5 March 1995

Observer Governments

Algeria	Bhutan	Cape Verde
Ethiopia	Sudan	Yemen

Note: With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.

2. Sources, Texts and Further Supplementary Reading

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Ekpere, Prof. J. A., *Introduction to the TRIPS Agreement*, paper delivered at the Regional Workshop on Legislation for the Recognition and Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources, United Nations Economic Community for Africa, 1-5 November 1999

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R. Wynberg, Gaia Foundation/GRAIN Briefing, *Privatising the means for survival: the commercialisation of Africa's biodiversity*, May 2000

3. Organisations

Consolidation of the Amazon Region
(COAMA)
Cra 4, 26B-31, Office 001,
Bogotá, Colombia
Tel: +57 1 281 4925
Fax: +57 1 281 4945
Website: www.coama.org.co

Coordinating Body of Indigenous
Organisations of the Amazon Basin
(COICA)
Casilla Postal: 17-21-753
Murgeón 717 y Av América
Quito, Ecuador
Tel: +593 502 260 / 545 457 / 562
753
Fax: +593 502 260 / 545 457
Website: www.uio.satnet.net

Food and Agriculture Organisation
of the UN (FAO)
Viale delle Terme di Caracalla,
00100 Rome, Italy
Tel : +39 0657051
Fax: +39 0657053152
Telex: 625852/625853/610181
FAO I
Telegrams: FOODAGRI ROME
Website: www.fao.org

Foundation for International
Environmental Law and
Development (FIELD)
SOAS, University of London,
London WC1B 4JP, UK
Tel: +44 (0)20 7637 7950
Fax: +44 (0)20 7637 7951
Website: www.field.org.uk

The Gaia Foundation
18 Well Walk
London NW3 1LD, UK
Tel: +44 (0)20 7435 5000
Fax: +44 (0)20 7431 0551
Website:
www.thegaiafoundation.org

International Union for the
Conservation of Nature / The World
Conservation Union (IUCN)
Rue Mauverney 28,
CH-1196 Gland, Switzerland
Website: www.iucn.org

Organisation for African Unity
(OAU)
P O Box 3243
Addis Ababa, Ethiopia
Tel: +251 (1)51 7700
Fax: +251 (1)51 2622/3036
Cable: OAU, ADDIS ABABA
Telex: 21046
Website: www.oau-oua.org

Rural Advancement Foundation
International (RAFI)
110 Osborne St , Suite 202
Winnipeg MB R3L 1Y5, Canada
Tel: +204 453 5259 (Central Time
Zone)
Fax: +204 925 8034
Website: www.rafi.org

Southern and Eastern African
Trade Information and Negotiations
Initiative (SEATINI)
United Nations Development Fund
Head Office, Takura House,
67-69 Union Avenue, P O Box
4775, Harare, Zimbabwe
Tel: +263 4 792681/6 Ext 276 &
255
Fax: +263 4 251648/728695
Website: www.seatini.org

Third World Network (TWN)
228 Macalister Road,
10400 Penang, Malaysia
Tel: +60 4 2266728/2266159
Fax: +60 4 2264505
Website: www.twinside.org

Genetic Resources Action
International (GRAIN)
Girona 25, pral
E-08010 Barcelona, Spain
Tel: +34 93 301 1381
Fax: +34 93 301 1627
Website: www.grain.org

Institute for Sustainable
Development, Ethiopia
PO Box 30231
Addis Ababa, Ethiopia
Tel: + 251 1 514580
Email: sustain@telecom.net.et

International Labour Organisation
(ILO)
4, route des Morillons
CH-1211 Geneva 22, Switzerland
Tel: +41 22 799 6111
Fax: +41 22 798 8685
Website: www.ilo.org

United Nations Environment
Programme (UNEP)
United Nations Avenue, Gigiri
PO Box 30552,
Nairobi, Kenya
Tel: +254 2 621234
Fax: +254 2 624489/90
Website: www.unep.org

United Nations High Commission
for Human Rights (UNHCHR)
8-14 Avenue de la Paix
CH-1211 Geneva 10, Switzerland
Tel: + 41 22 917 9000
Fax: + 41 22 917 9016
Website: www.unhchr.ch

World Trade Organisation (WTO)
Centre William Rappard,
Rue de Lausanne 154,
CH-1211 Geneva 21, Switzerland
Tel: +41 22 739 5111
Fax: +41 22 731 4206
Website: www.wto.org