

A GAP ANALYSIS REPORT ON THE AFRICAN MODEL LAW

ON

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

EXECUTIVE SUMMARY

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1. EXECUTIVE SUMMARY¹

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

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

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

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

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

¹ The full report is available at <http://www.abs-initiative.info/>.

the Nagoya Protocol introduces new concepts, such as a definition of ‘utilization of genetic resources’, provision for trans-boundary cooperation, a role for community protocols and procedures, as well as special considerations for basic research, situations of health emergencies and plant genetic resources for food and agriculture.

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

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

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

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

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

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