PROCEEDINGS OF THE WORKSHOP FOR DEVELOPING PRINCIPLES FOR SUI GENERIS, NATIONAL POLICIES AND LEGISLATION FOR INTELECTUAL PROPERTY PROTECTION THAT EMPHASISE COMMUNITY, FARMERS AND BREEDERS RIGHTS

NYAGA, 29 OCTOBER – 1 NOVEMBER 2000
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<td>1.</td>
<td>ABS</td>
<td>Access and Benefit Sharing</td>
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<td>2.</td>
<td>ARIPO</td>
<td>African Regional Industrial Property Organisation</td>
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<td>3.</td>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>4.</td>
<td>CTDT</td>
<td>Community Technology Development Trust</td>
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<td>5.</td>
<td>DI</td>
<td>Distinct and Identifiable</td>
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<td>6.</td>
<td>DO</td>
<td>Distinct and Original</td>
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<tr>
<td>7.</td>
<td>DUS</td>
<td>Distinct, Uniform and Stable</td>
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<td>8.</td>
<td>FAO</td>
<td>Food and Agricultural Organisation</td>
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<td>9.</td>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>10.</td>
<td>GPA</td>
<td>Global Plan of Action</td>
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<td>11.</td>
<td>IPR</td>
<td>Intellectual Property Rights</td>
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<td>13.</td>
<td>IUCN</td>
<td>World Conservation Union</td>
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<td>14.</td>
<td>IUPGRFA</td>
<td>International Understanding on Plant</td>
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<td>15.</td>
<td>MAT</td>
<td>Mutually Agreed Terms</td>
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<td>16.</td>
<td>MEA</td>
<td>Multi-lateral Environmental Agreements</td>
</tr>
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<td>17.</td>
<td>NCA</td>
<td>National Competent Authority</td>
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<td>18.</td>
<td>NISCB</td>
<td>National Inter-Sectoral Coordination Body</td>
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<td>19.</td>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>20.</td>
<td>PIC</td>
<td>Prior Informed Consent</td>
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<td>21.</td>
<td>PVP</td>
<td>Plant Variety Protection</td>
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<td>22.</td>
<td>SADC</td>
<td>Southern African Development Community</td>
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<td>23.</td>
<td>TRIPS</td>
<td>Trade Related Intellectual Property Rights</td>
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<td>24.</td>
<td>UPOV</td>
<td>International Union for the Protection of New</td>
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<td></td>
<td></td>
<td>Plant Varieties</td>
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<td>25.</td>
<td>VCU</td>
<td>Value for Cultivation and Use</td>
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<td>26.</td>
<td>WTO</td>
<td>World Trade Organisation</td>
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<td>27.</td>
<td>FAO- LinKS</td>
<td>Food and Agricultural Organisation Project on</td>
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<td>Gender, Biodiversity and Local Knowledge Systems for Rural Development in Southern Africa</td>
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PREFACE

The Guidelines on *sui generis* Policy and Legislation on Community, Farmers and Breeders Rights contained in this document is the outcome of a three-day workshop held at Nyanga, Zimbabwe between October 29th and November 1st, 2000.

The Workshop was organized by FAO-LinKS and IUCN-ROSA in association with Community Technology Development Trust (CTDT) as a forum for SADC states. Participants came from Tanzania, Malawi, Zambia, South Africa, Namibia, Swaziland, Mozambique and Zimbabwe. Participants from other states could not attend for various reasons but were invited. Also present were participants from Nigeria and Norway, the IUCN and FAO-LinKS itself.

The workshop was held at Montclair Hotel, Nyanga in Manicaland Province, Zimbabwe and was officially opened by the Honorable Minister of Lands, Agriculture and Rural Resettlement, Dr J.M. Made and officially closed on behalf of the Honorable Minister of Environment and Tourism, Dr F. Nhema, by a Ministry official.

The objective of holding the workshop was to press forward the efforts made so far to produce Policy and legislative guidelines on *sui generis* systems that could protect biological resources in the SADC Region that are falling under increasing bio-piracy threats from developed Countries. The Policy and Legislative Guidelines were produced within the framework and in Compliance with the Convention on Biological Diversity (CBD) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Before the Nyanga Workshop, a taskforce from East and Southern African countries met in Lusaka in June 1999 and produced the OAU Model Legislation. However, whilst the model Constitutes the core elements of an appropriate *sui generis* system, it nevertheless, does not Adequately provide countries with sufficient guidelines in the production of their national Policies and legislation. There was therefore need to provide general background on the International status of rights relating to biological resources, the pre-conditions for producing a *sui generis* system compliant with CBD and TRIPS, identification and filling in policy and legislative Gaps and options that different countries could choose from.

The Guidelines Document that has come out of the papers, deliberations and recommendations From the Nyanga workshop is an attempt to produce a more comprehensive and complete set of guidelines for SADC and other African countries. It should, however, be noted that no attempt is made in the document to systematically separate policy, legislation, regulations and orders. That is the next Task for each country to do in its own context.

The Document is produced under the following Headings:

: A Preface that provides a brief introduction of the document as a whole
: An Acknowledgement showing contributions and inputs from persons and institutions
: An Executive Summary
: An Abstract

   The International Context of Community, Farmers and Breeders Rights
The OAU Model Legislation
The Nyanga Guidelines on Policy and Legislation
The Way Forward
ACKNOWLEDGEMENTS

I wish to acknowledge the contributions of several persons who presented papers at the Nyanga Workshop and whose inputs constitute the body of this Report, they include:

- The Honorable Minister of Lands and Agriculture, Dr J M Made, who delivered an opening address that, placed the objectives, scope and direction of the workshop into focus, thus facilitating the positive deliberations that followed his address.

- The Honorable Minister of Environment and Tourism, Dr E Nhema whose closing address provided a sound way forward to participants.

- The statement by IUCN, Dr E Chonguica.

- The statement by Dr J Matowanyika of the FAO-LINKS – who provided the workshop with a *sui-generis* system vision for the SADC Region with special reference to the role and participation of women.

- Dr L T Chitsike on the objectives of the workshop, the work done so far in SADC on *sui generis* system and the remaining gaps and unmet needs to date.

- Mr. A Mushita who presented a paper on Issues and *sui generis* system: Recommendations from a Sub-Regional Workshop on International Instruments, March 2000 (Comm-Tech, Zimbabwe).

- Two papers by Dr L T Chitsike on: "The OAU Model Legislation" and on "Access and Benefit-Sharing" (Practical action to take).

- Paper presented by Professor Trygve Berg (Norway), on Sharing of Benefits – An Overview.

- Paper by Marian Mayet (South Africa) on Community Resources Rights.

- Paper by Dr P K Mbote (Kenya) presented on her behalf by Mr. GZ Banda of IUCN-ROSA on Guiding Principles for Designing *Sui Generis* Systems.

- Paper by Dr B Mpofu (Zimbabwe), on Farmers and Breeders Rights – from Research and Specialist Services (Zimbabwe).

- The Contributions from all participants is hereby acknowledged.

These will form the basis of a technical document being prepared by FAO LinKS and IUCN in association with Commu-Tech as a publication coming out in the first half of year 2001.

There were also papers circulated to all participants which were not formally presented but contributed to this Guidelines Document, these included:
• The National Environmental Management Act: Biodiversity Chapter – First Draft, October 2000, Department of Environmental Affairs and Tourism (South Africa).


• This document also incorporates recommendations made at the Nyanga Workshop into the proposed guidelines. Of particular note however is the attachment of the Way Forward at the end of the document.

I accept full responsibilities for any errors or views directly or indirectly stated or implied in this paper.

The Regional Workshop was made possible by the FAO LinKS, which is financially supported by the Government of Norway. Further financial contributions were made by IUCN- ROSA’S Project: Strengthening Environmental Law in Southern Africa. Funded by the Royal Netherlands Government.

Thanks also extended to the Co-ordination Committee that prepared for and organised the workshop, in addition to contributing to the preparation of this paper. The Committee comprises Gracian Banda (IUCN-ROSA), J.Z.Z Matowanyika(FAO – LinKS), A. Mushita (CTDT) and the author.
EXECUTIVE SUMMARY

I. INTERNATIONAL CONTEXT OF THE RIGHTS ISSUES.

1. The objective of producing Guidelines on Policy and Legislation on Community, Farmers and Breeders rights is to assist SADC countries to produce national IPR Policy and Legislation largely based on *Sui generis* systems, in compliance with the TRIPS Agreement and the Convention on Biological Diversity (CBD) and related instruments.

2. In the provision of these Guidelines, the issue of rights is placed in an international context related to the right to development and proprietorship of biological resources in the ecological, social, political and cultural senses.

3. The Guidelines show, that although international bodies such as the CBD accept the rights, TRIPs criteria in their current form do not recognize community or farmers rights because they are not trade-related.

4. TRIPS, however makes a provision under its Article 27.3(b) that community or farmers rights could be recognized as a *Sui generis* system, that is, a special protection system that meets the aspirations of communities and small farmers.

5. However, whilst biological resources under the proprietorship of local communities remain unprotected under TRIPS, the multi-national pharmaceutical and other industrial companies and their research scientists continue to exploit biological resources in the region and other developing countries. This exploitation takes the form of lack of acknowledgement and making huge commercial gains out of the knowledge, practice and innovations of local communities on a non-benefit sharing basis as well as taking the form of unauthorized patenting. These forms of exploitation constitute what is termed “bio-piracy”.

II CURRENT STATUS OF RIGHTS IN SADC COUNTRIES

- In terms of policy and legislation designed to protect rights on biological resources, there is a wide range of differences from countries that do not have basic plant breeders rights legislation like Malawi, Zambia and Botswana to those that have it such as Zimbabwe and South Africa.
- However, none of the countries in the SADC Region have adequate policy and legislation to protect biological resources under a *Sui generis* system that includes community and farmers rights.
- All members in the region are Parties to the CBD and signatories to the WTO/TRIPS Agreement. TRIPS require that developing countries comply with their obligations by January 2000 and least developed countries should comply by January 2006. Compliance means either producing a national *Sui generis* system or accepting the current patent system of recognition.
III THE OAU MODEL LEGISLATION

1. Introduction

- The first serious attempt to assist African States to produce national *Sui generis* systems was made through a group of East and Southern African experts that met as a taskforce in Lusaka in June 1999.
- The taskforce made a direct attempt at producing a *Sui generis* system model legislation. The main contents of the Model Legislation are outlined below:

2. The Model Legislation content is structured as follows:

2.1 Objectives: The main objectives in the model are:

- To recognize and protect the inalienable rights of local communities including farming communities over their biological resources.
- To recognize and protect the rights of breeders
- Promote appropriate mechanism for a fair and equitable sharing of benefits from biological resources.

2.2 Scope

In close relation to objectives, the Model Legislation prescribes the scope as follows that:

- Biological resources cover both *in situ* and *ex situ* conditions
- Community, farmers and breeders rights
- Access, use and exchange of knowledge and technologies

2.3 Access to Biological Resources:

The model addresses this central core of *Sui generis* system stating that.

- Access shall be based on prior informed consent by the National Competent Authority (NCA) and the concerned community.
- The receiver seeking access shall provide detailed information about the nature of genetic material needed, the purpose whether commercial or academic research, and primary destination of the genetic material; and proposals for benefit sharing.

2.4 Content of Agreement.

The agreement content should have commitments undertaken by the collectors as follows:

- To guarantee to deposit duplicates of each specimen taken
- Not to apply any form of intellectual property rights over biological resources without prior informed consent of the original providers.
- To provide for benefit sharing
To abide by state laws on sanitary control and bio-safety.

2.5 **Patents over Life and Biological Processes**

The key clause is that, patents over life forms and biological processes are not recognized and cannot be applied.

2.6 **Control and Enforcement**

The Model provides that the NCA may unilaterally withdraw consent and repossess the written permit when there is evidence that the collector violated any of the provisions of the legislation.

2.7 **Specific Issues**

2.7.1 **Community Rights**

The African Model Legislation makes reference to Community Rights and shows the following critical rights as rights to:

- Their biological resources
- Collect benefits
- The right to refuse access to their biological resources, where access will be detrimental to the integrity of their natural and cultural heritage.

2.7.2 **Farmers Rights**

These are also provided legislative sections stating that:

- Farmer’s rights are recognized as stemming from enormous contributions that have been made in conservation and use of plant-genetic resources.
- Farmer’s varieties be recognized and protected under similar laws that protect breeder’s varieties, as long as they are identifiable.
- Farmers are free to use a breeder’s variety protected under the law, but not for commercial purposes.

2.7.3 **Plant Breeders Rights**

The model makes extensive coverage of the Plant Breeders Rights (PBRs). The main points, however relate to:

- The recognition of PBRs stemming from the efforts, and investments made by persons as basis for an economic reward.
- The breeder’s variety is recognized if it is distinctive, stable and homogenous.
- The breeders right to sell, and to license other persons.

2.8.5 **Institutional Arrangements**

- The states should make provision for an NCA whose duties include: the creation of a regulatory mechanism that will ensure effective protection of farmers and community
intellectual rights, and establish the National Inter-Sectoral Coordinating Body to ensure that minimum conditions for agreements with collectors are strictly observed and complied with.
• Institutions to administer sanctions and penalties.

IV NYANGA GUIDELINES

Out of the Nyanga Workshop, there were additional guidelines to the legislative structures set up under the OAU Model Legislation. These were identified from gaps observed on the Model Legislation. The additional guidelines provided a broader framework for policy, legislation, regulation or orders. These fell under the following main headings:

1. Framework Conditions for Sui generis System

The Model Legislation omitted the provision for framework conditions for the provision for a Sui generis system including:

• The provision of Minimum Requirements for Sui generis system for plant varieties
• The Elements for Sui generis system that need to be addressed.

2. The Patent Option-Completely Excluded?

The African Model fails to clarify whether there is absolutely no inclusion of the patent system required under communities, farmers or small breeder’s rights. The additional guidelines here see room for including some aspects of:

2.1 Patents: to safeguard knowledge legally and for biotechnology inventions associated with farmers or the community; where appropriate petty patents could be applied.

2.2 Copyright and Neighbouring Right: these could assist to protect indigenous knowledge especially neighbouring rights.

2.3 Trade Secrets this would be particularly relevant to traditional medical practitioners.

3. “Combination thereof” - (Article 27.3(b)).

The OAU model does not come clearly whether to adopt the Sui generis system alone or with patents. The new guidelines, suggest a combination of the two, to accommodate the interests of traditional farmers staple cereal crops under a Sui generis system and the small-commercial farmers who depend on elite seeds that have a patent-like intellectual property rights regime.

4. Access and Benefits Sharing (ABS)

The new guidelines extent the provisions under ABS

• The new Guidelines accept the need for access legislation but could even include natural resource protection and access in the national constitution because a country’s wealth lies on its natural resources.
• ABS needs an elaboration of elements of receiving, providing and both parties together.
5. **Mutually Agreed Terms (MATS):** also needs the identification of its elements for clarity to implementers of the *Sui generis* legislative system. This would encourage equitable benefit sharing and ensure prior informed consent.

6. **Types of Benefits that may be shared**

   *Sui generis* system may provide for monetary benefits as well as technology information exchange and joint research. The African model does not adequately elaborate on this matter.

7. **Role of Government:** This too needs more details: For example, government may assist ABS by developing and enforcing standards of agreements and provision of legal and technical advice.

8. **Community Rights**

   - The African Model Legislation addresses several critical issues on community rights but leaves out equally critical issues. There is need to distinguish or compare breeders rights and community rights. The concept of traditional resources rights (TRR) is important.
   - The introduction of the Community Biodiversity Register is important as a way of scientifically identifying local communities and their attributes.

9. **Farmers Rights**

   - It is important to stress the recognition criteria of farmers varieties as both identifiable and distinctive (DI) rather than just identifiable.
   - It is also important to set up a register for traditional crops under various levels of heterogeneity.

10. **Legal Options for *Sui generis* System**

    - The African Model does not offer options that may be considered by countries with different backgrounds.
    - Countries should choose whether to go for short-term legislation or straightaway for long-term legislation.
    - Countries should decide whether to have existing sectoral laws reviewed to accommodate *Sui generis* legislation on biological resources.
    - Countries could choose to operate on a contractual agreement basis without overall laws on *Sui generis* systems.
    - The structure of the OAU Legislation could be improved upon by isolating the regulations, orders and statutory instruments from the components of the main act.

VI **REGIONAL POSITIONS AND THE WAYFORWARD**

- The OAU Model document does not indicate the way forward although the OAU and the SADC Council of Ministers are aware of the model.
• The Nyanga workshop guidelines suggest that the general policy approach of SADC IPR should be “of combination thereof” – that is predominantly *Sui generis* and patent pattern where appropriate.

• No acceptance of UPOV Act 1991 by SADC States and that S. Africa should reconsider its membership of UPOV 1991.

• The SADC Biodiversity Focal Point in Malawi to coordinate IPR activities in the SADC Region.

• All countries to proceed to produce national policy and legislation to protect their biological and genetic resources without delay. Such Policies and legislation may be based on the OAU Model Legislation read together with the Nyanga Workshop Guidelines.
ABSTRACT

The Guidelines provided in this Report are written in the context of international, regional, national and local concerns about the conservation and sustainable use of natural resources, the problems of bio-piracy as well as access and benefit sharing out of these resources and lack of policy and legislation on the protection of genetic resources in developing countries.

Developed countries apply the patent system of intellectual property rights protection for industrial inventions and have devised a patent-like system for plant varieties protection known as UPOV Act1991. Instead of letting developing countries decide which system of protection would suit their biological resources and their development aspirations, some developed countries wish to assume and even try to impose UPOV Act1991 on them. Developing countries have resisted such imposition and are proceeding to produce their own sui generis systems outside UPOV.

This Report is written with special reference to SADC countries being known to be endowed with rich biological and genetic resources that contribute to modern agriculture, medicine and industry, valued at billions of US dollars. Researchers and pharmaceutical companies who do not acknowledge the sources of their knowledge and technologies nor share benefits with local communities nor their national institutions are tapping these resources and they thereby operate on the basis of bio-piracy.

With the support of international bodies like the Convention on Biological Diversity (CBD) and the International Undertaking, developed by the FAO, sui generis policy and legislative frameworks can be put into place at the national and regional levels. Legislation so made can support the conservation of natural resources and sustainable use, control bio-piracy, and provide for prior informed consent and benefit sharing.

However, the rules and regulations of the World Trade Organisation (WTO)’s Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement, in their present form do not protect indigenous knowledge and technologies until or unless concerned states produce “effective” sui generis systems that are legally enforceable outside the current patent intellectual property rights system and comply with TRIPs. This is possible since the minimum requirements to be met under TRIPs are defined and create no problems to any developing country.

Several African countries amongst other developing countries are formulating or producing new IPR systems that focus on sui generis systems outside UPOV, with some difficulties, due to limited capacities in this field. The Guidelines provided in this Report constitute a combination of the OAU Model Legislation and the Nyanga Guidelines designed to facilitate the production of sui generis policy and legislation in the SADC and other African regions. These Guidelines were formulated and incorporate initiatives being made in other parts of the Third World such as India, the
Philippines and the Andean-Pact countries. Countries are expected to choose or select what aspects of the Guidelines meet their ecological, institutional, economical, historical, social and cultural backgrounds as they draw up their policies and legislation.

This Report attempts to present these intellectual property rights issues in some detail and in a manner designed to assist and support the region in producing *sui generis* Policy and legislation that adequately protects its natural resources, community and Farmers rights.
I. INTERNATIONAL CONTEXT OF COMMUNITY, FARMERS AND BREEDERS RIGHTS

1.1 Right to Development

The context in which the development of policy and legislation on Sui generis systems should be taken for SADC countries originates and gained international legitimacy from the Declaration of the Right to Development adopted by the General Assembly of the United Nations on December 14, 1986.

This Declaration extends human rights to embrace the following notions:

- The right of people to self-determination, as meaning the right of people to develop their political status and pursue economic, social and cultural development.
- Their right to full and complete sovereignty over all their wealth and natural resources.

The fundamental human right to development implies that states must be free to evolve and pursue policies unconstrained by political and economic pressure from without. In addition, there is a responsibility by nations of the world to create international conditions favorable to the realization by states of the right to development. (Third World Network, G.S. Nijar 1995).

This right to development is acknowledged in several international conventions and declarations such as Agenda 21, the Convention on Biological Diversity (CBD), the ILO Convention No. 169, and the International Undertaking on Plant Genetic Resources for Food and Agriculture.

However, the World Trade Organisation (WTO) and its trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement pursues policies that undermine the rights of developing countries to follow policies of development consistent with their stage of development. Instead of creating favorable conditions for development, WTO sets a bundle of unfavorable rules and norms to be adhered to and these negatively impact on developing countries, in particular.

1.2 The Convention on Biological Diversity (CBD)

Out of the international conventions and agreements that support the rights of communities to the proprietorship and use of local resources, the most important one is the CBD. It gives this support through its critical articles such as:

1.2.1 Article 8(j) on Indigenous Knowledge: which calls on states to respect, preserve and maintain indigenous knowledge innovations and practices of indigenous and local communities and conservation and sustainable use of biological diversity.

1.2.2 Article 15 on Access Framework: which affirms that each Party has authority to control access of its genetic resources and that such access is subject to national legislation. It goes further to say access must be based on prior informed consent, mutually agreed terms and equitable benefit sharing.
1.3 The International Undertaking on Plant Genetic Resources for Food and Agriculture

In support of the rights of farmers in particular, and to reinforce the rights of communities spelt out in CBD, is the FAO instrument known in brief as the International Understanding (IU).

The IU supports farmer’s rights in order to recognize the erroneous contribution that farmers of all regions of the world have made and will continue to make for the conservation and development of plant genetic resources, which constitute the basis of food and agricultural production throughout the world.

IU thus resolved that each member country should adopt measures including administrative, policy and legislative to assist their farmers to improve, own and use their traditional crops. Furthermore, to develop a Sui generis system that recognizes protects and compensates for knowledge and innovations by local farmers and local communities.

1.4 Trade-Related Intellectual Property Rights (TRIPS)

Although WTO/TRIPS has general rules and regulations that could have deterred SADC countries from joining, they rather found themselves in circumstances that forced them to join.

By joining WTO, SADC members automatically fall into a situation in which they have to comply with WTO obligations. WTO has judicial powers such that non-complying members can be punished with trade sanctions.

The TRIPS Agreement signed by all SADC countries obliges all members to adopt a system of protecting intellectual property rights based on the patent system. SADC countries classified as “developing” such as Zimbabwe and Botswana must comply by January 2000 (now extended to June 2000) and “least developing countries such as Mozambique or Zambia must comply by January 2006.

However, there is an exception under Article 27.3(b) that allows biological and agricultural genetic resources to be recognized under an “effective Sui generis system or a combination thereof”. This exception is viewed by developing countries including those in the SADC region as a way of overcoming the conflicts or problems of recognizing community and farmer’s rights and those of small or indigenous breeders, and the conflict between CBD and TRIPS.

1.5 The International Union for the Protection of New Varieties (UPOV) and Sui generis Systems

“Sui generis” is Latin for “of its own kind”, meaning in this context an intellectual property right designed specifically for the protection of biological resources and material. The term is also used for many new or area specified types of IPR such as farmer’s rights to community rights.
Some people in developed countries have interpreted *sui generis* systems to mean UPOV whose criteria for recognition are homogeneity, distinctiveness and stability of new varieties, but TRIPS makes no reference to UPOV.

The lack of reference to UPOV means that SADC and other developing regions of the world are free to develop *Sui generis* systems that meet the aspirations of their communities and farmers. This means that countries only have to meet the minimum requirements set out in the TRIPS agreement and ensure that elements and minimum requirements for a *sui generis* system, such as prosecutable subject matter, scope, duration, legal enforcement and procedures against infringements are in place.

SADC countries have reservations and disinterest in joining the UPOV convention because the convention does not recognize farmers or community rights, particularly UPOV Act 1991, which is the only one still open to new membership since the closure of UPOV Act 1978.

The above arguments show that SADC countries are basically against protecting their biological resources under the patent systems or under the UPOV Acts and therefore need to formulate their own IPR systems that meet their development aspirations. These considerations led to the formulation of the African Model Legislation to be presented and analyzed in subsequent sections of this document.
II  SOUTHERN AFRICAN CONTEXT AND STATUS OF CONVENTIONS
AND AGREEMENTS

2.1 Introduction

The previous Section (Section I) demonstrated the need for an IPR system that is largely
based on the *Sui generis* system to meet the development needs of local communities and
farmers. However, before examining attempts made so far to produce new IPR systems
outside the traditional TRIPS patents system, it is important to know the status of SADC
countries in terms of their current IPR status and institutions related to IPR issues. Such
information provides the base upon which to develop and build new and appropriate
IPRs.

2.2 Patents

One of the first indicators of IPR status in a country is related to patents– the traditional
IPR system. Within the SADC Region, most countries have patents legislation of their
own except Namibia and Swaziland that have used the South African law until recently
when they decided to develop their own. These laws have, however, been designed for
industrial inventions and need to be broadened or adjusted to adequately accommodate
biological protection requirements.

2.3 Plant Breeders Rights (PBRs)

There are only two countries in the Sadc Region with PBR legislation - South Africa and
Zimbabwe. Zimbabwe has an old piece of legislation which makes no reference to
community or farmers rights, and the same for South African legislation now based on
the 1978 and 1991 UPOV Acts. The rest of the countries in the region appear not to have
realized the need for such legislation until recent years when the World Bank introduced
issues of structural adjustments to their economies.

Plant breeder’s legislation, is generally infavour of big commercial companies but it,
evertheless, has development advantages as well, in the region, which also impact on
small farmers. South Africa and Zimbabwe have received more agricultural investments
partly because of their IPR legislation compared to other countries.

2.4 Access and Transfer of Biotechnology Legislation

There is no SADC country that has produced a complete set of policies and legislation in
compliance with both CBD and TRIPS on *Sui generis* systems. However, draft policy
and legislative work has been produced and is at various levels of refinement in a few
countries such as Zimbabwe and South Africa. The lack of complete policy and
legislation on *Sui generis* systems indicates the high level of openness of these countries
to bio-piracy.
2.5 Membership of the African Regional Industrial Property Organisation (ARIPO)

Countries, who wish to ensure that a thorough screening of patents takes place, become members of ARIPO. This is an inter-government organisation constituted in 1976 under the Harare Protocol on Patents and Industrial Designs (1982). The protocol allows ARIPO to grant patents in all the contracting states, following a substantive examination by ARIPO’s technical advisers and subject to their compliance with national patent laws. However, ARIPO’s work is still focused on industrial property rights. With the exception of South Africa, other Southern African states are members.

2.6 Trade Related Intellectual Property Rights (TRIPS)

All SADC countries are signatories to the WTO/TRIPS Agreement. Those under the category of developing countries (Zimbabwe, Botswana, Swaziland, Namibia and South Africa) were expected to have complied with the agreement by January 2000 and the rest by January 2006. Most countries in the region wish to comply with TRIPS basically under the Sui generis system considered an attractive alternative to the hard patent system. The Sui generis system in the form of UPOV Act 1991 is also considered unacceptable.

2.7 Convention on Biological Diversity (CBD)

All member states of SADC are signatories of CBD. SADC is keen to use the CBD as the basis for developing Sui generis systems especially with respect to access, benefit sharing, prior informed consent, on access and transfer of technology, and the recognition of indigenous knowledge and practices.

2.8 Uneven Regional Experiences and Undeveloped National Instruments

The above summary illustrates checkered experiences across the region. The countries are at different levels of awareness and implementation of the international instruments. There is an expressed need for continued awareness raising among many of the stakeholders in the region. There is also an expressed need to develop clear national policies and legislation especially on the issue of promoting and protecting rights of ordinary people and their right to development out of their own resources.
III. OAU AFRICAN MODEL LEGISLATION ON RIGHTS FOR COMMUNITIES, FARMERS AND BREEDERS AND ACCESS TO BIOLOGICAL RESOURCES

3.1 Establishment of Task force

Following a workshop held for East and Southern African countries in Lusaka, January 1999 on “Understanding the Convention on Biological Diversity (CBD) and its related instruments”, a resolution was passed that a taskforce be constituted to draft a model *Sui generis* system for Africa.

The taskforce met over 4 days in Lusaka, six months after the Lusaka workshop and produced the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources”. The model is based on the CBD's Articles 8(j) and 15(1) and (2), and related instruments such as the International Undertaking on Plant Genetic Resources (IUPGR) s Article 12.

3.2 General Issues

3.2.1 Legislative Summary Declarations

The Model begins by a set of declarations, acknowledgements and principles on which the African *Sui generis* system should be based. These may be briefly stated as follows:

- that the State and its people exercise sovereign and inalienable rights over their biological resources.
- that the rights of local communities over their biological resources, knowledge and technologies evolved over generations of human history are collective *a priori* rights that take precedence over private ownership rights.
- that the State provides adequate mechanisms for guaranteeing equitable and effective participation of its citizens in making decisions affecting biological and intellectual resources.
- that there be no patenting of life forms.

3.2.2 Objectives, Definitions and Scope: Part I

3.2.2.1 The objectives of this legislation are to:

- Recognize and protect the inalienable rights of local communities including farming communities over their biological resources.
- Recognize and protect the rights of breeders.
- Provide an approximate system of access to biological resources and community knowledge.
- Promote appropriate mechanism for a fair and equitable sharing of benefits from biological resources.

3.2.2.2 Definitions

The Model Legislation proceeds from objectives to definitions of key concepts in the legislation. These definitions include the following: that,
• Access is the acquisition of biological resources, their derivatives, community knowledge, innovations, technologies or practices as authorized by the National Competent Authority.
• Benefit sharing is the sharing of whatever accrues from the utilization of biological resources, community knowledge, technologies innovations or practices.
• Community knowledge is the accumulated knowledge that is of socio-economic value, developed over the years in indigenous and local communities.
• National Competent Authority (NCA) is the entity authorized 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 of a collector of complete and accurate information, and based on that information, prior acceptance of that collector in the providing country and its communities, to collect biological resources.

3.2.3 Scope

The Model states that the scope of the legislation covers biological resources in in situ and ex situ conditions; the derivatives of the biological resources; community knowledge and technologies; and plant breeders.

3.3 Access to Biological Resources: Part II

The Model Legislation then addresses the very critical and crucial aspect of a Sui generis system – that of access and states that:
• Any access to any biological resources and knowledge or technologies of local communities in any part of the country shall be subjected to an application for the necessary prior informed consent and written permit.
• All applications for the necessary consent and written permit to access any biological resources, community knowledge or technology, shall be directed to the National Competent Authority (NCA).

In making application for access the following information shall be provided by the applicant:
• The Identity of the applicant and the documents that testify legal capacity to contract
• The resources to which access is sought including the sites, from which it will be collected, its present and potential uses, its sustainability and the risks, which may arise from, access.
• 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.
• Description of the manner and extent of local and national collaboration in the research and development of the biological resource concerned.
• The primary destination of the resource and its probable subsequent destination(s).
• The proposed mechanisms and arrangements to benefit sharing.

3.3.1 Content of Agreement

The Model Legislation provides that agreement shall contain commitments undertaken or to be undertaken by the collector as follows:

• To guarantee to deposit duplicates of each specimen taken.
• Not to apply to any form of IPR over biological resources or community innovation without the prior informed consent of the original providers.
• To provide for benefit sharing.
• Access shall be based on a commitment to regenerate and conserve biological resources and maintenance of indigenous knowledge.
• Abide by state laws on sanitary control, bio-safety and the protection of the environment, as well as by the cultural practices, traditional values and customs of local communities.
• As far as possible research is done in country to facilitate local participation.

3.3.2 Patents over Life and Biological Processes

Controls in this area are very strict in the Model Legislation. The key clauses are, that:  
• Patents over life forms and biological processes are not recognized and cannot be applied.
• The collector shall, therefore, not apply for patents over life forms and biological processes.

3.3.3 Conditions Pertaining to Academic Research Institutions

The Model Legislation attempts to distinguish academic from commercial research by the following conditions, that:
• The NCA shall subject all applications for access to PIC
• The NCA shall determine the appropriate conditions under a written agreement with government, research institutions and local communities.
• The application for access shall clearly state the objective of the research and relation to industry.

3.3.4 Control and Enforcement

The Model Legislation has enforcement measures stating that the NCA may unilaterally withdraw consent and repossess the written permit when there is evidence that the
collector has violated any of the provisions of the legislation; and when there is evidence that the collector failed to comply with agreed terms.

3.4 Specific Issues

3.4.1 Community Rights

The African Model Legislation makes some specific references to Community and Farmers Rights. On community rights the Model states that the State recognizes the rights of communities over:

- Their right to collectively benefit from the use of their biological resources
- Their innovations, practices, knowledge and technologies acquired through generations.
- The right to refuse access to their biological resources, innovations and knowledge, where such access will be detrimental to the integrity of their natural or cultural heritage.

3.4.2 Farmers Rights

On farmers rights the OAU Model sets these rights under the following headings:

3.4.2.1 Recognition of the Farmers Rights Concept

- Farmer’s rights are recognized and stemming from the enormous contributions those local farming communities, especially women 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.
- For farmers to continue making those achievements therefore, Farmers Rights have to be recognized and protected.

3.4.2.2 The Law on Farmers Varieties

- A variety with specific attributes, identified by a community shall be granted intellectual property 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.
- Under the Model law farmers are free to use a new breeder’s variety protected under this law to develop farmer’s varieties.
- However, farmers shall not sell farm saved seed material of a breeders’ protected variety in the seed industry on a commercial-scale.

3.4.3 Plant Breeders Rights

The Model makes extensive coverage of the Plant Breeders Rights (PBRs) under the following headings:
3.4.3.1 Recognition of Plant Breeders Rights

The Model says, Plant Breeders Rights stem from the efforts and investments made by persons or institutions for the development of new varieties of plants and forms the basis for providing recognition and economic reward.

3.4.3.2 Characteristics of New Varieties

The model states that a variety will be considered new if it is distinct, stable and homogenous.

3.4.3.3 Rights of Plant Breeders

The rights of plant breeders in respect of new varieties are the rights to sell, including the right to license other persons to sell plants or propagating material of that variety; the right to produce, including the right to license other persons to produce, propagating material of that variety for sale.

3.4.3.4 Exemptions to the Rights of Breeders

Notwithstanding the existence of Plant Breeders Rights in respect of plant variety, any person or farmers’ community may:

- Use the protected variety in further breeding, research or teaching
- Propagate, grow and use plants of that variety to purposes other than commerce

3.4.3.5 Duration of Plant Breeders Rights

A plant breeders rights shall exist for 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 PBRs was accepted.

3.5 Institutional Arrangements

The African Model Legislation provides for the following institutional arrangements:

3.5.1 The National Competent Authority (NCA)

The Model makes provision for an NCA through government structures, whose duties are to:

- Create and operate a regulatory mechanism that will ensure effective protection of community intellectual rights and farmer’s rights, and the regulation of access to biological resources.
- Carry out the process of consulting and participation of local communities including farming communities in the identification of their rights
3.5.2 The National Inter-Sectoral Coordination Body (NISCB)

The NISCB shall:

- ensure that the minimum conditions for agreements with collectors are strictly observed and compiled.
- that community rights are protected, with due regard to gender equity.
- recommend policies and laws on the sustainable use of biological resources, including new laws on intellectual property rights
- be a composite body of persons selected on the basis of their qualifications, fields of expertise or specialization and public interest qualities.

3.5.3 Appointment of Technical Advisory Body (TBA)

The model provides for a TBA, whose functions are to:

- prepare lists of tax threatened by deterioration and/or extinction and of the places threatened by services loss of biodiversity
- monitor and evaluate, at regular intervals, the implementation of this legislation

3.5.4 A National Information System (NIS)

The Model Provides for an NIS with regard to biological resources, which includes the activities set out in this model law. Local communities may also establish data bases on their biological resources together with their components and derivatives.

3.6 Enabling Provisions

The Model Legislation provides for Enabling Provisions that allow the state to establish appropriate agencies with power to ensure compliance with the provision of this law. Here sanctions and penalties may include: i) written warning, ii) fines, iii) automatic cancellation/renovation of the permission for access, iv) confiscation of collected biological specimens and equipment; v) permanent ban from access to biological resources and community knowledge.

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

As stated in this paper, the Nyanga Workshop was held to review the OAU Model Legislation in order to provide countries in the SADC Region with a more comprehensive set of Guidelines on *Sui generis* system policy and legislation. The Workshop identified gaps in terms of the rationale for developing *sui generis* systems, the pre-conditions for developing such IPR that is compliant with TRIPS, and the missing substantive issues. The review produced the following guidelines.

4.1 Pre-Conditions for Developing A *Sui Generis* System Under Trips

One primary omission in the OAU Model Legislation, is the lack of guidelines on the requirements for a *sui generis* system that is recognizable under TRIPS. Though not formally written, legal experts agree that TRIPS requires certain minimum requirements and elements as follows:

4.1.1 Minimum Requirements that:

- The *sui generis* system has to be an intellectual property right: that is, a legally enforceable right to exclude others from defined commercial acts or obtain remuneration on certain uses of genetic material
- Since TRIPS does not specify any species, member states may have to provide for the protection of all varieties.
- The *sui generis* system needs to comply with the basic principles of national treatment (although this may fall under exceptions of the Agreement)
- In order to be effective, a *sui generis* system requires an enforcement procedure so as to permit action against any act of infringement.

4.1.2 Elements of a *Sui Generis* system that comply with TRIPS include:

- A prosecutable subject matter: *Sui generis* systems must define what is protectable
  Protection requirements: these must be defined under IPR granted, i.e. patent system or *sui generis* system outside UPOV Acts
- Scope of Protection: define the rights conferred to the persons whose plant variety fulfills all protection requirements.
- Duration: clarify the duration of the right conferred, UPOV provides a minimum of 15 years but TRIPS does not.
4.2 The Possible Role of Patents

The OAU Model does not come out clearly whether African countries should completely discard all patent types of IPR. The Nyanga Workshop came out with the view that whilst most components of IPR that meet the aspirations of local communities fall under *Sui generis* systems, there still room for some patent IPR elements, such as the following:

4.2.1 **Patents:** These can safeguard knowledge legally and are available in most SADC countries. They are applicable to biotechnology inventions and can also assist traditional medicinal associations and individual practitioners, although they are expensive. Petty patents could also be considered as cheaper alternatives.

4.2.2 **Copyright and Neighbouring Rights:** Traditional people have expressed concern about unauthorized reproduction of their knowledge and practice. TRIPS provides for neighbouring rights that are related to copyright laws - these would protect traditional unfixed works.

4.2.3 **Trade Secrets:** TRIPS has provision to prevent information from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices. To be protected, information must be secret and have commercial value because it is secret, and under measures to be kept secret. Under this right community or individual knowledge may be protected as a trade secret and this would particularly suit traditional healers.

4.3 The Need for Differential IPRS to protect different Biological and Agricultural Resources

Since SADC countries have different crops and wild plant varieties within one country, managed at different technological levels and whose uses range from subsistence to commercial, there is need for different forms of protection - implying a policy of "combination thereof" (Article 27.3(b) of TRIPS. This may be analyzed or broken down to:

4.3.1 **Traditional Crops:** Crops such as cereals and tubers represent traditional and basic staple foods crops. The majority of peasant farmers re-use the grains or tubers that they harvest for next season production. Furthermore, in the context of informal seed systems, in which farmers freely exchange knowledge, seed and technology, the *sui generis* system pronounced in the OAU Model, ideally suits this sector.

4.3.2 **Commercial Crops:** All SADC countries at different levels of development have components of commercial crops including those that are grown by small farmers. Commercial crops especially ornamentals; fruits, vegetables and plantation crops have limited concern about farmer’s privileges. The biological features of the protected material make its re-use unattractive for farmers - small and large. For horticultural crops, for example, the harvested product generally cannot be used as propagating material as in the case of cereals. Thus the application of a patent type of PVP would not undermine the interests of small-farmers.
4.3.3 Medicinal Plants: This category of plants requires a special system of IPR, that combines various forms of the patent and *sui generis* system based on CBD principles. Such a combination is necessary where the traditional practitioner works jointly with a pharmaceutical company.

4.3.4 Biotechnological Resources and Products: The principles and policies that apply to the medicinal plants regarding joint work between traditional healers and scientists equally apply to similar circumstances in biotechnology.

4.4 Access and Benefit Sharing (ABS)

4.4.1 Access and Resource Conservation in the National Constitution

The SADC countries could copy the examples of India, the Philippines and Namibia by the incorporation of access and natural resources conservation into their national constitutions. Article 15.1(CBD) recognizes the sovereign rights of States over their natural resources.

4.4.2 Elements for Receiving Parties

The OAU Model set up elements for the Providing Parties but is silent on Receiving Parties. Whilst receiving Parties do not have specific obligations under Art.15 (CBD) that article’s wording providing access, "shall be on mutually agreed terms" and be subject to "prior informed consent" indicates these requirements are not limited to proving Parties alone. Measures by receiving parties to ensure PIC could also be useful ways of implementing Art.15.7 and 16.3. The following measures by receiving Parties could ensure implementation:

(a) A requirement that imported genetic resources have export permits evidencing PIC from the providing Parties
(b) A requirement that importers, within national jurisdiction, maintain records of imported genetic resources showing origin, date of receipt and other information.
(c) Designation of a government authority to administer the regulations of imports of genetic resources from other countries.

4.4.3 Providing and Receiving Parties

Legislation must also demand that both providing and receiving Parties provide for administrative and [judicial](#) penalties. The penalty system should be related to a programme of monitoring and enforcement. All PIC elements contain elements that assess their practical effect and promote observance. The PIC procedures and access agreements and the following situations should be covered:

- Export of genetic resources without any PIC all
- Export of genetic resources not obtained in compliance with PIC
- Forgery of export certificates confirming the correct acquisition of genetic material.

4.4.4 Possible Elements on Guidelines on Mutually Agreed Terms (MATS)
Although the OAU Model details requirements for PIC, it should also cover elements on MATS for clarity to implementers of *sui generis* systems. Guidelines on elements of MATS could prove useful in encouraging equitable benefit sharing and assist to ensure that PIC is indeed informed.

Experts suggest that access seekers should include more of the following elements in some categories of ABS arrangements:

- Providing monetary benefits through fees for shipment of samples and
- Reporting on results of future research involving the genetic resources royalties on profits from future products.
- Providing technology transfer, training or agreeing to joint research to the providing institutions.
- Agreeing to cite or acknowledge sources of genetic resources that
- Providing benefits to local communities. Contribute to research findings, including products and inventions.

### 4.4.5 The Role of Government in ABS Arrangements

Government should play strategic and critical roles in ABS matters. Government may:

- Develop and enforce standards for agreements
- In the case of Parties providing access, it may designate an agency to serve as the gatekeeper to determine PIC. It may provide seed grants to ensure new ventures
- Government could also provide technical or legal assistance to potential parties to such agreements.

### 4.5 Community Rights

The OAU Model Legislation addresses several critical issues on community rights but it is not comprehensive. Unlike the elaboration made on Plant Breeders’ Right (section 28 to 56), community rights which constitute the heart of *Sui generis* issues are only briefly presented. These are addressed below, and need to be added to the sections covering community rights.

#### 4.5.1 Traditional Resources Rights TRR

These are community rights introduced to encompass many different types of rights relating to the traditional or customary use of resources by indigenous people and local farming communities. The term reflects an attempt to build upon the concept of intellectual property rights protection without necessarily restricting it to the concept of property, because of the recognition of traditional resources-tangible and intangible. TRR as a package of rights, primarily aims at the protection of the traditional or customary use of tangible and intangible resources by indigenous people and local communities. Some of the rights still need to be put into binding regulations, but the necessity to strengthen them is widely recognized.
TRRs are associated with some specific rights related to natural resources, such as the right to self-determination, the right to land, the right to indigenous knowledge, and the right to participate in decision-making.

For the above reasons, the state must recognize the use of customary law, norms and practices in the management of biological resources. The community must also participate in the formulation of policies and legislation that affect biological resources for which communities are responsible.

4.5.2 Community Biodiversity Registers

The OAU Model Legislation fails to address the issue of legal definition of a community through scientific components of a given community area. In brief, there is need to identify communities through documentation of their ecological, demographic micro-territorial boundaries, cultural resources and social systems.

The SADC countries should learn from India and other countries experience in documentation of biological, social, economic and cultural information that are critical to the establishment of community rights and organised systems of access and benefit sharing of local resources.

Documentation in India is conducted through biodiversity registers. The registers contain plans and implementation of natural resources management at the local level. The registers give a detailed picture of human communities and how they relate to their environment and natural resources, including a profile of the village itself, its population, civic amenities and infrastructure, how people make their living, major eco-systems and natural resources; types of animals and plants found there and their uses, ecological history and which species need to be harvested, at what time, which ones should be regulated and which ones need protection. The ultimate goal of the registers is to record, recognize and reward grassroots knowledge.

Government policy is essential in ensuring that the registers are well protected, and the information systematically and effectively used to the benefit of the people. The SADC countries can take up policy and legislative measures on such registers to their advantage.

4.6 Farmers Rights

The OAU Model contains most components required in a sui generis system that meets the aspirations of small farmers with few exceptions as noted below:

4.6.1 Failure to Recognize the Need for "Combination thereof"
As already noted above the OAU Model does not seem to realize the need for patents and even some elements of the UPOV Acts that relate to some commercial crops grown by small farmers.

4.6.2 Different Protection Systems for Heterogeneous and Local Varieties

The OAU Model makes no reference to this aspect of *sui generis* system. Presently, UPOV excludes protection from landraces or traditional crops. SADC countries should follow the example of Switzerland in their policies over landraces. Switzerland has recently set up a second register for highly heterogeneous groupings of cereals (landraces).

It may be noted that some open pollinated varieties (e.g. Rye varieties) protected in Europe for decades are just as heterogenous as those found in SADC countries. They were neither uniform nor stable but could be identified and were distinctive.

A special unit within the competent authority can judge, in a practical way, whether a certain landrace shall be considered sufficiently defined to be eligible for protection. However, property rights over heterogeneous varieties should not hold the same rights as those held under UPOV Acts. Within the *sui generis* system, there is would be needed to have two separate certification registers that confer different rights to different levels of uniformity and stability.

4.7 Plant Breeders Rights

The most comprehensive work in the OAU Model Legislation is the section on Plant Breeders Rights. All that remains is the clear separation of policy from legislative components and regulations from the main body of the Act.

4.8 Developing National *Sui generis* Legislation: Issues and Options

The Nyanga Workshop went further than the OAU Model in providing guidelines for legislative frameworks for SADC countries as follows:

4.8.1 Legislative Establishment Process - Options

The approach that SADC countries may take in establishing a legal regime on genetic resources under a *sui generis* system should reflect their unique legal, institutional, economic and cultural conditions. There is no blue-print but only guidelines can be given as provided below:

4.8.1.1 Experimental Approach

While comprehensive legislation with the approval of a country’s parliamentary body is desirable in the long run, it may well be the case that experimentation with less comprehensive but more flexible alternatives is better at the beginning. This is the course that the Philippines took, by issuing a Presidential Executive Order regulating biodiversity prospecting and access to genetic resources in mid 1995. The Philippines wished to establish an initial regulatory framework as quickly as possible, given the slow
pace of congressional legislation, at a time when bio-privacy was rapidly growing and needed immediate measures to control it.

4.8.1.2 Sectoral Law Amendment

In other countries, amendment of existing sectoral laws on, for example, wildlife and national parks, forestry and fisheries could include provisions on access to genetic resources and benefit sharing right, make the best sense. This is the model Nigeria seems to follow so far, working primarily with its law on national parks. One advantage of reforming existing natural resources laws to PIC, benefit sharing and other provisions is that the country can largely use existing administrative measures, policies and institutional structures.

4.8.1.3 Gradualist Approach

Another possibility is to adopt a gradualist approach where a general law or policy is established, with the expectation that it will be followed by more detailed legislation. The advantage of a general law or policy is that it can be set up quickly, and allows countries to prepare themselves adequately before engaging in the formulation of an elaborate national legislation.

4.8.1.4 Contractual Agreements

A final option and most widely used approach, is to deal with access and benefits related to genetic resources through individual contracts between providers and collectors through ad hoc state supervision and monitoring. While contracts of this nature are expected to develop under most access legislation schemes under consideration, a number of countries are moving directly to the negotiation of contracts that reflect the provisions of CBD, even without national legislation being in place.

4.8.2 Guidelines for the Process of developing National Sui generis Legislation

4.8.2.1 Broad Participation

The first point to bear in mind as a guideline is to establish legislation for a national sui generis system requires the broad participation, involvement and inputs from all relevant sectors of government and civil society; and must be supported by institutional processes and capacities sufficient to implement it.

A sound participatory process will encompass:
- Identifying and building a consensus on national objectives and priorities.
- Identifying and mobilizing expertise as well as formation of working groups or committees to address aspects of access and sharing of benefits.
- Conducting an inventory of existing institutional, policy and legal measures governing access to genetic resources and the sharing of benefits.
• discussions in public for and expert consultations to seek input to prove successive drafts of the legislation.

4.8.2.2 An Integrated Approach

In formulating legislation on *Sui generis* systems and other forms of IPR, it is also important that SADC countries adopt an integrated approach, which does not treat the issue in isolation. Legislation should be placed within the broader set of policies and activities aimed at implementing CBD as a whole. The manner in which genetic resources should be regulated should be built into a national planning process – as required by Article 6 of CBD.

4.8.2.3 Need for Capacity-building

Since regulations of access to genetic resources are a new area of law, few countries possess the institutions and human resources to implement these new laws. Building this capacity is a long-term process. However, it is crucial that it begins systematically during the development of the legislation.

4.8.3 Structure and Content of *Sui generis* Legislation

There are some basic elements that countries setting up *sui generis* legislation have to consider regardless of the approach a country takes in enacting this legislation. These elements are inter alia:

• a preamble containing statement of principles and objectives.
• definition of terms or concepts
• provisions elaborating the law’s scope of application
• provision establishing PIC requirements or elements and procedures
• provision of governing monitoring and enforcement of the legislation
• provisions for sharing of benefits provisions on the Participation of interest groups e.g. local communities

4.9 Institutional Arrangements

National legislation will be ineffective if it does not have clear provisions on the institutional arrangements necessary to enforce it. Key elements are the procedures and mechanisms to handle applications for access determination of government and local PIC, and to monitor implementation of the agreement as a whole. Government will need to appoint or create an institutional focal point for co-ordination.
V. THE WAY FORWARD

The plenary session of the workshop discussed and agreed on the following regional positions and the way forward, that:

(a) SADC countries are encouraged to adopt a combination of IPR regimes with the *sui generis* system playing the dominant role.
(b) SDC countries are requested not to sign or accede to UPOV Act 1991.
(c) SADC countries are encouraged to make a through review of the OAU Model to ensure that it effectively and comprehensively captures all sound proposals that contribute to the protection of community resources rights.
(d) SADC countries that have signed and or acceded to UPOV 1991 are encouraged reviewing their positions since it is incompatible with the African Model Legislation and the Regional position.
(e) Responsible SADC sectors such as FSCTU FANR, ELMS, SADC, PGRC should seriously consider developing an appropriate regional instrument to guide regional and national action in conservation and utilization of biological diversity.
(f) The SADC Focal point in Malawi-- Lilongwe, was mandated to co-ordinate IPR activities.
(g) SADC countries are encouraged to formulate IPR policies and legislation based on this workshop's recommendations and the African Model Legislation as revised.