

Draft for Discussion

Towards an Access and Benefit  
Sharing Framework Agreement  
of the Hindu Kush-Himalayan  
Region

ICIMOD

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# **Towards an Access and Benefit Sharing Framework Agreement for the Genetic Resources and Traditional Knowledge of the Hindu Kush-Himalayan Region**

**Draft for discussion**

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## Part One: **Background**

Today, genetic resources are no longer considered a common heritage belonging to all mankind and cannot be treated as 'freely accessible' commodities. The 1992 Convention on Biological Diversity (CBD) and the 2001 FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) recognise the sovereign right of countries to control and regulate the use of their genetic resources and associated traditional knowledge. These two international legal instruments stress that the authority to determine access to bio-genetic resources and associated traditional knowledge rests with national governments and is subject to national legislation. The objectives of the CBD are: a) the conservation of biological diversity, b) sustainable use of its components, and c) the fair and equitable sharing of the benefits derived from the use of genetic resources. Similarly, the objectives of ITPGRFA are: a) the conservation of plants used for food and agriculture, b) their sustainable use, and c) the fair and equitable sharing of the benefits derived from their genetic resources. In this light, access, utilisation, and conservation of genetic resources and their proper conservation and use remain a major concern.

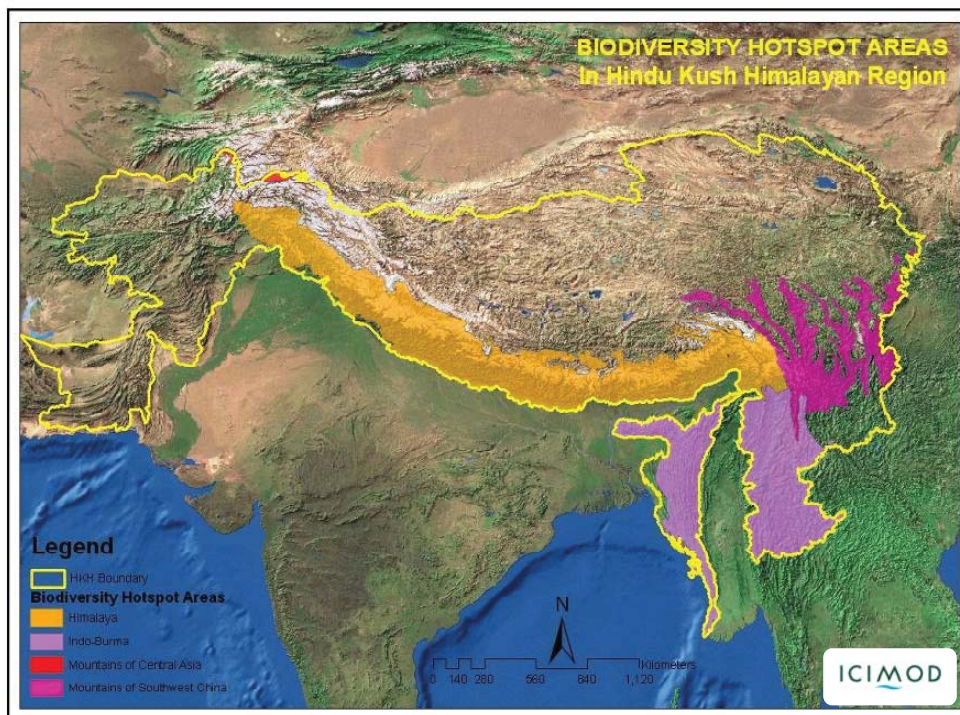
The CBD is a powerful covenant, and the fact that it has been ratified by nearly every country in the world (over 190 ratifications) makes it even more so. Among its components, the one on Access and Benefit Sharing of Genetic Resources (ABS) plays a major role.<sup>1</sup> Article 15 deals with access to genetic resources and the fair and equitable sharing of benefits arising out of their utilisation. In Article 8(j), the CBD calls upon Parties to the Convention to respect, preserve, and maintain the knowledge, innovations, and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity, and to encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations, and practices.

Article 14(1) of the CBD calls for parties to enter into bilateral, regional, and multilateral arrangements for notification, exchange of information, and consultation on activities which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction. This has been supplemented by the adoption of the so-called 'ecosystem approach' by the Conference of Parties (COP) to the CBD through decisions V/6, VI/12, and VII /11 of COP5, COP6, and COP7. These decisions provide a more detailed international framework for enhanced regional cooperation. Regarding biological resources for food and agriculture, a regional committee has been in operation in some Southeast Asian countries since 1977.

In the light of the above, it has become apparent that a regional cooperation framework for access and benefit sharing from the use of genetic resources and associated traditional knowledge of the Hindu Kush-Himalayan region could be beneficial to all the countries in the region, and also for its indigenous/marginalised and local communities. This document offers a basic conceptual background to such an agreement, a draft framework agreement for the attention of regional inter-governmental institutions (RIGIs) and other rightholders and stakeholders in the region, and a proposed roadmap for the discussion and refinement of the draft framework agreement leading to possible adoption and implementation.

## Biological resources and associated traditional knowledge in the Hindu Kush-Himalayan region

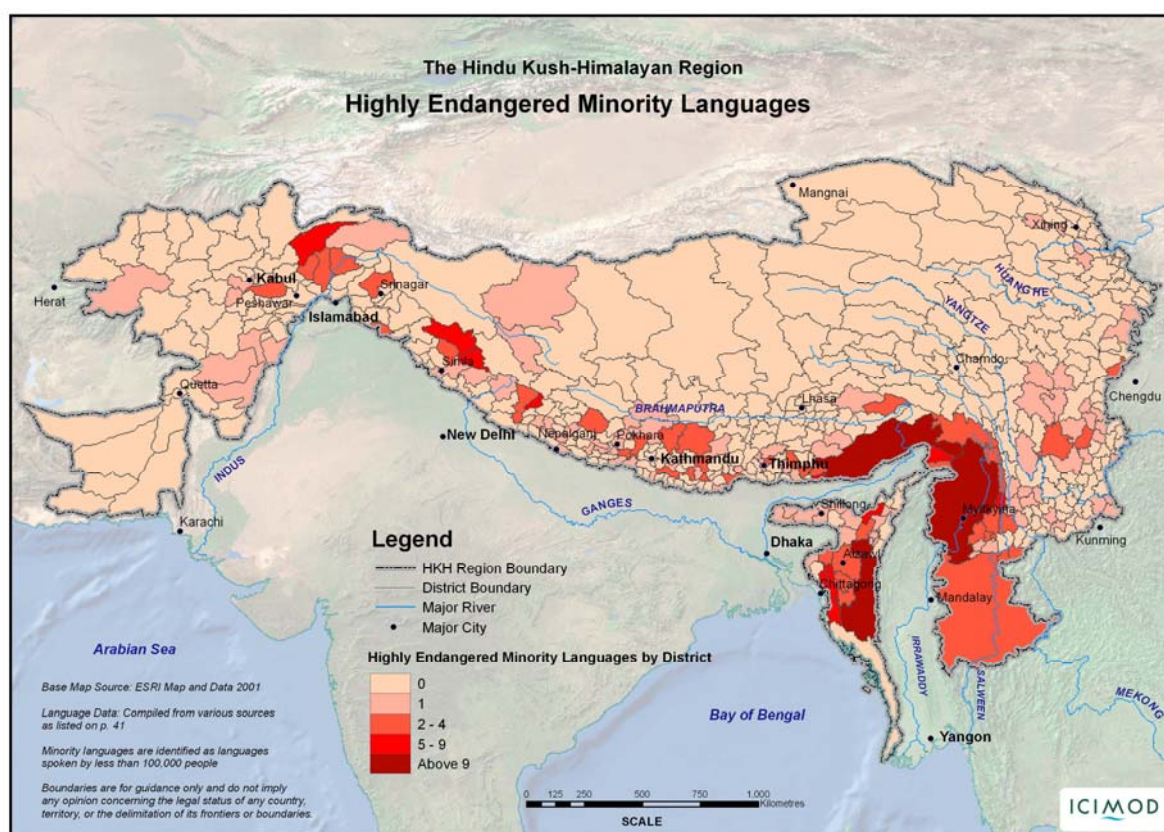
The Hindu Kush-Himalayan region encompasses all or part of eight countries (Afghanistan, Bangladesh, Bhutan, China, India, Myanmar, Nepal, Pakistan) and is home to a large number of people who share a common cultural and biological heritage. Extending over 3,500 km from east to west, this ecoregion is host to the world's highest ecosystems and contains a variety of environments. Mountain environments in general are rich in biodiversity because of the varied altitude, climatic conditions, geological-biophysical conditions, and soil formations. The Hindu Kush-Himalayan region includes all or part of four of the world's 34 biodiversity hotspots, including the 10<sup>th</sup> richest.<sup>2</sup> The region has many rare and endemic species, including relic species from the glacial period. About 30% of Himalayan flora is endemic. Nine thousand plant species have been reported in the virgin forests of the Eastern Himalayas, and the total number of species of plants in the region is estimated to be as high as 25,000 or 10% of the world's total. The diversity of fauna is as rich as that of the plants; endemic animals include the giant panda, golden monkey, sika deer, takin, red panda, lynx, snow leopard, musk deer, and gibbon.<sup>3</sup>



Map 1: Biodiversity hotspots in the Hindu Kush-Himalayan region

The Hindu Kush-Himalayan region is also a 'mega language centre' with more than 1000 spoken languages in the countries of the region (Afghanistan has 45 living languages, Bangladesh 38, Bhutan 24, China 202, India 387, Myanmar 108, Nepal 121, and Pakistan 69). Among these, many, especially in the Eastern Himalayan region, are spoken by less than 100,000 people<sup>4</sup> (Map 2). If we take language diversity as a proxy for cultural diversity we can see that the Hindu Kush-Himalayan region is one of the most important centres of biocultural diversity in the world.





Map 2: Highly endangered minority languages in the Hindu Kush-Himalayan region (Source: Turin 2007)

Throughout the world, genetic diversity relates to local customary systems of natural resource governance and management, which include unique knowledge, skills, and institutions, and can often only be fully expressed through local languages and with reference to related worldviews. We refer to these complex systems as traditional knowledge systems (TKSs).<sup>5</sup> As stressed by the CBD, TKSs are associated with genetic resources and add value to the resources through the knowledge related to such matters as where the resources are located, when and how they should be harvested, what they can be used for, how they interact with other resources, how they can best be propagated, and other information crucial to the sustainable use of such resources. However, TKSs include much more than knowledge; they cover the rules and social institutions developed by societies to make decisions based on that knowledge, to modify and enrich it, and to pass it from one generation to the next. Traditional natural resource governance and management systems are complex phenomena, not readily broken into distinct components or easily 'acquired' (bought or sold) by non-local people. The TKSs of the Hindu Kush-Himalayas are an essential part of the biocultural diversity<sup>6</sup> of the region, where the term 'biocultural' encompasses both biological and genetic resources and cultural features.

The people of the Hindu Kush-Himalayas are considered among the poorest in the world, possibly a result of the region's remote mountainous landscapes and high-altitude environments. Conserving the local biodiversity, preserving related ecosystem functions, meeting the needs of the region's communities, and sharing with them the benefits derived from the fair and equitable utilisation of their natural resources, genetic resources, and associated traditional knowledge are major intertwined challenges.

Many common genetic resources and associated traditional knowledge systems in the region have great potential for reducing poverty among mountain communities. For example, many medicinal and aromatic plants and food crops common to the entire Hindu Kush-Himalayan region have a very high economic value, like the Himalayan yew (*Taxus baccata*), a medicinal plant found throughout the Himalayas whose bark is used for the treatment of ovarian cancer, yarsha gumba (*Cordyceps sinensis*), and chirayita (*Swertia chirayita*)

Another classic example of valuable genetic diversity and associated knowledge is found in the shifting cultivation systems shared by communities of Mizoram and Nagaland (North East India), the Chittagong Hill Tracts (Bangladesh), and parts of China. All these communities grow hot chillies (*Capsicum annuum*) and other food crops applying the same traditional knowledge and practices. Clearly, the development of these hot chillies and associated traditional knowledge systems is claimed by the countries that have these genetic resources, which may create conflicts of interest when it comes to bio-prospecting and benefit sharing.

Over the last decades, there has been growing interest in the potential commercial uses of biodiversity. A 1999 study estimated the size of global markets for the use of genetic resources in the pharmaceutical, seed, cosmetic, horticultural and botanical medicine industries, with figures ranging from US\$ 20 billion a year in the horticultural sector to US\$ 300 billion a year in the case of pharmaceuticals.<sup>7</sup> The actual demand for access to genetic resources, however, has changed in recent years. On the one hand, scientific and technological advances have tended to depress the demand for natural products by the pharmaceutical industry, as other approaches appeared more promising. Today, however, technology and scientific understanding are once again focusing on natural products, as alternative approaches such as combinatorial chemistry have not lived up to their promise. The diversity found in microorganisms, in particular, is of increasing interest to pharmaceutical and biotechnology companies. The full impact of new technological developments on demand for access to genetic resources is still unfolding, but it is likely that nature will continue to be a source of novelty and complexity that will then be modified in the laboratory.<sup>8</sup>

It is primarily the industrialised countries that possess the technological and economic capacity to reap the ever-larger benefits from the commercial use of biodiversity.<sup>9</sup> This imbalance has raised many questions concerning the sharing of benefits from the use of genetic resources, the role and rights of traditional knowledge-holders, and the roles and responsibilities of the countries that use and provide these resources and knowledge.<sup>10</sup> Originally, international trade in plant genetic resources was based on the principle of a common heritage of mankind. This principle was gradually abandoned as property rights and especially patent legislation were reinterpreted to cover biological material.<sup>11</sup>

There has been increasing concern over the ways in which traditional knowledge and genetic resources are being appropriated by corporations and research institutions without adequately sharing the benefits with communities and countries of origin, and often even without their knowledge. There have been several cases over the last years where patents have been granted on inventions based directly or indirectly on genetic resources or traditional knowledge that don't qualify as 'novel' or 'inventive'. Thus, the current patent system frequently gives rise to situations in which so-called inventions pass the novelty or inventiveness test when they shouldn't.<sup>12</sup> And even when they do meet the official patentability requirements,

inventions often incorporate traditional knowledge or genetic resources that have been obtained without prior informed consent and without provisions to share the benefits from the commercialisation of the final product. This misappropriation of plants and cultural knowledge is often referred to as 'biopiracy'. Most initial biopiracy cases involve claims by indigenous people that bio-prospectors have used their knowledge of local flora and fauna to develop new drugs, which yielded high profits that are not shared with the original users. Two famous cases involve the rosy periwinkle of Madagascar, which was developed into a highly effective cancer drug by Eli Lilly & Co, and the hoodia cactus of the San people of Southern Africa, which is being developed into an anti-obesity drug. From the 1990s onward, there has been an escalation in the number of cases of patents being misused to acquire rights to indigenous resources that do not benefit the source country and communities. Examples include neem oil and turmeric from India, and ayahuasca, quinoa, and maca from South America. In some of these cases, patents have been revoked, but only after lengthy legal battles.<sup>13</sup>

Natural ecosystems existed long before the formalising of the political boundaries of the Hindu Kush-Himalayas', and usually do not respect them nor adjust to them in special ways. In particular, political boundaries do not limit the movement of communities of plants and animals, nor the presence of associated knowledge systems. In other words, the countries in the region broadly share genetic resources and traditional knowledge systems. A regional ABS framework agreement appears a logical choice for the governance and management of such an important common heritage.

### **Why a regional ABS framework?**

Almost all countries in the Hindu Kush-Himalayan region have some form of biodiversity policy or plan in place and in some cases legislation.<sup>14</sup> China, Afghanistan, and Myanmar do not have specific ABS legislation, but refer to different pieces of legislation for authority. India developed its Biodiversity Act in 2002, which was enforced through the promulgation of Biodiversity Rules in 2004. State Biodiversity Boards are in the process of being established and State Biodiversity Regulations are being promulgated. Bhutan approved its Biodiversity Act in 2003 and is now in the process of developing its regulations. Nepal has drafted a Bill on Access to Genetic Resources and Benefit Sharing. Similarly, Bangladesh has drafted a Bill on Biodiversity and Community Knowledge Protection and Pakistan has drafted a Biodiversity Law.

Despite these important policy and legal developments, there is little awareness in policy making circles about the nature and extent of trade in and movement of genetic resources and associated traditional knowledge throughout the region. There is also an insufficient flow of information among states concerning genetic resources and associated traditional knowledge, and existing or planned bio-prospecting activities within each national territory. As only broad estimates have so far been available, the region is faced with the challenge of dealing with a process that is, overall, poorly known. Just as information sharing on the issues has been scarce, so have efforts at harmonising ABS legislation across the region. Patterns of extraction of biological resources are often unsound and unsustainable, and access to genetic resources by bio-prospectors from the region and outside is virtually free. In addition, when benefits related to genetic resources are realised, they tend to reach local elites rather than the indigenous and local communities and custodians of these natural resources and associated traditional knowledge.

In summary, the current ABS scenario is one of 'business as usual'. No regional regulatory framework exists for the genetic resources of the Hindu Kush-Himalayan region, the related economic benefits do not accrue to the real custodians and local users of these resources, and unregulated collection is not accompanied by conservation concerns, raising doubts about the long-term viability of extraction practices.

### **Regional cooperation and bargaining power**

The Convention on Biological Diversity (CBD) reaffirms national sovereignty over genetic resources and associated traditional knowledge systems, but national legal frameworks cannot address cross-border concerns and are often unable to stop the unsustainable exploitation of wild flora and fauna through transborder trade. Under current conditions, private companies are also free to strike advantageous deals on access to genetic resources in locations with non-existent or less stringent regulations. As biological resources and their associated traditional knowledge cross national boundaries, companies can easily 'play' one state or community against another.

Ensuring fair access and benefit sharing and a stable supply of biological resources requires cooperation between countries sharing the same ecological landscape. This has been understood by many countries, and several initiatives for regional ABS frameworks have been developed in different regions in the world. The Andean Community of Nations Common Regime of Access to Genetic Resources was enforced on 17 July 1996 and is now effective in five countries (Bolivia, Colombia, Ecuador, Peru, and Venezuela) as a legally binding and rather elaborate instrument.<sup>15</sup> The Central American agreement<sup>16</sup> has recently been enforced, and the Association of Southeast Asian Nations (ASEAN) Framework Agreement<sup>17</sup> is currently in draft form. The African Model Law provides a model for the development of access and benefit-sharing legislation in African countries and is different from the other regimes in the sense that it prescribes a model for each member country to follow, rather than a regional agreement. But there is an emerging regional framework on ABS in the South African Development Community, comprising fourteen southern African countries.<sup>18</sup> Another group, a network of like-minded mega diverse countries across the globe<sup>19</sup>, has also decided to collaborate and to act as a caucus in international fora on biodiversity.

Regional ABS frameworks tend to be developed in areas rich in biodiversity and included into existing regional economic frameworks.<sup>20</sup> Developing such frameworks becomes more urgent when surveillance of access to genetic resources is difficult. This is the case in the Hindu Kush-Himalayas, as unprotected sensitive borders exist in mountainous areas with high levels of biodiversity. Violations of national laws are also not uncommon in the region, an issue that regional cooperation could address. Further, regional cooperation is needed to deal with both sustainable development in border areas and to address pressure on natural habitats related to infrastructure beyond national borders. Overall, the conservation of biological diversity requires sound planning at the ecological landscape level and the regulation of transborder utilisation and trade. A classic example is the trade in medicinal plants, with multiple collection points and different actors spread across at least four countries in the Hindu Kush-Himalayan region.

In light of the above, it is clear that the countries and people of the region would benefit from a common ABS framework. A critical advantage would be the increased bargaining power of

each country. A common framework would also help countries avoid being played off against each other in international negotiations and by bio-prospectors seeking access to the resources owned by more than one country alone. A regional framework could regulate both cross-border trade and bio-prospecting.

In addition, the harmonisation of regional requirements for access and benefit sharing would facilitate technical cooperation among countries, providing both providers and users with better access to information, greater predictability, and streamlined processes. Member countries could also more easily develop and defend a common position in international fora that negotiate ABS and intellectual property right (IPR) issues, such as the Working Group on ABS of the Convention on Biological Diversity. Finally, a regional framework could play an important role in enabling countries to benefit from existing expertise in the region. An example in point is provided by the Andean Pact Agreement. Not only does this agreement provide for the establishment of a common bargaining position, it helps 'poorer' countries to benefit from work already done by countries more 'advanced' in terms of ABS regulation.

### **Community rights**

Another advantage of a regional ABS framework would be its capacity to safeguard the rights of indigenous and local communities and to ensure a fair sharing of benefits with the original stewards of biological resources and holders of associated traditional knowledge.

The CBD obliges member states to protect the traditional knowledge of indigenous and local communities associated with natural resources. In Article 8j, the CBD calls for states to seek the approval of local communities when traditional knowledge is used, and to equitably share with local communities the benefits arising from the utilisation of such knowledge.<sup>21</sup> Further, the CBD Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization stipulates that the rights of indigenous and local communities should be respected and that their prior and informed consent (PIC)<sup>22</sup> should be sought when genetic resources or associated traditional knowledge are being accessed.<sup>23</sup> Furthermore, the rights of indigenous peoples are now enshrined in the UN Declaration on the Rights of Indigenous Peoples, which spells out, among others, the right of indigenous peoples to self-determination; ancestral lands, territories and resources; traditional knowledge and intellectual property; and to prior informed consent.<sup>24</sup>

A regional ABS framework agreement could help all countries in the region to fulfil their obligations, as listed above, by developing and promoting well thought-out mechanisms to recognise the rights and responsibilities of indigenous and local communities. These would include fair processes to obtain prior informed consent (PIC) before access is granted to genetic resources and/or associated traditional knowledge. In this sense, the right of indigenous peoples and local communities to deny access to their resources if they so wish would be recognised, and states would be responsible for respecting and upholding this decision. In cases where access is granted, a regional framework agreement could facilitate equitable, participatory, and transparent negotiations towards mutually agreed terms (MAT) for access to resources and the sharing of benefits.

A regional ABS framework agreement could and should safeguard the rights of indigenous and local communities to use and share their own resources and knowledge in customary ways. For centuries, knowledge about the uses of the region's biological resources has been

developed by communities who have freely shared both resources and knowledge across current political borders. These exchanges have contributed enormously to the biocultural diversity of the region and it is paramount that the region's communities are allowed to continue this practice; prohibiting such exchanges would infringe upon their rights, endanger their livelihoods and, in the long term, erode the biocultural richness of the Hindu Kush-Himalayas. To avoid this, a regional ABS framework agreement could clearly exempt from regulation the customary use and exchange of resources and knowledge among the region's indigenous peoples and local communities.

### **Equitable benefit sharing**

Article 15.7 of the CBD requires Contracting Parties to take measures with the aim of sharing in a fair and equitable way the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Parties providing such resources.<sup>25</sup> In Article 8j, Parties are further called upon to encourage the equitable sharing of benefits arising from the utilisation of traditional knowledge with the indigenous and local communities providing such knowledge. The Bonn Guidelines reaffirm these principles and state that benefits should be shared fairly and equitably with all those who contributed to the resource management, or to their scientific and/or commercial processing.<sup>26</sup> The Hindu Kush-Himalayan communities who have conserved and sustainably managed the wealth of genetic resources in the region and who hold the traditional knowledge associated with them should be the first to draw benefits from their use.

A regional ABS framework agreement could ensure that this is indeed the case, and that the sharing of benefits is based on negotiated MAT. Benefits could be monetary as well as non-monetary,<sup>27</sup> and a balance could be sought between near-term, medium-term, and long-term benefits. The agreement could make sure that attention is paid to the mechanisms of benefit sharing, which should target beneficiaries fairly and in culturally sensitive ways, respecting customary institutions and paying attention to transparency, equity, and accountability. Benefits such as training, capacity building, and technology transfer could also be effectively considered and designed at the regional level.

Importantly, a regional framework agreement offers good opportunities to involve communities in the negotiation of ABS agreements and benefit sharing at various levels. It could set up fora, for example, in which representatives of indigenous peoples and local communities could contribute to the development of region-appropriate avenues, tools, principles, and safeguards for PIC and MAT designed to respect customary laws, institutions, and practices (e.g., respecting 'community protocols' for access) and could contribute to decisions on the allocation of resources, if an ABS-related fund is established.

### **Avoiding misappropriation of genetic resources and traditional knowledge**

The facilitation of access to genetic resources and their likely subsequent commercialisation does raise fundamental issues about the privatisation of resources and knowledge. Perhaps the most contentious issue in any ABS regime is the relationship with property rights, and especially intellectual property rights (IPRs).<sup>28</sup> IPRs, including patents, are awarded to individuals or organisations mainly over inventions and creative works, and give the 'inventor' the right to prevent others from unauthorised use for a limited period (usually 20 years). IPRs become problematic when they are extended to cover biological resources and inventions

derived from these. The granting of proprietary rights over innovations generated on the basis of genetic material from the Hindu Kush-Himalayan region could have far-reaching consequences for access arrangements, because these exclusive rights could be defined so broadly as to cover even unmodified plants or plant components.<sup>29</sup> This would undermine the sovereign rights of Himalayan states over their biological resources, and threaten the rights of indigenous peoples and local communities, especially when traditional knowledge is used to develop the 'invention'.

There have been many cases over the past years where patents have been granted on 'inventions' that have made use of genetic resources and/or traditional knowledge – despite the fact that such inventions should not have passed the novelty test required for patentability, and that the related genetic resources and knowledge may have been obtained without PIC from the original providers and without MAT. Some mechanisms, however, are being developed at the international level to avoid this kind of misappropriation of resources and traditional knowledge. Prominent among these are so-called 'disclosure requirements' in patent applications, which make it mandatory to disclose the origin and legal source of the resource and knowledge, and provide evidence of PIC and existing MAT.<sup>30</sup>

An ABS framework agreement could help the countries in the Hindu Kush-Himalayan region to develop a 'certificate of origin' which would accompany every genetic resource and/or piece of traditional knowledge originating from the region. The countries could introduce this certificate to the Working Group on ABS of the Convention on Biological Diversity, which is currently negotiating an international ABS regime in which disclosure requirements are likely to play a central role. An international regime is crucial, as most cases of misappropriation occur outside the territory of user countries and disclosure will only be enforceable if international rules are created.

### **A chance to ban patenting of the region's plants and animals**

Remedial mechanisms such as disclosure requirements do not address all possible points of friction between the current international IPR regime and the values and practices of traditional communities, which are usually fundamentally at odds with each other. IPRs are designed to protect commercial interests through private property rights, as opposed to protecting subsistence and cultural needs through communal custodianship rights. They are designed to encourage industrial innovation through market incentives for research and development, as opposed to encouraging traditional innovation by safeguarding traditional livelihoods based on the sound management of natural resources.

In traditional communities, resources and knowledge are considered a common property, freely exchanged within and between communities according to customary rules. IPRs clash with the indigenous value of free sharing, which sustains livelihoods and biodiversity, and can undermine local control over resources, indigenous pathways to development, and even community livelihoods in general. In an IPR framework, a new 'invention' may be patented, granting exclusive rights to produce, use, and sell it. IPRs over genetic material could make essential resources, such as seeds, unaffordable, create dependency on external products, and, eventually, replace community values such as communal property and solidarity with a private property ethos.<sup>31</sup> Moreover, patents on life forms contradict the fundamental values held by many communities that nature cannot and should not be owned.

Considering these and other issues, and following the example of the draft ASEAN ABS Framework, it would be wise for the Hindu Kush-Himalayan region countries to take a similar stand. Development of a regional ABS framework agreement would provide the best chance to do this. Importantly, the exclusion of plants and animals from patenting is fully allowed under the World Trade Organization's (WTO's) Trade and Intellectual Property Rights (TRIPs) agreement. WTO member states are not obliged to grant patents for higher taxonomic levels of plants and animals (e.g., species or genera), but are required to provide patent protection, or an effective sui generis system, for plant varieties.<sup>32</sup> This means that even in the case of plant varieties, patents can be replaced by other systems of protection such as sui-generis systems. Indeed, this would be an advisable option for the protection of biodiversity from the Hindu Kush-Himalayan region.

### **Facilitating the sharing of information**

Sharing information about the distribution and use of genetic resources is essential to promote cooperation among countries and communities, facilitate access to genetic resources, and achieve fair and equitable sharing of benefits across the Hindu Kush-Himalayan region. A regional ABS framework could play an important role in this sense: establishing a clearinghouse to store and distribute knowledge about genetic resources, making it freely available to all interested parties in the region, and ensuring transparency in the negotiation of access and benefits among countries and broadly in civil society. Transparency and the full disclosure of negotiated agreements are crucial elements of a fair and equitable ABS regime.

The indigenous peoples and local communities that provide information about their genetic resources and associated traditional knowledge should retain full access to this information and be able to decide (through prior informed consent procedures) whether or not such knowledge should be collected, stored, shared, used, and so forth. The regional ABS framework could ensure the respect of such rights.

### **Promoting the conservation of biocultural diversity through a regional fund**

An ABS regional framework could and should promote the sustainable use of biocultural diversity via a well thought-out structure of benefit sharing. First and foremost, and whatever the mechanism in place, it would be important to ensure that the benefits actually accrue to the custodian communities and are clearly linked by them to maintaining the presence of the relevant genetic resources and the meaning of the related knowledge systems. It would also be most useful if the ABS framework could consciously and openly orient benefit sharing towards valuing, upholding, and conserving the biocultural diversity of the region. The same framework could also promote safeguards so that the region's genetic resources and cultures are not negatively impacted by uncontrolled access and excessive exploitation.

A good avenue towards these ends would be a regional fund for genetic diversity and traditional knowledge, fed by part of the benefits negotiated when granting access to genetic resources through MATs. The fund could also be sourced from a portion of whatever is imposed as the appropriate charges and fees on access applications.

The fund (see Figure 1) would be used to provide incentives to the indigenous and local communities, the custodians of biocultural diversity, and/ or to support a variety of appropriate conservation initiatives at regional, national, and local levels. The fund could:



- Reward customary community institutions and individuals who keep alive biodiversity-related knowledge and skills
- Reward indigenous and local communities that actively engage in the conservation of biocultural diversity
- Support policies and initiatives that promote the conservation of biocultural diversity (e.g., initiatives that strengthen and support community conserved areas, train teachers and revise school curricula and textbooks, or promote trade rules)
- Implement environmental impact assessment (EIA) of bio-prospecting/harvesting of natural resources, as necessary.

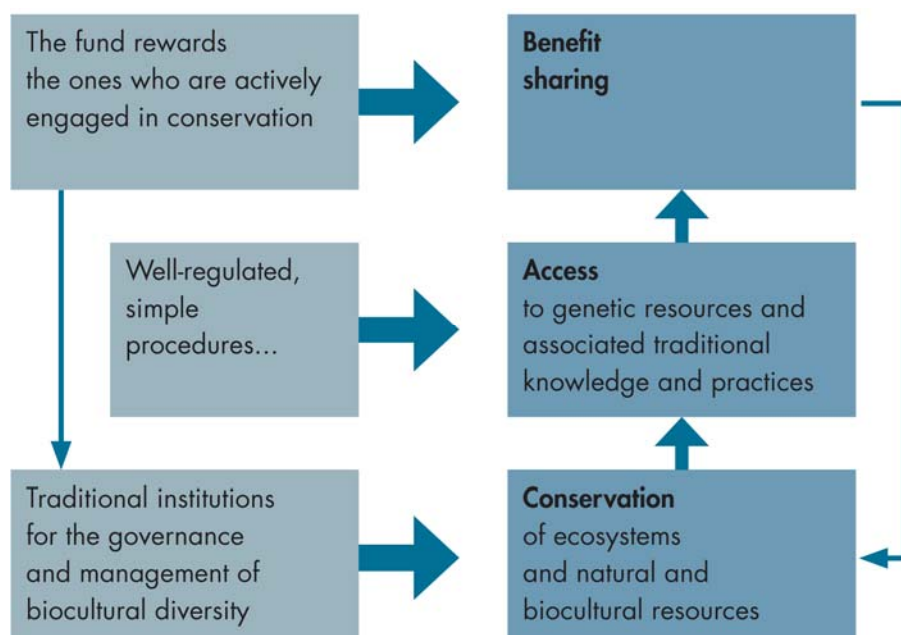


Figure 1: Regional fund for genetic diversity and traditional knowledge

In general, any harvesting of wild genetic resources accessed through a regional ABS framework (in particular, any ongoing commercial extraction of resources) should be preceded by a social and environmental impact assessment. Such a precautionary approach, ensuring that the sustainable yield of the resources is not exceeded and ecosystems are not damaged, should be combined with culturally sensitive methods of harvesting.

### Potential structure of a regional ABS mechanism

A regional ABS mechanism to respond to the collective interests of the countries and communities in the Hindu Kush-Himalayas should have the capacity to gather and deal with information on the region's genetic resources and associated traditional knowledge and facilitate effective and equitable processes of access and benefit sharing. It could comprise a decision making body (standing committee), a secretariat, and a clearinghouse for information, all possibly hosted by an RIGI. The mechanism would have to remain in very close contact with the key stakeholders and rightholders in the region (signatory countries, custodian communities, national and regional institutions with relevant mandates and capacities, and so forth) and act on their behalf. The mechanism would facilitate and regulate both access and benefit sharing, and promote a variety of avenues and tools towards this, including the aforementioned regional fund for genetic diversity and traditional knowledge (see Figures 1 and 2).

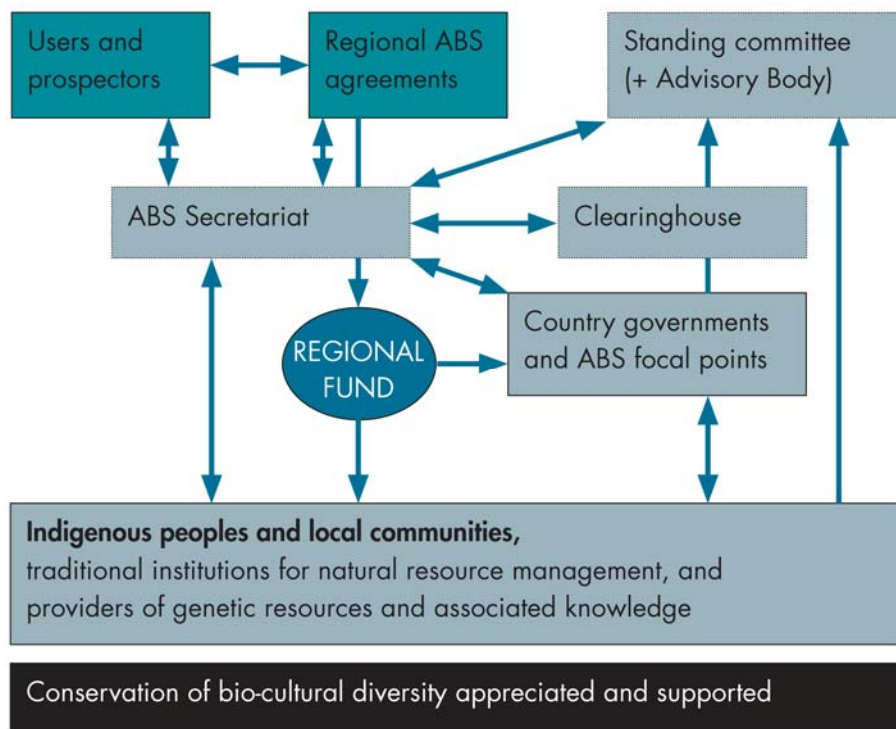


Figure 2: Potential structure of a regional ABS mechanism

The standing committee should include representatives of the competent national authorities of all signatory countries. It could be assisted by a consultative body including representatives of provider indigenous and local communities, civil society organisations, concerned businesses and industry, research institutions/academia, botanical gardens and other ex situ collection holders, non-government organisations, and relevant international organisations.

### Potential key actors and emerging cooperation

Several international and national institutions are currently collaborating with countries and people in the region to formulate biodiversity conservation policies and laws. The International Centre for Integrated Mountain Development (ICIMOD), in particular, is crucially engaged in promoting the effective implementation of the third objective of the Convention on Biological Diversity (the fair and equitable sharing of the benefits arising from the use of genetic resources). As part of this, ICIMOD launched a project on ABS encompassing activities in Nepal, India, Bangladesh, and Bhutan and is investigating ways in which governments, civil society, communities, and marginalised people can develop their own capacities, gain benefits from access to genetic diversity, and promote the sustainable use of biological resources. The project is working with partner institutions (government bodies, academic bodies, and civil society organisations) to raise awareness about ABS and promote interest towards a common ABS framework and mechanism for the Hindu Kush-Himalayan region. The project is also collaborating with various partners to document biodiversity-related traditional knowledge and to incorporate ABS issues in training curricula.

In many ways, RIGI type of institution would be ideal to facilitate implementation of a regional ABS framework, and it would be most appropriate if such an institution would be made responsible, with other regional institutions such as ICIMOD, towards this. The challenge is to

ensure that the emerging framework does not become another layer of bureaucratic decision-making procedures, but a lean, competent, and effective ABS mechanism that facilitates access to biological resources and benefit sharing in an effective, transparent, and equitable manner. An RIGI could meet this challenge by developing its capacities and including the new framework in the existing climate of economic integration and structures. ICIMOD could help with technical backstopping and linkages with professional bodies and civil society representatives in the region.



## Part Two: **Draft Framework Agreement for the Hindu Kush-Himalayan Region**

### **Preamble stating key principles**

The Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Kingdom of Bhutan, the People's Republic of China, the Republic of India, Myanmar, the Federal Democratic Republic of Nepal, and the Islamic Republic of Pakistan, all Parties to the Convention on Biological Diversity (hereinafter referred to as signatory countries)

**Proud** of the enormous richness in biological and cultural diversity of the Hindu Kush-Himalayan region shared among all of them

**Aware** that the maintenance of this biological and cultural diversity is of immense and crucial common interest because of its:

1. identity, cultural and spiritual value for the peoples of the region;
2. livelihood and economic value (e.g., for food, medicinal substances, building and handicraft materials, commercial and industrial applications, carbon sequestration, tourism, and so forth); and
3. strategic value (e.g., as it relates to water purification and water absorption, the prevention of disastrous floods, and the provision of the headwaters of the ten major rivers of the region)

**Informed** that all such values are also embedded in the genetic information of the biodiversity that has the Hindu Kush-Himalayas as the 'region of origin', and that the economic and strategic importance of such information is likely to increase exponentially as part of the ongoing biotechnology revolution

**Mindful** that biological and cultural diversity are profoundly inter-related and that native communities and indigenous peoples of the region have historically contributed to the conservation of such biodiversity and its enrichment through the selection and development of new cultivars and breeds (agro-biodiversity)

**Conscious** that the native communities and indigenous peoples of the region have historically developed a variety of institutions for the governance of local biodiversity, and that such institutions comprise traditional knowledge, skills, practices, organisations, values, worldviews and languages adapted over time to the local context and generally acting as a whole

**Recalling** the main objectives of the Convention on Biological Diversity, i.e., the conservation of biological diversity, the sustainable use of natural resources, and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources, as well as the provision of the Convention that declares nation states as having sovereignty over genetic resources<sup>33</sup>

**Noting** the numerous decisions of the Conference of the Parties to the Convention on Biological Diversity promoting and encouraging regional approaches to access and benefit sharing arrangements<sup>34</sup>

**Recognising** that access to genetic resources, their derivatives and associated traditional knowledge is formally regulated in some, but not yet all, of the countries of the region and that effective protection from 'biopiracy' should be prudently and rapidly set in place at the regional level

**Stressing** that benefits of scale, equity and collaboration among the countries of the region are to be expected upon the establishment of a regional framework that upholds the conservation of the genetic resources, derivatives and associated traditional knowledge of the region, regulates access to the same, and ensures the fair and equitable sharing of the benefits deriving therefrom

**Valuing** the proud characteristics of strength, spirituality and ingenuity of the people in the Hindu Kush-Himalayan region and their capacity to live in difficult and demanding environments

**Highlighting** that eradicating the scourge of poverty as agreed in the Millennium Development Goals and ensuring respect for human rights have great relevance in the Hindu Kush-Himalayan region

**Upholding** both the precautionary principle and the primacy of the individual and collective rights of the Hindu Kush-Himalayan people in particular, but not solely, in relation to traditional knowledge of biological and genetic diversity

## **AFFIRM THEIR STRONG RESOLVE TO COLLABORATE TO**

**Conserve** the biodiversity and natural resources of the Hindu Kush-Himalayan region, embedded within which are the region's identity and its cultural, spiritual, economic and strategic values, for all its peoples

**Respect and value** the traditional knowledge of the region's peoples and the customary institutions and laws that have developed and maintained this knowledge and that have governed natural resources through the test of time – which are both fundamental tenets of the cultural diversity of the region

**Ensure** the maintenance of the regional biocultural diversity as a sacred heritage of humankind, rejecting the application of any patent system thereon

**Facilitate** the transparent, fair and well-regulated access to genetic resources, their derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region for the benefit of the people of the region and the rest of the world

**Adhere** to the fundamental principle that the prior informed consent (PIC) of provider countries and communities needs to be secured before regulated access can take place

**Develop** mutually agreed terms (MAT) to regulate access to genetic resources, their derivatives and associated traditional knowledge within the Hindu Kush-Himalayan region and to ensure a fair sharing of the related monetary and non-monetary benefits among the

concerned countries and indigenous and local communities, the stewards of that biodiversity and providers of that knowledge

**Uphold** the basic principle that the benefits from access to genetic resources, their derivatives and associated traditional knowledge should reward both the countries and the indigenous and local communities that actively engage in the stewardship, conservation and sustainable use of these resources and knowledge, and that traditional knowledge should be accessed in conformity with the customary institutions and laws of the concerned communities

**Strive** to ensure the uniformity and consistency of mutually agreed terms and related regulations in the Hindu Kush-Himalayan region to maximise monetary and non-monetary benefits for the concerned countries and peoples

## **AND HEREBY AGREE AS FOLLOWS**

### **Objectives**

- i. To preserve the biological and cultural diversity of the Hindu Kush-Himalayan region, promote the use of its natural resources in ways that are sustainable and equitable, and promote human wellbeing and security through the maintenance of ecosystem functions and integrity;
- ii. To strive towards food sovereignty based on local food crop germplasm and traditional knowledge already widely dispersed and utilised in the Hindu Kush-Himalayan region;
- iii. To develop an ABS framework to provide certainty about origin/source/legal provenance and set the minimum requirements for access to, and benefit sharing from, genetic resources, derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region;
- iv. To ensure and enforce the rights and obligations of users who comply with agreed requirements and prevent the misappropriation and misuse of genetic resources, their derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region;
- v. To enhance economic and social welfare and ensure that maximum and equitably shared benefits from access to genetic resources, their derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region accrue to both countries and communities of origin, consistent with the principle of prior informed consent;
- vi. To accord respect, recognition, protection and support to the traditional knowledge of the indigenous and local communities and customary institutions governing natural resources in the Hindu Kush-Himalayan region, ensuring that access to such knowledge properly compensates the rightful individuals and communities;
- vii. To ensure that the customary uses of biological and genetic resources, their derivatives and associated traditional knowledge by indigenous and local communities are maintained unencumbered in accordance with customary practices and local traditions;
- viii. To promote scientific, technical and economic cooperation among the countries in the Hindu Kush-Himalayan region and ensure that access regulations to genetic resources, derivatives and associated traditional knowledge are uniform and consistent with the minimum requirements set out in this Framework Agreement; and

- ix. To strengthen capacities and initiatives dealing with access to and benefit sharing from genetic resources, their derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region at the regional, national and community levels.

## **Definition of terms**

Under this Framework Agreement, the following terms shall mean:

**Biological resources** – Genetic resources, organisms or parts thereof, populations or any other biotic component of ecosystems with actual or potential use or value for humanity

**Genetic resources** – Information and materials, organisms or any other biotic component of ecosystems that contain functional units of biological heredity with actual or potential use and monetary or non-monetary value for humanity<sup>35</sup>

**Derivatives** – Any extract from biological and genetic resources such as blood, oil, resin, genes, seeds, spores, pollen and the like, as well as the products derived from, patterned on, or incorporating manipulated compounds and/or genes

**Traditional knowledge** – Knowledge, skills, practices and innovations of indigenous and local communities mostly, but not exclusively, as they relate to the properties, values, processes and use of biological resources [Traditional knowledge is usually embedded in traditional knowledge systems, uniquely related to local institutions, local languages and culture-specific worldviews.]

**Access to genetic resources** – The acquisition and use of genetic information and samples and/or their derivatives for the purpose of industrial application, commercial use, bio-prospecting, research and conservation, among others [It can be granted via a suite of possible permits, licences, contracts or other relevant instruments.]

**Bio-prospecting** – The active search for genetic resources, including in wild and domesticated biodiversity, and associated knowledge for any type of industrial, commercial or intellectual use

**Biopiracy** – The unauthorised and uncompensated collection for commercial ends of genetic resources and/or traditional knowledge (including when acquired by deception or failure to fully disclose the motive behind the acquisition) and/or the theft or misappropriation of, or unfair free-riding on, genetic resources and/or traditional knowledge through the patent system

**Resource providers** – Legal and customary owners of natural resources at federal, state and local levels, with emphasis on the traditional institutions of the indigenous peoples and local communities that have governed natural resources in ways that have withstood the test of time, developed associated traditional knowledge systems, and are actively engaged in the preservation and sustainable use of biocultural diversity



**Indigenous peoples and local communities** – Human groups defined according to the International Labour Organization (ILO) Convention 169 by characteristics related to their identity, territory, culture, tradition and knowledge.

**Prior informed consent** – Prior informed consent is the approval in advance for the use of genetic resources and any associated traditional knowledge.<sup>36</sup> Originally conceived (in ethics) in reference to the individual as a protection from physical harm, it is increasingly being extended to collective and non-physical contexts. Consent is a process clearly different from and more demanding than consultation.

**Region of origin** – Region where relevant plants, animals or microbial species developed their distinctive properties and characteristics.

**Certificate of origin /source /legal provenance** – A certificate of origin is a passport for genetic resources that enables the tracking of resources to the physical point of in situ collection and which is checked by the patent authorities at border crossings or in view of commercial applications. A certificate of source is similar, but tracks the genetic resource only as far as the place where the user obtained it, which may be a collection or depository, and not necessarily the country of origin. A certificate of legal provenance in addition, documents evidence that the resources have been obtained from a legally entitled provider.<sup>37</sup>

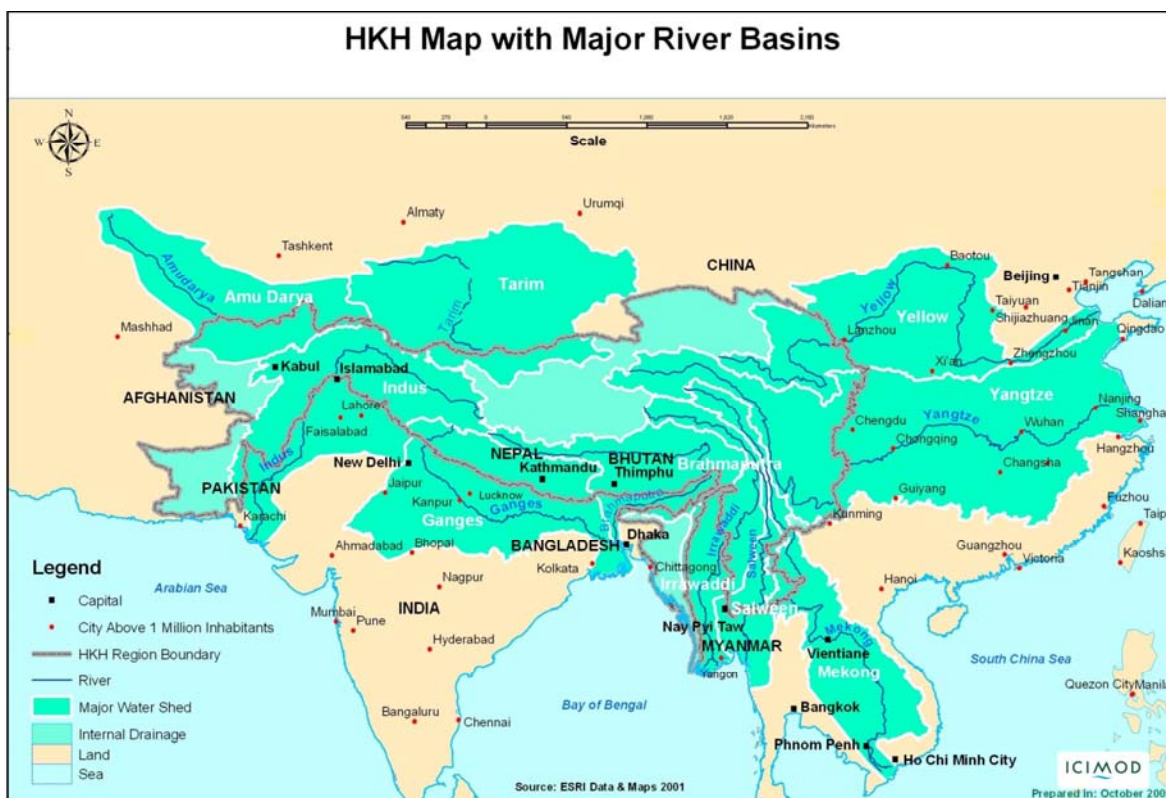
## **Scope and coverage**

In accordance with international obligations and national legislations, this Framework Agreement:

- applies to all biological and genetic resources that originate in the Hindu Kush-Himalayan region (see Map 3) and the traditional knowledge associated therein [access to biological and genetic resources shall not automatically mean access to the traditional knowledge associated with the resource, which shall be explicitly indicated in the application for access]; and
- does not apply to the uses and sharing of biological and genetic resources by indigenous peoples and local communities of the region in accordance with their customary practices and traditions [all other individuals, agencies and institutions shall comply with the access regulations established by the Framework Agreement].

The countries signatory to this Framework Agreement:

- shall not allow the prospecting, patenting and/or application of any intellectual property rights on genetic materials of human origin;
- shall not allow the patenting of plants, animals, micro-organisms or any parts thereof, and traditional knowledge originating from the Hindu Kush-Himalayan region;
- shall consider any biological or genetic material originating from the Hindu Kush-Himalayan region and collected prior to the adoption of the Convention on Biological Diversity as ex situ materials held in trust for the benefit of humankind in relation to which the application of intellectual property rights shall not be allowed.



Map 3: Hindu Kush-Himalayan region

### Competent national authorities

The countries signatory to this Framework Agreement designate their respective Competent National Authorities, which are responsible for:

- formulating and implementing national legislation on access and benefit sharing;
- establishing procedures for the granting of prior informed consent at the national and local levels with the direct involvement of resource providers;
- disseminating information on access and benefit sharing regulations;
- establishing links with the regional Standing Committee, ABS Secretariat and ABS Clearinghouse once established; and
- providing to the regional ABS Clearinghouse any information they consider of regional importance.

### Regional ABS Mechanism

A Regional ABS Mechanism shall be created to respond to the collective interests of the countries and communities in the Hindu Kush-Himalayan region regarding genetic resources, derivatives and/or associated traditional knowledge. The Regional ABS Mechanism shall:

- seek, collect, classify, maintain and share relevant information;
- provide, as appropriate, certificates of regional origin/ source/ legal provenance;
- receive applications for access and ensure compliance with prior informed consent (PIC) requirements from the rightful resource providers;
- ensure open, transparent and inclusive negotiation processes towards mutually agreed terms (MAT) of access, involving providers and any other interested party;
- oversee and ensure the fair and equitable sharing of access-related benefits; and

- ensure that the implementation of this Framework Agreement is regularly monitored and evaluated, and that it evolves following explicit needs and lessons learned.

The Regional ABS Mechanism will comprise a Standing Committee, a Secretariat and a Clearinghouse for information, and will possibly be hosted by an RIGI and manage a number of avenues and tools for benefit sharing, including a Regional Fund for Genetic Diversity and Traditional Knowledge.

The Standing Committee will be composed of the representatives of the competent national authorities. It will be assisted by a Consultative Body including representatives of provider indigenous and local communities, civil society organisations, concerned businesses and industry, research institutions/academia, botanical gardens and other ex situ collection holders, non-government organisations and representatives from relevant international organisations.

The Standing Committee shall be responsible for:

- formally agreeing on terms of access and granting access for genetic resources and/or associated traditional knowledge found in more than one country in the region, ensuring compliance with prior informed consent and mutually agreed terms requirements involving all resource providers;
- settling disputes between and among signatory countries;
- formally agreeing on the allocation of resources from the Regional Fund for Genetic Diversity and Traditional Knowledge; and
- supervising the Regional ABS Secretariat.

The Consultative Body shall be responsible for:

- providing advice to the Standing Committee, upon request, on all matters of its responsibility, and, in particular, on terms of access and granting access;
- providing the Standing Committee with specific recommendations on the allocation of resources from the Regional Fund for Genetic Diversity and Traditional Knowledge (see below);
- assisting the ABS Secretariat in setting out dialogue and experts exchanges on relevant subjects in the region;
- providing the Standing Committee, ABS Secretariat and Clearinghouse with specific recommendations to render their performance as effective and equitable as possible;
- assisting the ABS Secretariat in monitoring and evaluating the status of implementation of the Framework Agreement; and
- identifying some of its members, on a rotational basis, to act as ombudspersons and hear/respond to any sensitive complaint or proposal from any interested party.

The ABS Secretariat shall be responsible for:

- serving as entry point for applications for access to genetic resources and associated traditional knowledge from the region;
- processing applications for access and relaying them to the Standing Committee for approval and negotiation of terms, if the genetic resource and/or associated traditional knowledge in question is found in more than one signatory country;

- relaying the application to the competent national authority, if the genetic resource and/or associated traditional knowledge in question is limited to the territory of one state;
- providing technical and legal support to competent national authorities and local resource providers, as appropriate;
- issuing certificates of regional origin/source/legal provenance, as appropriate;
- promoting dialogue and expert exchanges on the region's genetic diversity, associated traditional knowledge, and links among genetic diversity, traditional knowledge, and customary institutions, laws, practices and tenure rights;
- promoting dialogue and expert exchanges on the need for and opportunities presented by developing a specific Hindu Kush-Himalayas gene bank as well as branding such as 'Hindu Kush-Himalayan' (or other) labels;
- promoting dialogue and expert exchanges on the opportunities presented by linking support to communities 'avoiding deforestation' and maintaining/establishing community conserved areas where biocultural diversity can thrive;
- promoting regional learning networks on ABS matters among field-based sites where indigenous and local communities and national authorities collaborate towards the conservation and sustainable use of genetic diversity and associated traditional knowledge;
- supporting competent national authorities and/or national ABS committees comprising a variety of relevant rightholders and stakeholders to carry out social communication campaigns on the needs and benefits of valuing and upholding biocultural diversity and on a variety of avenues and tools towards this end (e.g., community conserved areas, community biodiversity registers, community protocols for access, scenario workshops, citizen juries, processes to locally govern and share the benefits of biodiversity, and so forth);
- developing a collection of best practices and recommendations relevant for the effective and equitable implementation of the Framework Agreement in the region;
- monitoring the implementation of national access legislation and warning signatory countries on applications that have been denied by other countries in the region by disseminating information on the reasons and circumstances for such refusal or rejection;
- reporting to the Standing Committee on the status of implementation of the Framework Agreement; and
- supervising the regional Clearinghouse.

The Clearinghouse shall be responsible for:

- establishing and maintaining a database on the status of biodiversity and genetic resources in the Hindu Kush-Himalayan region and, as feasible, species distribution maps;
- establishing and maintaining a digital library on traditional knowledge in the Hindu Kush-Himalayan region;
- establishing and maintaining a database of access applications and agreements;
- providing relevant information, as appropriate, to resource providers, resource users and competent national authorities;
- ensuring that information deemed confidential by the resource providers (signatory countries, and/or the indigenous and local communities stewards of the genetic resources and holders of the associated traditional knowledge) is not shared with

- parties other than the resource providers themselves and is subject to appropriate security precautions; and
- serving as an information node to which signatory countries that have allowed access to genetic resources shall report such access and from which information is disseminated to other countries in the region.

### **Regional Fund for Genetic Diversity and Traditional Knowledge**

The signatory countries shall create a Regional Fund dedicated to the conservation of biocultural diversity, and in particular of genetic diversity and related traditional knowledge. Contributions to this Fund shall be sourced from a share in the revenue derived from access to and use of genetic resources and traditional knowledge held in common by the signatory countries. This will be negotiated as part of the benefit-sharing arrangements in each MAT. Funds shall also be sourced from a portion of the fees and charges imposed on each access application submitted.

The Fund shall be used to compensate communities for their engagement in support of biocultural diversity. The disbursement of financial resources to communities shall be implemented in a manner that fully recognises and respects the customary institutions of these communities and in compliance with their diverse customary laws and practices. The ABS Secretariat shall be responsible for the operation of this Fund while decisions regarding allocations will be taken by the Standing Committee on the basis of specific criteria and recommendations from its Consultative Body.

### **Access to genetic resources, derivatives and products**

States have sovereign rights over their own genetic resources and the authority to determine access rests with national governments subject to national legislation and the prior informed consent of the provider communities.

Following this Framework Agreement, access to genetic resources and their derivatives that can be considered as the common heritage of the Hindu Kush-Himalayan region can also be determined by the Regional ABS Mechanism following a set of minimum terms and conditions agreed by all signatory countries.

A set of minimum terms and conditions – in relation to access applications, procedures for prior informed consent (PIC) and mutually agreed terms (MAT), types of contracts, benefit sharing arrangements, the execution of contracts, and limitations on this agreement, violations, sanctions, and so forth – shall be developed by the Regional ABS Mechanism and applied to regional contracts, subject to approval by all countries signatory to the Framework Agreement.

Access to genetic resources, their derivatives and products shall be dependent upon PIC and benefit sharing arrangements as part of MAT.

Access procedures shall be clear, simple, and transparent and provide legal certainty to users and providers of genetic resources.

Mutually agreed terms for access to and specific uses of genetic resources, their derivatives and products should include conditions for their transfer to third parties, subject to national

legislation of countries of origin; in case such conditions are not explicit, transfer to third parties shall be considered illegal.

### **Environmental and social impact of access**

Signatory countries shall adopt measures aimed at impeding genetic erosion or the degradation of the environment and biocultural diversity as a consequence of access. Such consequences shall be examined by considering both local (community-related) and non-local foreseeable phenomena and changes. In all cases in which extended extraction is envisaged, an Environmental and Social Impact Assessment (ESIA) shall be conducted with the active involvement of the provider communities before access to a genetic resource is granted. If a danger of serious and irreversible damage exists, the precautionary principle should apply and the lack of scientific certainty shall not be considered as a valid reason for postponing the adoption of effective measures to prevent such damage.

The ABS Secretariat shall work in cooperation with multi-disciplinary ESIA teams that will seek to develop as rapid and reasonably accurate an assessment as possible with the active involvement of the provider communities. The ABS Secretariat will submit the results of the study to the Consultative Body, which will review the assessment and submit specific recommendations to the Standing Committee for the conditions of granting access, if any, in all controversial cases.

The Standing Committee shall agree and establish restrictions or prohibitions on access to genetic resources their derivatives and products as needed and, in particular, in the following cases:

- endemism, rarity or danger of extinction of species, subspecies, varieties, races or breeds;
- danger of genetic erosion or loss of ecosystems, their resources or their components;
- undesirable or not easily controlled environmental effects of access activities on ecosystems;
- adverse effects upon human health or upon the quality of life or the cultural values of local communities;
- non-compliance with rules on biosafety or food security; and
- use of resources for purposes contrary to national interests or relevant international agreements endorsed by the country.

### **Prior informed consent and engagement of indigenous and local communities in negotiation processes**

The prior informed consent of the countries providing the biological and genetic resources is necessary before access to genetic resources can take place. The competent national authorities shall establish legally-binding procedures for the granting of prior informed consent up to the local level, with the active engagement of the traditional institutions that embody traditional knowledge, skills, practices, values, languages and worldviews related to the genetic resources at stake.

The prior informed consent process shall respect and comply with the customary laws, practices and protocols of indigenous and local communities and the disclosure of any

information pertaining to the access shall be in a language understandable to the local communities.

The applications for prior informed consent shall be accompanied by a full disclosure, at a minimum, of the following information:

- name of the researcher, collector and collaborators;
- specific area and location of the proposed bio-prospecting activity;
- defined period when the collection activities will take place;
- specific purposes, objectives, resources to be used, activities and methodologies;
- expected outputs;
- names and background of local collaborators;
- potential environmental and ecological impact of bio-prospecting activities; and
- potential benefits to the region, countries and communities of origin.

The ABS Secretariat and Consultative Body shall develop as soon as possible after the entering into force of the Framework Agreement a regional compilation of best practices and recommendations for prior informed consent and shall assemble information on expert facilitators to assist signatory countries upon request.

### **Equitable benefit sharing**

Minimum conditions for the equitable sharing of the benefits arising out of the use of genetic resources, their derivatives and products from more than one signatory country shall be regionally stipulated and be based on the prior informed consent of the providers of such resources.

Minimum conditions for the sharing of the benefits arising out of the use of traditional knowledge, practices or innovations associated with genetic resources, their derivatives and products from more than one signatory country shall be regionally stipulated and shall be based on the prior informed consent of the providers of such knowledge.

Mutually agreed terms will be developed between the Regional ABS Mechanism and the access seekers with the active involvement of concerned indigenous and local communities and the competent national authorities of the countries signatory to this Framework Agreement, as appropriate.

Mutually agreed terms may stipulate monetary and/or non-monetary benefits and conditions for the use of genetic resources, their derivatives and products, and associated traditional knowledge and practices.

The Regional ABS Mechanism shall establish basic benefit-sharing obligations, including the distribution of benefits through financial avenues and tools (such as the Regional Fund for Genetic Diversity and Traditional Knowledge) to be applicable in the absence of specific provisions for access arrangements.

Where the country of origin of the accessed genetic resources their derivatives or products cannot be identified, any related monetary benefit shall accrue to the regional financial

mechanism and the non-monetary benefits shall be made available to those parties that apply for them.

The countries signatory to this Framework Agreement shall establish measures to ensure the fair and equitable sharing of benefits from the results of research and development, including through facilitating access to the results of such research and development, and differentiating between commercial and non-commercial uses of genetic resources.

Benefits shall be directed in such a way as to promote the conservation and sustainable use of biological diversity and associated cultural diversity.

Intellectual property rights applications that concern genetic resources, their derivatives or products, or associated traditional knowledge from the Hindu Kush-Himalayan region should disclose the region of origin/source/legal provenance of such genetic resources, derivatives and products, or associated traditional knowledge, as well as evidence that provisions regarding prior informed consent and benefit sharing have been complied with.

Remedies to sanction lack of compliance with the requirements set out in the above paragraph must include, inter alia, the revocation of the intellectual property rights in question, as well as co-ownership of the intellectual property and its transfer.

If the disclosed information is incorrect or incomplete, effective, proportionate and dissuasive sanctions should be envisaged outside the field of patent law.

### **Recognition and protection of traditional knowledge associated with genetic resources, derivatives and products**

The countries signatory to this Framework Agreement recognise and agree to protect the customary rights, knowledge, skills, practices, institutions, values, worldviews and languages of the indigenous peoples and local communities of the region and strive to ensure the equitable sharing of benefits arising from their utilisation.

The communal intellectual rights of indigenous peoples and local communities, shall remain inalienable, and shall be protected under the Regional ABS Mechanism established by this Framework Agreement.

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 concerned communities under their customary practices and laws. Non-registration of any community innovations, practices, knowledge or technologies shall not be taken to mean that these are not protected by communal intellectual rights.

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 communal intellectual rights in relation to those resources.



## **Certificate of origin/source/legal provenance**

The ABS Secretariat, in close cooperation with the Clearinghouse, may establish certificates of origin/source/legal provenance of genetic resources, derivatives, and products from the Hindu Kush-Himalayan region and a system for certifying the provenance of such resources and the legal utilisation of associated traditional knowledge and practices.

Such certificates of origin/source/legal provenance should be an integral part of PIC and MAT arrangements, which in turn may be used as conditions for any sui generis intellectually property applications.

The certificate of origin/source/legal provenance may be used as a means of complying with the disclosure requirements according to national legislation.

## **Implementation, monitoring, compliance and enforcement**

The countries signatory to this Framework Agreement shall establish processes for implementing and monitoring this Framework Agreement, as well as reporting procedures to the Regional ABS Mechanism.

The Regional ABS Mechanism shall foster cooperative procedures and institutional mechanisms to ensure compliance with this Framework Agreement by all signatory countries and users of genetic resources, their derivatives, products and associated traditional knowledge, and to prevent their misappropriation (e.g., appropriation by unfair means, or under false premises and misleading or incomplete information) and unauthorised access and use.

The Regional ABS Mechanism shall facilitate collaboration among relevant enforcement agencies in both provider countries in the Hindu Kush-Himalayan region and user countries outside the region.

Without prejudice to specific remedies concerning IPR applications, national legislations shall provide for sanctions to prevent the use of genetic resources, derivatives and associated traditional knowledge from the Hindu Kush-Himalayan region without compliance with the provisions of this Framework Agreement (which would be considered an act or case of misappropriation).

## **Access to justice**

The Regional ABS Mechanism shall facilitate access to justice and redress for providers and users, including administrative and judicial remedies, as well as alternative dispute resolution mechanisms.

The countries signatory to this Framework Agreement agree to ensure access to justice and redress following the national legislation of the country where a complaint is filed within the region, regardless of the country where misappropriation or other problems regarding this Framework Agreement occurred.

## **Capacity building**

The Regional ABS Mechanism shall promote and facilitate provisions for the building and enhancement of capacity among the countries signatory to this Framework Agreement, in particular to support fair procedures for PIC and MAT involving traditional institutions at the community level and to support effective EIA studies regarding specific access proposals. At both national and local level, issues of gender equity will be taken into particular consideration, as well as the concerns of indigenous peoples, in line with the 2007 UN Declaration on the Rights of Indigenous Peoples.

## **Lead actors**

The lead actors in the development of the Regional ABS Framework Agreement would be the coordinating RIGI, the competent national authorities and focal points of all relevant countries, and ICIMOD. Indigenous peoples' organisations, community-based organisations and other civil society organisations working on conservation and development issues, and, in particular, on genetic diversity and biocultural diversity, would also play important roles, along with regional experts in the field of biodiversity conservation and ABS. The competent national authorities of all the countries in the Hindu Kush-Himalayan region would take the final decisions regarding the Regional ABS Framework Agreement.

## **Key outputs**

- Regional ABS Framework Agreement developed and adopted by all countries in the region;
- Regional ABS Mechanism for the Hindu Kush-Himalayan Region functioning with the active participation of key actors of all the signatory countries; and
- Common negotiating positions on ABS from genetic resources and associated traditional knowledge from the Hindu Kush-Himalayas adopted in relevant fora.

## Part Three: **Endnotes and References**

### **Endnotes**

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- <sup>1</sup> Simple summaries of the objectives, processes, implementation and terminology of access and benefit sharing can be found in Oli and Dakal (2009)
- <sup>2</sup> Mittermeier et al. (2004)
- <sup>3</sup> Gungwei (2002)
- <sup>4</sup> Turin (2007)
- <sup>5</sup> Berkes (1999)
- <sup>6</sup> Maffi (2001)
- <sup>7</sup> Lasen (2005)
- <sup>8</sup> Laird and Wynberg (2005)
- <sup>9</sup> Rosendal (2003)
- <sup>10</sup> IUCN (2005)
- <sup>11</sup> Rosendal (2003)
- <sup>12</sup> Ho (2003)
- <sup>13</sup> South Centre and CIEL (2005); Zenobia and Fakir (2004)
- <sup>14</sup> Oli and Dakal(2009)
- <sup>15</sup> Andean Community Decision 391: Common Regime on Access to Genetic Resources (1996)
- <sup>16</sup> Acuerdo Centroamericano de acceso a los recursos genéticos y bioquímicos y al conocimiento tradicional asociado (2003, Draft)
- <sup>17</sup> ASEAN Framework Agreement on Access to Biological and Genetic Resources (2000, Draft)
- <sup>18</sup> The countries are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Zambia, and Zimbabwe.
- <sup>19</sup> This was formed in 2002 and includes 17 countries, i.e., Brazil, Bolivia, Colombia, Ecuador, Mexico, Peru, Venezuela, Costa Rica, South Africa, Kenya, Democratic Republic of Congo, Madagascar, India, China, Indonesia, Malaysia, and the Philippines.
- <sup>20</sup> It is rather premature to evaluate the performance of existing regional ABS frameworks except for the Andean Pact, which has been in operation for more than a decade. In the case of the Andean pact the results have been mixed. On the one hand the regional and national level legal frameworks are in place, but there have been fewer than expected ABS agreements with users of genetic resources, possibly because of cumbersome procedures and a lack of institutional capacity to handle the requisite application process. In the case of the African Model Law, the results have been equally mixed. While a common African position on ABS issues has been articulated, the development of national legislation taking into account the Model Law has been rather slow for a variety of reasons (e.g., lack of national capacity). The ASEAN and the Central American Frameworks are either in a draft form or have only recently been enforced so it is too early to come to any conclusions about their effectiveness.
- <sup>21</sup> Article 8j: "Each Contracting Party, shall as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge; innovations and practices."
- <sup>22</sup> For an explanation of this and other terms, see Oli and Dhakal (2009) p. 61-65.

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<sup>23</sup> Bonn Guidelines 31: "Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws."

<sup>24</sup> Article 26:

1. "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (...)"
3. "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

Article 31:

1. "Indigenous peoples have the right to maintain, control, protect and develop their (...) traditional knowledge (...), including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora (...). They also have the right to maintain, control, protect and develop their intellectual property over such (...) traditional knowledge, and traditional cultural expressions."
2. "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."

Article 32:

2. "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources (...)."

<sup>25</sup> Article 15.7: "Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, (...) with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."

<sup>26</sup> Bonn Guidelines 48: "Pursuant to mutually agreed terms established following prior informed consent, benefits should be shared fairly and equitably with all those who have been identified as having contributed to the resource management, scientific and/or commercial process. The latter may include governmental, non-governmental or academic institutions and indigenous and local communities. Benefits should be directed in such a way as to promote conservation and sustainable use of biological diversity."

<sup>27</sup> These can include up-front payments, milestone payments, and royalties. For a list of possible monetary and non-monetary benefits, see Annex 2 of the CBD Bonn Guidelines.

<sup>28</sup> Lasen (2005)

<sup>29</sup> Seiler and Dutfield (2001)

<sup>30</sup> Vivas-Eugui and Ruiz (2005)

<sup>31</sup> Swiderska (2006)

<sup>32</sup> Article 27.3: "Members may also exclude from patentability: (...) b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof (...)."

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- <sup>33</sup> Article 15.1: "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation."
- <sup>34</sup> Notably, CBD COP2 Decision II/11 on Access to Genetic Resources notes that "...regional efforts, based in part on the similarity of the genetic resources found in the region, are important to common strategies and therefore should be encouraged".
- <sup>35</sup> As discussed by Greer and Harvey (2007), the CBD distinction between biological and genetic diversity is not entirely clear and 'biological resources' might be better defined as referring to resources of which each specimen is purchased or acquired separately, while 'genetic resources' can also refer to genetic information – such as, for example, a gene sequence, that has the potential to be used by humanity for the reproduction of life or development of a product. In these practical terms, genetic resources mean any cells containing genes – reproductive or otherwise. Different definitions have implications for the rights of local and indigenous communities. Usually, the consent of producer communities is required for biological resources, while for genetic resources consent may be required only from communities that provide traditional knowledge that facilitates the use of those resources.
- <sup>36</sup> Hansen and Van Fleet (2003)
- <sup>37</sup> Tobin (2005)

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