



## THE INTERFACE BETWEEN SUSTAINABLE FOREST MANAGEMENT AND ACCESS AND BENEFIT SHARING: OUTLINING POTENTIAL AREAS OF SYNERGY

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## **1. Introduction: why do we need a study on the interface between forests and ABS?**

The question of access and benefit sharing (ABS) under the Convention on Biological Diversity (the Convention)<sup>1</sup> embraces a complex and varied set of issues that are directly relevant to sustainable forest management (SFM). Forests are some of the most important repositories of biodiversity, and genetic resources are often used in support of forest-related activities (i.e. tree breeding, silviculture, product processing). The use of forest genetic resources and forest resources in general involves a broad range of stakeholders who are either custodians, providers or users of forest resources. Furthermore, the harvesting and consumption of natural forest products is often a significant component of the lives of people who live near forest resources. Forest policy is thus often punctuated by the twin objectives of ensuring resource conservation while allowing for the sustainable use of forest resources by forest-dependent communities and other users.

Traditional forest-related knowledge and sustainable forest management practices that have developed over centuries can significantly contribute to the production of multiple goods and services that enhance our nutrition, health and quality of life. This predicates a need to design adequate benefit sharing mechanisms to recognize the role of forest communities who are at the origin of this knowledge. It is thus not surprising to observe that a number of forest related treaties, mechanisms and guidelines contain benefit sharing provisions to regulate the use and entitlements that may arise from the utilisation of forest resources. Consequently, the interface between SFM schemes and ABS must be further explored to identify further opportunities, challenges, and key considerations for the negotiation and implementation of ABS and SFM instruments and measures, be it at the international, regional or national level.

## **2 The Interface Between ABS and Forests: The International Policy-making Level**

### **2.1 Synergies between the Non-Legally Binding Instrument on all Types of Forests and ABS**

At its ninth meeting in May 2008, the Conference of the Parties (COP) to the Convention called for greater efforts to increase cross-sectoral cooperation and initiatives at all levels to support countries in their efforts to carry out a coordinated implementation of both the Programme of Work on Forest Biodiversity under the Convention and the decisions of the United Nations Forum on Forests (the Forum on Forests), including the Non-Legally Binding Instrument on All Types of Forests (the Instrument).<sup>2</sup> Issues related to potential areas of synergy and complementarity between ABS-related provisions and instruments under the Convention and the Instrument received scant attention. This study proposes to address this gap with a pointed analysis of the interface between sustainable forest management and issues related to the ongoing discussions on ABS that are currently taking place under the aegis of the Convention on Biological Diversity.

The Convention and the Forum on Forests have two separate but parallel processes dealing with forests and forest biological diversity, as well as other cross-sectoral issues such as access and benefit sharing. The Convention specifically addresses the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of genetic resources,<sup>3</sup> including those from forest ecosystems, while the Instrument addresses the management, conservation and sustainable development of forests on the basis of the outcomes of the United Nations Conference on Environment and Development (the Rio Forest Principles and Agenda 21), the Intergovernmental Panel on Forests (IPF) and Intergovernmental Forum on Forests (IFF) and the Forum on Forests. Notwithstanding the fact that each of these processes deals with specific and distinct issues, there are significant areas of synergy between the Convention's Programmes of Work on Article 8(j), ABS, and Forest Biodiversity, and processes under the Forum on

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<sup>1</sup> Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (1992). Available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf>.

<sup>2</sup> Decision IX/5 on Forest biodiversity adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting, UNEP/CBD/COP/DEC/IX/5, at para. 1(i). (Decision IX/5)

<sup>3</sup> ABS as envisaged in article 15 of the CBD is directly linked to the use of genetic resources (and “derivatives” a concept still under strong debates), but not to the utilization of “biological resources” which conceptually fall into a different category. The relevance of ABS-specially benefit sharing (BS) mechanisms to fulfill other objectives of the CBD: “sustainable use” (CBD articles 1 and 10) and the development of the Addis Ababa Principles on Sustainable Use adopted by COP VII in 2004 should be mentioned briefly. One of the principles considered in the Addis Ababa document is the fair and equitable benefit sharing. Therefore, BS is a legal concept also applicable to the use of biological resources. However, it should be emphasized that benefit sharing arising from the use of biological resources is not covered by article 15 and its provisions.

Forests. Some of these synergies may be addressed over the course of the next two years as a result of a recent CBD and UNFF memorandum of understanding that pledges closer collaboration between the two secretariats.<sup>4</sup>

### 2.1.1 The United Nations Forum on Forests and the IPF and IFF processes

The Forum on Forests was established as a subsidiary body of the United Nations Economic and Social Council by Resolution 2000/35 in October 2000.<sup>5</sup> At the time, the main objective of the international regime on forests was to promote the management, conservation and sustainable development of all types of forests.<sup>6</sup> To achieve that objective, the UNFF would begin by considering the parameters of a mandate for developing a legal framework on all types of forests.<sup>7</sup> It would also work on the basis of a multi-year programme of work, drawing on elements in the Rio Declaration, the Forest Principles, chapter 11 of Agenda 21 and IPF/IFF proposals for action. The UNFF Multi-Year Programme of Work and Plan of Action are mostly based on the over 270 proposals made by the IPF/IFF,<sup>8</sup> which are discussed at annual UNFF sessions.

The debates surrounding traditional forest-related knowledge at the IPF/IFF were characterized by several of the same issues that underlie the discussions taking place within the Working Groups on ABS and Article 8(j) at the CBD.<sup>9</sup> In its final report, the IFF recognized the need to further explore the modalities for promoting greater recognition, respect and protection of traditional forest-related knowledge involved in sustainable forest management. This was premised on an understanding of the role of traditional forest-related knowledge in sustainable forest management. One of the overarching conclusions was that traditional systems significantly contribute to the effective management, conservation and sustainable use of forest resources, in accordance with Article 8(j) and other provisions of the Convention and IPF/IFF proposals for action.<sup>10</sup>

The IFF made four proposals for action on traditional forest-related knowledge that relate to CBD negotiations on ABS and Article 8(j). First, it called upon countries to implement effective measures to recognize, respect, protect and maintain traditional forest-related knowledge in sustainable forest management, including forest biological resources within their intellectual property rights, *sui generis* or other relevant systems for protection, taking into account the work of the Convention and other relevant international agreements.<sup>11</sup> Secondly, it called for the recognition and promotion of the fair and equitable sharing of benefits with the holders of such knowledge, innovations and practices arising from the use of such knowledge, innovations and practices, in accordance with, *inter alia*, article 8(j) and related provisions of articles 15, 16 and 19 of the Convention, other relevant international agreements and national law.<sup>12</sup>

Thirdly, countries were requested to work with relevant organizations to develop a common conception of the relationship between IPR, *sui generis* or other forms of protection, and the Convention, including addressing issues related to the identification of origins of traditional forest-related knowledge and the knowledge that results from the use of forest genetic resources with a view to protecting such knowledge from inappropriate use.<sup>13</sup> Lastly, countries were requested to develop or strengthen national legislation and policies to achieve objectives under Article 8(j) and related provisions of the Convention, and to support efforts by relevant organizations and institutions regarding the protection and application of traditional forest-related knowledge, including guidelines.<sup>14</sup>

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<sup>4</sup> Secretariat to the United Nations Forum on Forests, “United Nations Forum on Forests and Convention on Biological Diversity Enter into Partnership”, [http://www.un.org/esa/forests/pdf/Communiqué\\_MoU\\_CBD\\_UNFF.pdf](http://www.un.org/esa/forests/pdf/Communiqué_MoU_CBD_UNFF.pdf).

<sup>5</sup> Report on the fourth session of the Intergovernmental Forum on Forests, New York, 31 January - 11 February 2000. Eighth session of the Commission on Sustainable Development, 24 April - 5 May 2000, E/CN.17/2000/14 at para 3(a). Available at: [http://www.un.org/esa/forests/pdf/2000\\_35\\_E.pdf](http://www.un.org/esa/forests/pdf/2000_35_E.pdf)

<sup>6</sup> *Ibid.* at para. 1.

<sup>7</sup> *Ibid.* at para. 3(c)(i).

<sup>8</sup> *Ibid.* at para. 3(g). See <http://www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf>

<sup>9</sup> Rosendal, G. Kristin. Overlapping International Regimes The Case of the Intergovernmental Forum on Forests (IFF) between Climate Change and Biodiversity, International Environmental Agreements: Politics, Law and Economics 1: 447–468, 2001 at 452.

<sup>10</sup> Report of the Intergovernmental Forum on Forests on its Fourth Session, New York, 31 January - 11 February 2000. Commission on Sustainable Development, Eighth Session, 24 April - 5 May 2000, E/CN.17/2000/14 at para. 69.

<sup>11</sup> *Ibid.* at para. 74(a).

<sup>12</sup> *Ibid.* at para. 74(b).

<sup>13</sup> *Ibid.* at para. 74(c).

<sup>14</sup> *Ibid.* at para. 74(d).

Traditional forest-related knowledge was discussed at the 4<sup>th</sup> session of the UNFF in 2004 as a part of the UNFF Multi-Year Plan of Work (2000-2005).<sup>15</sup> Although there were no substantive outcomes on the issue, the multi-stakeholder dialogue recognized several outstanding issues that are pertinent. Several participants in the dialogue argued the IPF/IFF proposals for action on TFRK were being blocked by three obstacles to implementation: a lack of recognition of such knowledge and its potential benefits; a lack of effective means of engaging indigenous peoples and local communities in decision-making; and, a lack of legal protection in terms of land tenure and property rights.<sup>16</sup> The participants also noted that TFRK is inextricably linked to the land and control of its management and use for all local stakeholders, and a direct link was drawn between the loss of TFRK and the loss of access to traditional lands. Clear property rights and secure land tenure were considered necessary for the continued use and maintenance of traditional forest-related knowledge.<sup>17</sup>

Within the multi-stakeholder dialogue, there was also recognition that the erosion of oral traditions of knowledge-sharing and the lack of systemic recording methods has led to a continuing loss of ancestral knowledge that could benefit modern medicine and forest management practices. To stem the loss, policies ensuring equal and fair sharing of benefits were deemed critical, and a need was seen for capacity-building regarding the development of culturally appropriate methods of storing and sharing traditional forest-related knowledge. Participants emphasized the living nature of such knowledge, and thus pressed for its incorporation into formal education systems and industry training programmes in order to ensure cultural sensitivity as well as preservation and use.<sup>18</sup> Lastly, it was noted that women also have a distinct body of forest-related knowledge that is linked to their different societal roles and responsibilities, and that their intergenerational traditional knowledge should be treated as intellectual property.<sup>19</sup> The stakeholders concluded that the vital role that traditional forest-related knowledge plays in sustainable forest management should be incorporated into national and local forest management plans and practices through the full and effective participation of indigenous peoples, local communities and stakeholders at all levels of decision-making.<sup>20</sup>

### 2.1.2 The Non-Legally Binding Instrument on all Types of Forests

Following intense negotiations, the Seventh Session of the Forum on Forests adopted the landmark Non-Legally Binding Instrument on All Types of Forests on 28 April 2007. The adoption of the instrument was seen as a major achievement, as it was the first time that Member States agreed to an international instrument promoting sustainable forest management. The instrument held and indeed still does hold great potential to channel international cooperation and national action to reduce deforestation, prevent forest degradation, promote sustainable livelihoods and reduce poverty for all forest-dependent peoples. The NLBI was formally adopted by the UN General Assembly on 17 December 2007.<sup>21</sup>

The Instrument contains several provisions that address issues similar to those found in articles 15, 8(j) and related provisions of the Convention. Notably, the Instrument refers to the concept of benefit sharing regarding the use of traditional forest related-knowledge (TFRK) in SFM. Article 6(f) of the Instrument specifically states that national policies should “support the protection and use of traditional forest-related knowledge and practices in sustainable forest management, with the approval and involvement of the holders of such knowledge, and promote fair and equitable sharing of benefits from their utilization, in accordance with national legislation and relevant international agreements.” The Instrument further recognizes the need to seek the approval and involvement of holders of TFRK, which accords with similar ABS provisions under the Convention (i.e. Articles 8(j) and 15, and the Bonn Guidelines, particularly in paragraphs 26 and 31).

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<sup>15</sup> Report of the United Nations Forum on Forests Fourth Session (E/CN.18/2004/17/Corr.1 • E/2004/42/Corr.1). Available at <http://www.un.org/esa/forests/documents-unff.html#4>.

<sup>16</sup> Report of the United Nations Forum on Forests Fourth Session, Chapter 4, Multi-stakeholder dialogue, Action taken by the Forum, at para. 10(10).

<sup>17</sup> *Ibid.* at para. 10(11).

<sup>18</sup> *Ibid.* at para. 10(12).

<sup>19</sup> *Ibid.* at para. 10(13).

<sup>20</sup> *Ibid.* at para. 10(14).

<sup>21</sup> Non-legally binding instrument on all types of forests, A/Res/62/98 of 17 December 2007. Available at: <http://www.fao.org/forestry/14717-1-0.pdf>.

**Box 1: Article 6(f) of the Non Legally Binding Instrument on All Types of Forests**

To achieve the purpose of this instrument, and taking into account national policies, priorities, conditions and available resources, member States should support the protection and use of traditional forest-related knowledge and practices in sustainable forest management with the approval and the involvement of the holders of such knowledge and promote fair and equitable sharing of benefits out of their utilization, according to national legislation and relevant international agreements.

### 2.1.3 The Convention on Biological Diversity

The Convention on Biological Diversity recognizes the sovereign rights of States over their natural resources in areas under their jurisdiction.<sup>22</sup> According to the Convention, States have the authority to determine physical access to genetic resources in areas within their jurisdiction. Parties also have the obligation to take appropriate measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources.<sup>23</sup> This is one of the three fundamental objectives of the Convention. Two further principles established under article 15 of the CBD are that “access [to genetic resources], where granted, shall be on mutually agreed terms” and “shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.”<sup>24</sup> This provides the basic legal framework under the Convention for access and benefit sharing arising from the utilization of genetic resources.<sup>25</sup>

**Box 2: Objectives of the Convention on Biological Diversity**

1. The conservation of biological diversity;
2. The sustainable use of the components of biological diversity; and
3. The fair and equitable sharing of the benefits arising out of the utilization of genetic resources<sup>26</sup>

Furthermore, the protection of traditional knowledge, innovations and practices of indigenous and local communities plays an important role. Traditional knowledge often provides a lead to genetic resources with beneficial properties and can thus form the basis for ABS mechanisms or entitlements. To this effect Article 8(j) states that “each contracting Party shall, as far as possible and as appropriate, subject to 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>27</sup>

Finally it also bears mentioning that the programme of work on forest biological diversity under the Convention calls for the participation of indigenous peoples and local communities in activities relating to protected areas while respecting their rights. In essence, their activities are to be supported in the use of traditional forest-related knowledge in forest biodiversity management and adaptive community-management systems. Furthermore, at its sixth meeting, the COP to the Convention adopted the expanded programme of work on forest biological diversity. Goal 1.5 of the programme of work is access and benefit-sharing of forest genetic resources. Substantively, the goal is to promote the fair and equitable sharing of benefits resulting from the utilization of forest genetic resources and associated traditional knowledge. Related activities shall be based on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (the Bonn Guidelines). Those activities are to: establish mechanisms to facilitate the sharing of benefits at local, national, regional and global levels; strengthen the capacity of

<sup>22</sup> Convention on Biological Diversity at art. 15(1).

<sup>23</sup> *Ibid.* at art. 15(7).

<sup>24</sup> *Ibid.* at art. 15(4) and 15(5).

<sup>25</sup> CBD article 15 is relevant in the context of the use of genetic (and biochemical) resources. However, access, use and commercialization of biological resources rather than the genetic components may require compliance with benefit sharing principles found in other CBD provisions ( article 10 “ sustainable use”, especially when TK is also accessed and used. In addition, the Addis Ababa Principles on the Sustainable Use of Biological Diversity lay the foundation for the applicability - within the CBD principles and norms - of BS provisions in the context of the use of biological rather than genetic resources.

<sup>26</sup> *Ibid.* at art. 1.

<sup>27</sup> *Ibid.* at art. 8(j).

indigenous and local communities to negotiate benefit-sharing arrangements; and, promote the dissemination of information about benefit-sharing experiences through the Convention's clearing-house mechanism and appropriate local means.<sup>28</sup>

### **Box 3: Expanded Programme of Work on Forest Biodiversity Goal 1.5.1:**

Promote the fair and equitable sharing of benefits resulting from the utilization of forest GR and associated TK, and undertake the following activities based on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, as adopted by COP 6:

1. Establish mechanisms to facilitate the sharing of benefits at local, national, regional and global levels.
2. Strengthen capacity of indigenous and local communities to negotiate benefit-sharing arrangements.
3. Promote dissemination of information about benefit-sharing experiences through the clearing-house mechanism and appropriate means at the local level.

This brief overview establishes a clear link between traditional forest-related knowledge and corresponding benefit sharing schemes under the UNFF and the issues under discussion in the Programmes of Work of the CBD where the questions of ABS and traditional knowledge are addressed. The UNFF and the CBD are thus engaged with overlapping issues that hinge on broad question of access and benefit sharing and the protection of traditional knowledge, and these synergies will need to be given particular attention in the context of the ongoing negotiations on the international regime on ABS.

## **2.2 The Role of Sustainable Forest Management in the Prospective International Regime on ABS**

The World Summit on Sustainable Development in Johannesburg in 2002 agreed to the establishment of an international regime to effectively promote and safeguard fair and equitable benefit-sharing. This determination was recorded in paragraph 42(o) of the Johannesburg Plan of Action. On 20<sup>th</sup> December 2002, Resolution 57-260 of the United Nations General Assembly invited the Conference of the Parties to take the necessary measures regarding the commitment established at the Summit to negotiate this regime<sup>29</sup>. Taken together with the Convention's decision this represents a commitment to create an international regime.

Paragraph 42(n) of the same Johannesburg Plan of Action provided a related commitment to:

Promote the wide implementation of and continued work on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising out of their Utilization of the Convention, as an input to assist Parties to the Convention when developing and drafting legislative, administrative or policy measures on access and benefit-sharing, and contracts and other arrangements under mutually agreed terms for access and benefit-sharing;

Decision VII/19 of the Conference of the Parties is probably one of the most comprehensive and detailed of all of the decisions having to do with the issue of access to genetic resources. This decision calls for the Working Group on ABS to meet again "... with the collaboration of the Ad Hoc Open-ended Intersessional Working Group on Article 8 (j) and Related Provisions, ensuring the participation of indigenous and local communities, non-governmental organisations, industry and scientific and academic institutions, as well as intergovernmental organisations, to elaborate and negotiate an International Regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8 (J) of the Convention and the three objectives of the Convention". The group has operated in accordance with the terms of reference contained in the Annex to Decision VII/19.

The Conference of the Parties also decided on the terms of reference for such a negotiation, including the process, nature, scope and elements for consideration in the elaboration of the regime. The terms of reference are contained in the annex to [Decision VII/19 D](#).

<sup>28</sup> Expanded Programme of Work on Forest Biological Diversity, Goal 1.5.1. Available at: <http://www.cbd.int/forest/PE1.shtml>.

<sup>29</sup> Although the language of the Summit refers only to benefit-sharing, the meeting on the Convention's Program of Work (Montreal, March 2003) recommended that the Working Group on ABS consider, at its second meeting, the process, nature, scope, elements and modalities for an international regime on **access to genetic resources** and benefit-sharing.

As set out in the Terms of reference of the Working Group on ABS, with respect to the nature, the IR could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding.

According to these same Terms of reference, the scope of the IR is to include:

- Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity;
- Traditional knowledge, innovations and practices in accordance with Article 8(j).

Finally, a long list of elements for consideration in the negotiation of the IR have been included, which relate to access to genetic resources, benefit-sharing, measures to support compliance, traditional knowledge and capacity building.

Whatever specific outcome of the negotiations, an IR on ABS will significantly build on existing CBD provisions and thus be of relevance for biodiversity based product activities and sustainable forest management.<sup>30</sup> Given the fundamental disagreements only a heavily bracketed structure exists as a basis for the negotiations on the regime. The document has four sections, covering the objective, scope, main components and nature of the regimen. The content of each section, however, identifies various options or is heavily bracketed. The text regarding the main components includes: benefit sharing, access, compliance, capacity building and TK and also reflects the wide divergence of positions among countries. As a result it is still difficult to determine the outcome of the negotiations and the type of impacts expected on the legal and policy framework for biodiversity.

The process of negotiating and implementing an international regime to effectively realize the provisions of the Convention on ABS and traditional knowledge will however be a complex, long-term process. The effective implementation of the international regime will demand input and collaboration from a range of organizations and fora to ensure that all cross-sectoral issues are given due consideration and effect. It is important to note that a prospective international regime on ABS will inevitably have an impact on how forest genetic resources are accessed and utilized, and how benefits derived from their use will be shared. Though the scope of the regime is still unclear at this stage in negotiations, issues related to forest use will need to be given due consideration. Therefore, it is important to foster closer co-operation and co-ordination between the processes of the Forum on Forests and the Convention to better capitalize on and take into account potential synergies between the prospective international regime on access and benefit sharing and the emerging international regime on sustainable forest management.

At this juncture, it is important to note that article 15 of the Convention grants States sovereignty over genetic resources, whereas article 8(j) of the Convention recognizes the rights of holders of traditional knowledge. These two prerogatives can lead to potential conflict if they are not carefully and harmoniously carried out. As such, the international regime will have to ensure that the implementation of articles 15 and 8(j) is mutually supportive so as to effectively ensure that traditional knowledge is adequately respected, protected and promoted within the ambit of the regime. This will require negotiators to indentify and agree upon specific principles and mechanisms to ensure respect for customary laws and the community level procedures of indigenous and local communities. These principles could include procedures or mechanisms upon which access and benefit sharing can be premised, such as *sui generis* systems. The establishment of Biocultural protocols for the protection of traditional knowledge and communities rights has been advanced by some parties as a promising tool that could be recognized under the international regime. Biocultural protocols consist in essence of community level procedures which affirm the interconnections between communities and their land rights as well as their current socio-economic and cultural situation. Bio-cultural protocols could provide communities an opportunity to focus on their development aspirations vis-a-vis ABS and to articulate for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with potential users of their TK.<sup>31</sup> This could turn potentially greatly enhance the ability of local communities to engage in activities that are both consonant with the protection of their knowledge and the conservation and sustainable use of natural resources that are at the basis of this knowledge.

Another important consideration is the fact that there is not always a relationship between the owners of genetic resources accessed and

<sup>30</sup> Union for Ethical Biotrade. *Access and Benefit sharing: principles, rules and practices. An overview for the cosmetic sector.* April, 2009

<sup>31</sup> Bio-cultural Protocols: A Community Response to Access and Benefit Sharing. Available at: [http://naturaljustice.org.za/images/abs\\_7\\_biocultural\\_brief.pdf](http://naturaljustice.org.za/images/abs_7_biocultural_brief.pdf).

the holders of traditional knowledge related to those resources. In some instances, genetic resources may be owned by the government or a private landowner and traditional knowledge held by indigenous and local communities. It must be noted that the relationship between access and use may vary depending on the nature of State sovereignty.<sup>32</sup>

The issue of property rights is one of the most complex<sup>33</sup>. The concept of sovereignty is different from those of heritage and property; the latter is not addressed by the Convention, leaving each State free to decide if genetic resources are private or public property and under what circumstances. This issue is not fully clear in comparative law, because, in general, the property systems and the Constitutions, with few exceptions, have not made reference to genetic resources. In the same manner, some legal systems make the difference between the property of biologic resources and the property of genetic resources.<sup>34</sup> Generally, the State is considered the owner of those resources but who gives the biologic resource containing the genetic resource or authorizes the entrance to the land where the resource is located or to the *ex-situ* collection is considered the provider of the biological resource.

The definition of property rights over genetic resources is interesting specially for 2 reasons:

- For the right to participate in the decision making processes of ABS and be beneficiary of the potential benefits.
- For the limitations that can derive from the concept of genetic resources as public property.

These questions are highly pertinent to discussion taking place in the forestry sector, where land tenure rights and ownership of forest resources may range from full state ownership of forest resources to joint ownership or sole ownership of indigenous and local communities who are custodians of these resources. A prospective international regime will thus have to carefully examine these issues to ensure that its implementation can be given effect in a harmonious and integrative manner across the varying scenarios.

The potential overlap between the Instrument and the CBD has already been envisaged. The Instrument states in its article 6(f) that the fair and equitable sharing of benefits arising out of the utilization of TFRK must be undertaken in accordance with relevant international agreements. This provision further accords with Article 22 of the CBD which provides that the provisions of the Convention shall not affect the rights and obligations of any Contracting Party deriving from any *existing* agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.

What transcribes from the above is that issues covered by the IPF/IFF/UNFF commitments ultimately hinge on questions of customary land rights, land tenure security and the protection of TFRK. Issues related to the free and prior informed consent of the holders of TFRK, fair and equitable benefit sharing related to traditional knowledge and the promotion of activities to increase understanding of the role of TFRK in forest management are also central in the forestry sector. Similar considerations are currently being negotiated in the context of the ongoing discussions for the elaboration of an international regime on ABS.

### 2.2.1 Forest Certification as a model for ABS

Decision IX/5 on Forest Biodiversity by COP 9 of the Convention recognizes a potential role for consistent and appropriate voluntary market-based certification schemes and tracking/chain-of-custody systems that promote the use of timber and non-timber forest products originating from sustainably managed forests produced in accordance with relevant national legislation, applicable standards, the Convention, and other relevant international obligations.<sup>35</sup>

The effective regulation of ABS requires a balanced approach that is cost effective, practical, produces timely solutions and effectively addresses the often diverging interests and considerations of providers and users. Various approaches are currently being discussed

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<sup>32</sup> Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, UNEP/CBD/WG-ABS/8/2 at para. 15.

<sup>33</sup> Concerning legal certainty, one of the most pertinent aspects to be studied regards the definition of physical property rights to GR, as recognized by the COP 8 when it requested the Parties to provide information to the Secretariat (Decision VIII/4 A).

<sup>34</sup> United States is an exception, where the owner of the land is equally the owner of the genetic resources located on it.

<sup>35</sup> Decision IX/5 on Forest biodiversity, *supra* 1, at para 1(o).

within the ongoing negotiations of an international regime on ABS, including the adoption of measures that could increase transparency in ABS about the obligations that govern users of genetic resources and/or traditional knowledge<sup>36</sup>. It is argued here that systems of voluntary certification<sup>37</sup> akin to those in place in the forestry sector could serve as a means to monitor the flow of genetic resources along their value creation chain to enhance transparency and build confidence between providers and users.

An interesting development is the promotion of voluntary measures<sup>38</sup>, such as Codes of Conduct, principles, and guidelines that may be of value, at least in a relative sense, especially given problems related to access to justice, monitoring, and observance. Basically these codes seek to encourage adherents to comply with legal standards and of good practices. However, these instruments can be ineffective if not accompanied by some incentive to use them. For instance, the Japanese Guidelines for Access to Genetic Resources offer a concrete first step toward effective user measures, by including a commitment of the Japanese Government, stating that if a user complies with all these guidelines and still encounters claims of misappropriation, unauthorized access or biopiracy, the Japanese Government will utilise diplomatic and informal means to seek solution to the problem. This assurance of user-country assistance in resolving ABS related claims offers real value to the user companies and may become a primary incentive encouraging companies to comply with these voluntary guidelines. Similarly, the Costa Rica's regulations on access to genetic resources found in ex situ collections (Decree No. 33697-MINAE of 2007), clearly requires the applicant to follow a Code of Conduct for Access to Genetic Resources (Annex II of the regulations). The Australian state of Queensland introduced its *Code of Ethical Practice for Biotechnology in Queensland in 2000*.<sup>39</sup> Such examples are not common however.

Certification in the forestry sector has received attention in recent years as a mechanism that can contribute to sustainable forest management. Certification most commonly refers to a voluntary, independent, third party verification process that evaluates whether an organization complies with a set of standards and principles derived from best practices in the field and national and international laws. Increasing interest among forest companies in achieving certification, through bodies such as the Forest Stewardship Council (FSC) or the *Programme for the Endorsement of Forest Certification* schemes (PEFC), has largely been driven by consumer demand for products from sustainably managed forests and by skepticism about the ability of regulators to ensure the sustainable exploitation of forest resources. It can be characterised both as a market-based instrument and as a ‘soft’ policy tool for promoting positive social and environmental outcomes. Third party verification offers the greatest potential for an objective and credible assessment of a company’s operations, independent of conflicts of interest and the inconsistent application of standards.<sup>40</sup>

In his analysis, Glowka provides a few arguments that substantiate how an independent certification system applied to bioprospecting could be a useful complement to ABS laws and policies. Providers of genetic resources often want to scrutinise the flow of a given resources to ensure that benefits that could subsequently ensue from their use are shared in a fair and equitable way. The underlying issue remains, however, that providers often lack the means to do so. In light of this, certification could be a useful and cost effective way for providers to monitor and scrutinize the flow and use of genetic resources. Indeed, Glowka further notes that an independent certification system applied to the legal and institutional systems of provider countries could increase the confidence of potential users in potential partners, which could in turn enhance and facilitate benefit sharing.<sup>41</sup>

It bears noting that the FSC's Principles and Criteria for Forest Stewardship<sup>42</sup> (the Principles and Criteria) address a set of legal obligations which notably include indigenous rights,<sup>43</sup> distribution of benefits,<sup>44</sup> and environmental impacts.<sup>45</sup> These issues also evidently

<sup>36</sup> The current negotiating states “the existence of a range of national and international, sectoral or company specific codes of conduct and best practice guidelines on access and benefit-sharing and their importance in achieving the fair and equitable sharing of benefits arising out of the utilization of genetic resources,” Report of the eighth meeting of the Ad Hoc open ended working Group on access and benefit sharing, Annex 1 (Montreal text).

<sup>37</sup> The use of these systems for ABS was anticipated by the Bonn Guidelines, see paragraph 58.

<sup>38</sup> The need for guidance and orientation is evidenced by the guidelines and principles, in either final or draft form, developed by biotechnological organisations in the United States, Europe, and Japan (in the latter case, in conjunction with the Japanese Trade Ministry).

<sup>39</sup> See the ABS provisions at Section 11 of the QLD Code at: <http://www.sd.qld.gov.au/dsdweb/v3/documents/objdirctrled/nonsecure/pdf/4130.pdf>

<sup>40</sup> Glowka, Lyle. Towards a Certification System for Bioprospecting Activities, Study Commissioned by Swiss State Secretariat for Economic Affairs, 2001, at 7. Available at <https://www.cbd.int/doc/meetings/cop/cop-06/other/cop-06-ch-rpt-en.pdf>.

<sup>41</sup> *Ibid.*, at 3.

<sup>42</sup> FSC International Standard, FSC Principles and Criteria for Forest Stewardship, FSC-STD-01-001 V4-0 EN

<sup>43</sup> *Ibid.*, Principle 3.

<sup>44</sup> *Ibid.*, Principle 5.

play an important role in the area of ABS and the protection of the traditional knowledge of indigenous and local communities. The Principles and Criteria are of broad application, as they apply to all tropical, temperate and boreal forests, and some also apply to plantations and partially replanted forests. Organizations that seek accreditation from the FSC must incorporate the Principles and Criteria into their evaluation systems and standards of certification. While the Principles and Criteria are mainly designed for forests managed for the production of wood products, they also have relevance to forests managed for NWFP and other services.

#### **Box 4: FSC Principle #3: Indigenous peoples' rights**

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

- 3.1** Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.
- 3.2** Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.
- 3.4** Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

The PEFC operates differently from the FSC, as it is an umbrella organization for the assessment and mutual recognition of national forest certification schemes developed through multi-stakeholder processes. The PEFC Basis for National Schemes and their Implementation requires national forest certification criteria to cover all relevant aspects of sustainable forest management, including economic, social and ecological functions as stated in intergovernmental criteria and indicators for SFM or related operational guidelines. One relevant series of criteria and indicators are the African Timber Organization/International Tropical Timber Organization (ATO/ITTO) principles, criteria and indicators for the sustainable management of African natural tropical forests (PCI).<sup>45</sup> Within the context of improving the economic and social well-being of local populations,<sup>46</sup> The ATO/ITTO PCI require that the legal and customary rights of local populations respecting ownership, use and tenure of forest land and resources are clearly defined, acknowledged and respected<sup>48</sup>. This includes ensuring that local populations receive compensation for the use and application of their traditional knowledge and techniques in the forest area. This compensation must be freely and formally accepted prior to the commencement of operations<sup>49</sup> and the modalities of access to natural resources must also be clearly defined and respected by all<sup>50</sup>.

#### **Box 5: Relevant Principles for the PEFC (ATO/ITTO):**

**Criterion 4.1** The rights and responsibilities of workers and local populations are clearly defined, acknowledged and respected

**Indicator 4.1.1** The legal and customary rights of local populations in respect to the ownership, use and tenure of the forest land and resources are clearly defined, acknowledged and respected.

**Sub-indicator 4.1.1.1** The provisions of the forestry law on rights of use and ownership are known and respected.

**Sub-indicator 4.1.1.3** As much as possible, local populations have control over the forestry operations on their forest land and resources, unless they freely delegate this control to a third party.

**Sub-indicator 4.1.1.5** Local populations receive compensation for the use and application of their traditional knowledge and techniques in the forest area. This compensation is freely and formally accepted prior to the commencement of operations.

**Indicator 4.1.2** The modalities of access to natural resources are clearly defined and respected by all.

**Sub-indicator 4.1.2.1** The provisions of the forestry law on modalities of access to resources are known and respected.

<sup>45</sup> *Ibid.*, Principle 6.

<sup>46</sup> ATO/ITTO principles, criteria and indicators for the sustainable management of African natural tropical forests, ITTO Policy Development Series No. 14, 2003. Available at [http://www.itto.int/en/policypapers\\_guidelines/](http://www.itto.int/en/policypapers_guidelines/).

<sup>47</sup> *Ibid.* Principle 4.

<sup>48</sup> *Ibid.* Indicator 4.1.1.

<sup>49</sup> *Ibid.* Sub-indicator 4.1.1.5.

<sup>50</sup> *Ibid.* Indicator 4.1.2.

The United Nations Conference on Trade and Development's BioTrade Initiative (BioTrade) responds to two fundamental goals of the Convention: the fair and equitable sharing of benefits arising from the use of genetic resources, based on prior informed consent and mutually agreed terms; and the sustainable use of biodiversity and equitable benefit sharing from the use of biological resources. As a result, these goals are reflected in the BioTrade Principles and Criteria.<sup>51</sup> Principle 3 tackles these two goals by promoting the fair and equitable sharing of benefits derived from the use of biodiversity, which encompasses both genetic and biological resources. It supports Article 15 of the Convention, which requires that access and benefit sharing be based on prior informed consent and mutually agreed terms,<sup>52</sup> and broadens benefit sharing to encompass the commercialization of biological resources.<sup>53</sup> In the context of trade in biological resources, Principle 3 requires that suitable methodologies be defined that can support the actors involved in its implementation. These methodologies are elaborated upon in subordinate criteria, such as Criterion 3.1 which suggests that the organization should interact and involve actors along the whole value chain, where possible, to facilitate balanced negotiations,<sup>54</sup> and Criterion 3.2 which underlines that income should be generated at all levels of the value chain.<sup>55</sup>

#### **Box 6: BioTrade Principle 3: Fair and equitable sharing of benefits derived from the use of biodiversity<sup>56</sup>**

This principle responds to a fundamental facet of the conservation and sustainable use of biodiversity under the Convention on Biological Diversity, of which the third objective is the fair and equitable sharing of benefits arising from the use of genetic resources. Article 15 thus requires access to and the distribution of the benefits related to genetic resources to be based on prior informed consent and mutually agreed terms. When BioTrade activities involve the commercialization of genetic resources, this principle supports these objectives and requirements. Equitable benefit sharing also arises in the context of the second objective of the Convention: the sustainable use of biodiversity. Benefit-sharing is therefore also important in activities dealing with biological resources, which form the vast majority of BioTrade activities.

The BioTrade Principles go beyond simply promoting the fair and equitable sharing of benefits derived from biodiversity. Principle 6 espouses respect for the rights of actors involved in BioTrade activities.<sup>57</sup> This includes respect for intellectual property rights, as well as the value of traditional knowledge in obtaining the innovations and creations protected by these rights. It requires that if traditional knowledge is relevant to the development and commercialization of a product, organizations should acknowledge its relevance through joint ownership of intellectual property rights and/or the sharing of the royalties from licensing. It is noted that adequate discussion of the intellectual property policy of the different actors is very important in this regard.<sup>58</sup> Furthermore, the rights of local and indigenous communities relating to their territory, culture, and knowledge should be respected. The Principles recognize that local communities and indigenous peoples are for the most part essential actors in the commercialization of biodiversity-based products, as well as in the conservation and sustainable use of biodiversity, and to guarantee sustainable trade, the impacts of the productive system on these groups of people should be identified and their rights respected.<sup>59</sup> It is recognized that traditional knowledge related to the conservation and sustainable use of biological resources is an important component of many BioTrade activities. Even when there is no direct contribution of traditional knowledge to the value chain, BioTrade organizations should frame their activities so that they do not undermine traditional practices, but rather contribute to their appreciation and conservation.<sup>60</sup>

Lastly, the BioTrade Principles also address the difficulties surrounding land tenure, use and access to natural resources and knowledge. Principle 7 states that clarity about rights of access is critical to the responsible management of an organization because clarity assists long-term decision-making for sustainability. At the same time, clarity means that the responsibilities of each actor in the management of

<sup>51</sup> United Nations Conference on Trade and Development, UNCTAD BioTrade Initiative, BioTrade Principles and Criteria, UNCTAD/DITC/TED/2007/4. Available at: [http://www.biota.org/BTFP/BTFP-docs/Working\\_docs/UNCTAD\\_BT\\_PC\\_en.pdf](http://www.biota.org/BTFP/BTFP-docs/Working_docs/UNCTAD_BT_PC_en.pdf).

<sup>52</sup> Convention on Biological Diversity at art. 15(4) and (5).

<sup>53</sup> BioTrade Principles and Criteria at Principle 3, Fair and equitable sharing of benefits derived from the use of biodiversity.

<sup>54</sup> *Ibid.* at Criterion 3.1, The organization should interact and involve actors along the whole value chain, where possible.

<sup>55</sup> *Ibid.* at Criterion 3.2, Income should be generated at all levels of the value chain, by contributing to the position of value-added products in the market, under transparent conditions.

<sup>56</sup> The Union of Ethical Biotrade, Framework for the verification native natural ingredients of Bio Trade companies. Union for Ethical Bio Trade. www. Ethicalbiotrade.org which is a system closer to the certification

<sup>57</sup> *Ibid.* at Principle 6, Respect for the rights of actors involved in BioTrade activities.

<sup>58</sup> *Ibid.* at Criterion 6.2, Intellectual property rights should be respected.

<sup>59</sup> *Ibid.* at Criterion 6.3, Rights of local and indigenous communities (territory, culture, knowledge) should be respected.

<sup>60</sup> *Ibid.* at Criterion 6.4, Traditional knowledge should be maintained and revived.

a species can be established.<sup>61</sup> Therefore, the organization should demonstrate its right to use the land and resources in addition to compliance with Principle 7 and in accordance with Principle 6. The organization should not encroach upon the existing rights of local communities, and where there are conflicts over the use of land – for example where traditional rights contradict legal rights – the organization should have mechanisms in place to resolve such conflicts in a way that is satisfactory to all parties.<sup>62</sup> Secondly, access to biological and genetic resources for sustainable use should be subject to prior informed consent. The Convention requires access and distribution of benefits in relation to genetic resources to take place on the basis of prior informed consent, thus the consent of all relevant national authorities in the provider country should be obtained in accordance with national legislation.<sup>63</sup> Lastly, access to TK should be granted only where prior informed consent has been granted. Where traditional knowledge is used, the organization should follow all regulations and their established procedures to ensure that the rights of the actors providing this knowledge are recognized, including the right to prior informed consent of all relevant stakeholders, as appropriate to the circumstances and subject to domestic law. Traditional knowledge is a resource and, as such, should be valued and rewarded in the appropriate manner.<sup>64</sup>

It follows from the preceding analysis that voluntary certification schemes could be useful in setting standards for bioprospecting that would act as a useful complement to ABS laws and policies. Holding users to certain standards and monitoring the flow of genetic resources along the value creation chain could increase the confidence of provider countries in potential partners, while verification of the legal and institutional systems of provider countries could increase the confidence of potential users. In short, voluntary certification systems could potentially be a supplementary means of fostering greater confidence between providers and users as it could help in ascertaining that bioprospecting and access to resources are conducted in accordance with mutually agreed set of standards. In addition, and as aptly noted by Glowka, local communities might also feasibly use certification systems to garner confidence that the use of their traditional knowledge is done in accordance with known and agreeable best practice standards. Given their flexibility, certification systems could be adapted to deal with different types of applications and the range of varying and corresponding interests involved in bioprospecting.

## 2.2.2 The Importance of Non-Wood Forest Products

The Food and Agriculture Organisation defines non-wood forest products (NWFP) as “goods of biological origin other than wood, derived from forests, other wooded land and trees outside forests.”<sup>65</sup> NWFPs include exudates (gums, resins and latex), canes, fruits, flowers, seeds, seed derivatives, entire plants, leaves, root or stem bark, fungi, meat and by-products from game animals, animals for the pet trade, micro-organisms, and insects.<sup>66</sup> Given the great degree of biodiversity found in tropical forests, this encompasses an enormous variety of plant and animal products. Many indigenous and local communities in developing countries rely on these products for food and medicine and also as a source of income and employment through commercialization. Given the potential that lies in this field, it is thus not surprising that the demand for certain types of NWFPs, particularly medicinal and aromatic plants<sup>67</sup>, has significantly increased in recent years.

The mamala tree case (*Homalanthus nutans*) is one example of an NWFP based ABS agreement<sup>68</sup>. The tree’s stemwood and bark contain a gene that is effective against the HIV virus and have been used to produce an anti-HIV compound (Prostratin). The tree’s

<sup>61</sup> *Ibid.* at Principle 7, Clarity about land tenure, use and access to natural resources and knowledge.

<sup>62</sup> *Ibid.* at Criterion 7.1, The organization should demonstrate land tenure according to the relevant regulations.

<sup>63</sup> *Ibid.* at Criterion 7.2, Access to biological and genetic resources for sustainable use should be subject to prior informed consent.

<sup>64</sup> *Ibid.* at Criterion 7.3, Access to traditional knowledge should be granted only where prior informed consent has been granted.

<sup>65</sup> FAO, “What are non-wood forest products?”. Available at <http://www.fao.org/forestry/nwfp/6388/en/>.

<sup>66</sup> Parrotta, John A., Alfred Oteng-Yeboah, Joseph Cobbinah, eds. Traditional Forest-Related Knowledge and Sustainable Forest Management in Africa: Conference Papers. IUFRO World Series Vol. 23. Accra, IUFRO, 2009 at p. 63.

<sup>67</sup> See Laird, Sara and Wynberg, Rachel, *Access and Benefit Sharing in practice: trends in partnerships across sectors*; CBD Technical Study No.38, Montreal, 2008

<sup>68</sup> Traditional knowledge is extensively used in the development of botanicals. Examples of benefit sharing in Botanical medicine / Nutraceuticals sectors are not common. However, there are instances where commercial benefits have been shared with local communities (e.g. Shaman pharmaceuticals shares a percentage of its benefits with communities it works with globally through The Healing Conservancy Funds; the TBGRI with the Kani tribes in the Kerala state of India). Monetary benefits shared by this sector include apart from prices paid for the resource, royalties on sales of products, share of license fees, advance payments, employment opportunities through commercial partnerships. Non-monetary benefits include training and capacity building for communities and host country institutions, support for the establishment of small scale enterprises based on medicinal plants and related resources. IP ownership of the product is retained primarily by the companies. See Laird and Wynberg, op cit.

components were used traditionally to make an anti-viral tea to cure hepatitis and the indigenous population had been in contact with an ethnobotanist. Before sending samples of the tree for testing, the researcher obtained prior informed consent from the Samoan government and the traditional Samoan healers and chiefs that were consulted. Once the anti-viral properties were discovered and further research and development was needed, benefit-sharing agreements (monetary and non-monetary) were signed. Since the discovery was based on TK, the Aids Research Alliance decided to return 20% of the revenue from commercialization to the peoples of Samoa that assisted in the discovery. The University of California, Berkeley also expressed interest in cloning the gene for mass fabrication, and entered into a memorandum of understanding with the Samoan Government to return 50% of net revenue to the Samoan people. To date, monetary benefits amounting to over US\$480,000 have been shared. Non-monetary benefits have included education on genetic engineering to local peoples, the construction of schools, medical clinics, water supplies, trails, an aerial rain forest canopy walkway, and an endowment for the local rain forest.<sup>69</sup>

This case aptly illustrates how ABS can be applied to the use of NWFP and underscores the potential of TFRK to provide significant monetary and non-monetary benefits for forest-dependent, indigenous, and local communities. The activities of the Ethical Union for BioTrade and their verification system, which is discussed further in the study, also illustrate the link between ABS and the use of NWFP.

### **2.2.3 Reducing Emissions from Deforestation and Forest Degradation and ABS**

Although REDD-Plus under the UN Framework Convention on Climate Change (the Framework Convention) and ABS under the Convention are two distinct mechanisms, there are various parallels between the two. In 2007, the Framework Convention's Bali Action Plan requested enhanced national and international action on the mitigation of climate change, including policies and incentives for reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.<sup>70</sup>

The synergies between the mechanisms are in the fields of conservation, sustainable management of forests and the enhancement of forest carbon stocks. Article 8(j) of the CBD promotes in-situ conservation, and could be supported by REDD-Plus offset schemes. The synergies between ABS and SFM could also be complemented by the certification of SFM related forest-offsets. Enhancement of forest carbon stocks in developing countries could be based on FGR and related TK that enhance forest productivity. However, land rights and tenure continue to be one of the most problematic areas when it comes to the implementation of REDD: those without tenure may not be able to claim compensation.

## **2.3 Forest Law Enforcement, Governance and Trade**

The Convention's COP 9 decision on forest biodiversity requested that parties strengthen forest law enforcement and governance at all levels, take effective legislative and non-legislative measures to prevent harvesting of forest products and resources in violation of national legislation, including timber and non-timber forest products, bushmeat, wildlife, and forest biological resources, and related trade, and contribute to bilateral, regional and international efforts to that end, taking into account articles 8(j) and 10(c) of the Convention.<sup>71</sup> Despite much recent discussion, there is no clear agreement on what forest governance means nor on how to assess whether it is being done well or poorly.

As a result, the enforcement of State forest laws aimed at *in situ* conservation must be done while respecting, preserving and maintaining knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promoting their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and encouraging the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.<sup>72</sup> States must also allow for the sustainable use of the components of biological diversity through

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<sup>69</sup> Secretariat for the Convention on Biological Diversity, ABS Policy Brief. Accessed at <http://www.cbd.int/forest/doc/abs-policy-brief-en.pdf>.

<sup>70</sup> United Nations Framework Convention on Climate Change, Bali Action Plan, Decision 1/CP.13 at para. 1(b)(iii).

<sup>71</sup> Decision IX/5 on Forest biodiversity, *supra* 1, at para. 1(l).

<sup>72</sup> Convention on Biological Diversity, at Article 8(j).

protecting and encouraging the customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.<sup>73</sup>

### 2.3.1 European Union Forest Law Enforcement, Governance and Trade (FLEGT)

The Communication from the Commission to the Council and the European Parliament on an EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT)<sup>74</sup> is an action plan that lays out the EU's first step towards addressing the issue of illegal logging of and trade in tropical timber. Governance reforms and capacity building are emphasized, supported by actions aimed at developing multilateral cooperation and demand-side measures that reduce the consumption of illegally harvested timber and that contribute to the wider objective of SFM in producer countries.

The 2005 FLEGT Regulation established rules for the import of certain timber products from particular countries for the purposes of implementing the FLEGT licensing scheme with the aim of ensuring that only timber products produced in accordance with the producing country's legislation may enter the EC. Timber imports from partner countries into the Community are prohibited unless covered by a FLEGT license, but existing schemes that guarantee the legality and reliable tracking of timber products from partner countries may form the basis of a FLEGT license if assessed and approved. The scheme only applies to imports of timber products listed in Annexes II and III from the partner countries listed in Annex I, but may be extended to other product categories in the future.<sup>75</sup>

Voluntary Partnership Agreements are agreements between the Community and a partner country by which they undertake to work together to support the FLEGT Action Plan and FLEGT licensing scheme. When the EC enters into a voluntary partnership agreement (VPA) with a country or regional organization, the agreement creates a legally binding obligation to implement the licensing scheme within a given schedule. Ghana has entered into such a VPA that aims to provide a legal framework and compliance monitoring system to ensure that all timber imports into the EU from Ghana have been legally acquired, harvested, transported and exported.<sup>76</sup> Ghana has gone beyond the licensing scheme to implement an ENGO facilitated multi-stakeholder dialogue to undertake the phased introduction of sustainable practices throughout the whole forestry sector.<sup>77</sup> It is, however, limited to timber products at this time.

### 2.3.2 Africa Forest Law Enforcement and Governance (AFLEG)

The 2003 Africa Forest Law Enforcement and Governance Ministerial Conference brought together African ministers to address the issues surrounding forest law and governance in Africa. In the Ministerial Declaration,<sup>78</sup> the Ministers reaffirmed and declared their intention to, *inter alia*, involve stakeholders, including local communities in decision-making in the forestry sector, thereby promoting transparency, reducing the potential for corruption, facilitating greater equity and minimizing the undue influence of privileged groups;<sup>79</sup> encourage and promote the participation of the rural population in the management of forest wildlife resources for their socio-economic and cultural development;<sup>80</sup> take steps to ensure the effective and equitable application of the progressive and wide-ranging changes made by many African countries to forest laws in recent years;<sup>81</sup> consider the legitimate interests of all parts of society when developing forest legislation, including addressing traditional and customary laws and practices, including *inter alia* sustainable bushmeat

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<sup>73</sup> *Ibid.*, at Article 10(c).

<sup>74</sup> Commission of The European Communities, Communication from the Commission to the Council and the European Parliament, Proposal for an EU Action Plan, Brussels, 21.5.2003, COM (2003) 251 final. Available at: <http://www.euflgt.efi.int/uploads/01FLEGTACTIONPLANFINALEN.pdf>

<sup>75</sup> Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, Official Journal of the European Union, L 347/1. Available at: <http://www.euflgt.efi.int/uploads/eucouncilflegtresolution.pdf>

<sup>76</sup> SAIIA Occasional Paper, No 50, October 2009

<sup>77</sup> Ghana Forestry Commission, "Leading the way on sustainable forestry", Ghana Gazette, No. 45, Jan-Jun 2009.

<sup>78</sup> Ministerial Declaration, Africa Forest Law Enforcement And Governance (AFLEG) Ministerial Conference, 13-16 October, 2003, Yaoundé, Cameroon.

<sup>79</sup> *Ibid.* at para. 7.

<sup>80</sup> *Ibid.* at para. 8.

<sup>81</sup> *Ibid.* at para. 11.

hunting;<sup>82</sup> Emphasize the importance of existing legal frameworks and the compatibility of laws with neighbouring states, taking into account traditional and customary forest laws;<sup>83</sup> work to advance the implementation of the AFLEG objectives within the NEPAD process, as well as COMIFAC, ATO and other similar organizations;<sup>84</sup> analyse land-use laws and policies and take measures to ensure that property and usufruct rights, including traditional forest-related knowledge, are fully respected;<sup>85</sup> explore the ways and means of demonstrating legality and sustainability of forest products to encourage consumer market confidence and thereby enhance legitimate trade for a greater financial return to producing countries;<sup>86</sup> and work in collaboration with other related initiatives such as the EU FLEGT Action Plan.<sup>87</sup> The indicative list of actions includes integrating the concern for sustainable development of wildlife resources and non-timber forest products in AFLEG and developing participatory forest management practices to enhance forest law enforcement and governance.<sup>88</sup>

### 2.3.3 AFLEG/FLEGT

Despite an early lack of success, potential lies in the AFLEG/FLEGT Task Force. Presently, there is little coherence between the FLEGT and AFLEG processes, and they function in different ways. The contrast is between the vague perception of AFLEG applicability vs. the codified approach undertaken by the FLEGT process. The formalized process under FLEGT has led to its growth to the detriment of AFLEG.<sup>89</sup> However, synergies could be leveraged on priority themes distilled from the discussions at the last meeting of the Task Force: legality, traceability and certification, and the redistribution of forestry fees (i.e. benefit sharing).<sup>90</sup> An FAO project on NWFP in Central Africa has also proposed placing NWFP under the umbrella of the Task Force.<sup>91</sup>

## 3. Regional Frameworks for Sustainable Forest Management (focus on Africa)

There are also a number of regional partnerships on SFM which contain, or are in the process of developing, access and benefit sharing provisions and strategies. These include the Central African Forests Commission (COMIFAC) and the South African Development Community (SADC). Some of these regional agreements contain benefit sharing provisions, but these instruments are often not synergistically linked to other ABS-specific regional initiatives.

### 3.1 Treaty on the Conservation and Sustainable Development of the Forest Ecosystems of Central Africa (COMIFAC)

The working group on biodiversity of COMIFAC, le Groupe de Travail sur la Biodiversity de l'Afrique Central (GTBAC), has focused its work on the question of access and benefit sharing. The Group has noted, through a commissioned study on the state of ABS legislation in the sub region, that ABS considerations can be found in general decrees, forestry codes, statutes or general national environmental frameworks and action plans. These measures are often very broad and do not address the question of ABS in great detail. As such the GTBAC has decided to engage in the elaboration of sub regional strategy on ABS which fosters greater synergies between ABS and forestry and other cross sectoral considerations.

In Feb 2008, FAO, COMIFAC and GTZ developed the Sub-Regional Directives on the Sustainable Management of NWFP in Central Africa (the Directives) for the member states of COMIFAC.<sup>92</sup> The object of the Directives is to propose common grounds upon which countries in the sub-region can properly take into account NWFP in political, legal, fiscal and institutional frameworks to assure the

<sup>82</sup> *Ibid.* at para. 12.

<sup>83</sup> *Ibid.* at para. 13.

<sup>84</sup> *Ibid.* at para. 14.

<sup>85</sup> *Ibid.* at para. 18.

<sup>86</sup> *Ibid.* at para. 20.

<sup>87</sup> *Ibid.* at para. 24.

<sup>88</sup> *Ibid.* at p. 5.

<sup>89</sup> Compte-Rendu, Atelier D'Evaluation de la Task Force Regionale AFLEG/FLEGT. Douala, Cameroun, du 13 au 15 mai 2009. Available at <http://www.comifac.org/Members/webmaster/compte-rendu-de-latelier-devaluation-de-la-tf-aflég-flegt> at p. 3

<sup>90</sup> Communiqué Final, Atelier D'Evaluation de la Task Force Regionale AFLEG/FLEGT. Douala, Cameroun, du 13 au 15 mai 2009. Available at <http://www.comifac.org/Members/webmaster/communiqué-final-de-latelier-devaluation-de-la-tf-aflég-flegt>.

<sup>91</sup> FAO project GCP/RAF/398/GER

<sup>92</sup> Directives Sous-Regionales Relatives à la Gestion Durable des Produits Forestiers Non Ligneux D'Origine Végétale en Afrique Centrale

sustainable management of forest resources.<sup>93</sup> Several modes of benefit sharing with ILC are explicitly recognized: In conformity with the CBD, each state must take all necessary measures to assure the just and equitable sharing of benefits resulting from the exploitation of NWFP genetic resources,<sup>94</sup> and each State must take all necessary measures to redistribute the fees that result from the exploitation of NWFP to local forest communities.<sup>95</sup>

The Directives also address access considerations. Access to NWFP requires either a usage right to the resources of the forest concerned; an exploitation permit, or a management agreement signed with the state.<sup>96</sup> Local forest populations that the law confers their property to the State have the right to remove, freely and without advanced informed agreement, all NWFP that they use to satisfy their individual or collective domestic needs, except for protected species.<sup>97</sup> In addition, local forest populations can barter non-endangered NWFP for other goods.<sup>98</sup> The competent national authority will put in place the necessary measures to reconcile the rights of the holders of usage rights and those of managers of the forests submitted to a management regime, notably through tripartite accords between competent authorities, manager and usage right holders and/or mechanisms to prevent and resolve conflicts.<sup>99</sup>

Modes of Access	Usage Rights
Most of the legislation in the countries of the sub-region governing the management of NWFP is built on the classical model of forestry management, calls for the sustainable use of natural resources, but is aimed on timber exploitation. The codes generally make reference to NWFP in an inconsistent and isolated fashion. <sup>100</sup>	In most of Central Africa, the State owns and manages forest resources. Legislation generally gives forest dependent peoples the right to use NWFP to satisfy domestic needs, but not the right to commercialize. In many countries, there is a dualism between customary and written law which complicates application of the legal framework.” <sup>101</sup>

### 3.2 South African Development Community (SADC) Protocol on Forestry

The SADC Protocol on Forestry requires State Parties to adopt national policies and mechanisms to ensure that access to forest genetic resources is subject to prior informed consent and mutually agreed terms and that there is an equitable sharing of the benefits derived from the use of these resources. State Parties are also required to develop a regional approach and harmonised national legislation regulating access to, and the management, development and use of forest genetic resources as well as for the equitable sharing of the benefits derived from resources shared by more than one State Party. Lastly, parties are expected to share germplasm from plant genetic resources upon mutually agreed terms, and contribute to preserving forest germplasm *ex situ* with the SADC gene bank. Article 17 of the Forestry Protocol specifically pertains to the question of access and benefit sharing of forest genetic resources. Forest genetic resources are defined drawing on the exact language from the CBD. Furthermore, the Protocol calls on member States to adopt national policies and to implement mechanisms that ensure that access to the forest genetic resources is subject to prior informed consent and mutually agreed terms. It further obligates them to guarantee equitable sharing of the benefits derived from the use of such resources.<sup>102</sup>

#### Box 7: SADC Protocol on Forestry: Forest Genetic Resources (Art. 17)

State Parties shall adopt national policies and implement mechanisms to ensure that access to the forest genetic resources is subject to prior informed consent and mutually agreed terms and that there is an equitable sharing of the benefits derived from the use of these resources.

<sup>93</sup> *Ibid.*, at Directive 1.

<sup>94</sup> *Ibid.*, at Directive 5.1.

<sup>95</sup> *Ibid.*, at Directive 5.2.

<sup>96</sup> *Ibid.*, at Directive 6.

<sup>97</sup> *Ibid.*, at Directive 7.1.

<sup>98</sup> *Ibid.*, at Directive 7.2

<sup>99</sup> *Ibid.*, at Directive 7.4.

<sup>100</sup> Cadre légal et réglementaire régissant le secteur ‘produits forestiers non ligneux’ en Afrique Centrale, FAO PROJET GCP/RAF/398/GER, Note d’information No. 2 (Septembre 2006) <http://www.fao.org/forestry/14257-1-0.pdf> at 1-2.

<sup>101</sup> *Ibid.*, at 2

<sup>102</sup> Southern African Development Community: Protocol on Forestry, art. 17. Available at: [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdfs/sadc/protocols/forestry.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/protocols/forestry.pdf)

Furthermore the protocol recognises the contribution of forest dependent communities in forest management by calling on State Parties to take appropriate measures to promote the participation of local people and communities in decisions and activities related to forest management.”<sup>103</sup>

**Box 8: SADC Protocol on Forestry: Community- based forest management (Art. 12(a))**

State parties adopt national policies and mechanisms to enable local people and communities to benefit collectively from the use of forest resources and to ensure their effective participation in forest management activities, including affirmative steps to seek and encourage such participation

The protocol continues by providing specific measures that State parties can enact to protect and promote traditional forest related knowledge.<sup>104</sup>

**Box 9: SADC Protocol on Forestry: Traditional Forest-Related Knowledge (Art. 16)**

1. State Parties shall recognize, respect and protect the rights of individuals and communities over their traditional forest-related knowledge and their right to benefit from the utilization of this knowledge.
2. State Parties, in consultation with local people and communities:
  - a. may record, preserve and protect traditional forest-related knowledge, provide for the equitable sharing of any benefits arising from the utilization of this knowledge among those who hold it;
  - b. shall, where appropriate, develop standards, guidelines and other mechanisms in this regard.

**4. Forest and ABS legislation on the national level: potential areas of synergy or conflict between ABS and Forest tenure schemes**

**4.1 Case Study on Cameroon’s Forest and ABS Legislation**

Type of Legislation	Modalities of Access	Usage Rights	Benefit Sharing provisions
Forest Code <sup>105</sup> & Regulations <sup>106</sup>	Cameroon’s genetic heritage belongs to the state and authorization is required for scientific, commercial or cultural use. <sup>107</sup>  Harvesting GR samples for scientific or cultural purposes requires authorization obtained from the Ministry of Forestry & Wildlife (MINFOF) and Ministry for Scientific Research & Innovation. Prior consultation of the reference stock at the National	Two types of forest area: ‘permanent’ forest area, which includes state forests, conservation areas and communal forests; <sup>113</sup> and forests which are non-permanent (i.e. lands that may be used for non-forest purposes). <sup>114</sup>  Customary use is defined as the right of local populations to exploit all forest, wildlife and fisheries resources for personal use, except protected species. <sup>115</sup>  In national forests, the rights of local communities are fixed by regulation, <sup>116</sup> but local peoples generally retain their traditional	Economic and financial benefits resulting from the use of GR are subject to the payment of royalties. <sup>123</sup>

<sup>103</sup> *Ibid.* at art. 12(a).

<sup>104</sup> *Ibid.* art. 16.

<sup>105</sup> Cameroon, Loi n° 94/01 portant régime des forêts, de la faune et de la pêche, 20 January 1994, FAL n° 44, 1995, p. 158 à 214. (Law 94/01)

<sup>106</sup> Cameroon, Décret n° 95-531/PM fixant les modalités d’application du régime des forêts. (Decree 95-531)

<sup>107</sup> Law 94/01 at art. 12(1).

	<p>Herbarium of Cameroon is also required.<sup>108</sup></p> <p>NWFP harvesting is subject to an operating permit.<sup>109</sup> which gives the authorization to exploit or harvest well defined quantities of forest products in a given zone.<sup>110</sup></p> <p>Operating permits for certain NWFP listed by MINFOF are granted, after advice from a competent commission, for a non-renewable maximum period of one year.<sup>111</sup></p> <p>MINFOF grants permits for other NWFP on a case-by-case basis.<sup>112</sup></p>	<p>rights to NWFP in national forests.<sup>117</sup></p> <p>Communal forests are all forests that have been classified on behalf of the respective community or that have been planted by it.<sup>118</sup></p> <p>Classification of a forest as a communal forest sets the limits and management objectives for the forest, as well defining the rights of use of indigenous populations, and the opens the right to establish a land title.<sup>119</sup></p> <p>Classified communal forests subsequently come under the private ownership of the community concerned.<sup>120</sup></p> <p>User rights in community forests are subject to the basic management plan for those forests established with the Minister.<sup>121</sup></p> <p>All forest products exploited in community forests belong entirely to the local communities concerned.<sup>122</sup></p>	
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#### 4.2 Case Study on Kenya's Forest and ABS Legislation

Type of Legislation	Modalities of Access	Usage Rights	Benefit Sharing provisions
Forest Act <sup>124</sup>	Access is determined through a management plan for a particular forest. Could be through a community forest association. <sup>125</sup> Regulations may control the	No member of a forest community is prohibited from using NWFP customarily taken otherwise than for the purpose of sale, subject to regulation. <sup>127</sup> Usage rights can be assigned within the context of community	

<sup>113</sup> Law 94/01 at arts. 21(1) and (2).

<sup>114</sup> *Ibid.*, at Art. 20(3).

<sup>115</sup> *Ibid.*, at art. 8(1).

<sup>116</sup> *Ibid.*, at art. 36.

<sup>123</sup> *Ibid.*, at art. 12(2).

<sup>108</sup> Decree 95-531 at art. 13(2).

<sup>109</sup> *Ibid.*, at Chapter II, Section I, Paragraph II, A.

<sup>110</sup> Cameroon, Loi N° 94/01, at art. 56(1).

<sup>111</sup> *Ibid.*, at art. 56(2).

<sup>112</sup> *Ibid.*, at art. 56(3).

<sup>117</sup> Décret n° 95-531/PM, at art. 26(1).

<sup>118</sup> *Ibid.*, at art. 30(1).

<sup>119</sup> *Ibid.*, at art. 30(2).

<sup>120</sup> *Ibid.*, at art. 30(3).

<sup>121</sup> *Ibid.*, at art. 32(1).

<sup>122</sup> Cameroon, Law 94/01, at art. 37(3).

<sup>124</sup> Republic of Kenya, The Forests Act, 2005.

<sup>125</sup> *Ibid.*, at art. 46.

	harvesting, collection, sale of and disposal of NWFP. <sup>126</sup>	forestry.	
Environment Act <sup>128</sup> and ABS Regulations <sup>129</sup>	<p>Access permit required for all access to genetic resources, except in limited situations.<sup>130</sup></p> <p>In applying for a permit, evidence of Prior Informed Consent from interested persons and relevant lead agencies is required, as is research clearance from the National Council for Science and Technology.<sup>131</sup></p> <p>An access permit will only be granted if NEMA is satisfied that the activity shall facilitate the sustainable management and utilization of genetic resources for the benefit of the people of Kenya.<sup>132</sup></p> <p>A Material Transfer Agreement between the holder of an access permit and the relevant lead agency or community is required prior to the export of genetic resources.<sup>133</sup></p>	<p>The exchange of genetic resources, derivative products or intangible components associated with GR between members of local communities amongst themselves, and for their own consumption, is exempt from regulation.<sup>134</sup></p> <p>The Minister may declare the traditional interests of local communities customarily resident within or around a lake shore wetland, coastal zone or river bank or forests to be protected interests.<sup>135</sup></p> <p>In prescribing measures for the conservation of biological diversity, NEMA shall protect indigenous property rights of local communities in respect of biological diversity.<sup>136</sup></p> <p>In entering into a conservation agreement with a private forest owner, the Director-General of NEMA shall not take any action which is prejudicial to the traditional interests of the local communities customarily resident within or around the forest area.<sup>137</sup></p>	<p>The holder of an access permit must facilitate the active involvement of Kenyan citizens and institutions in the execution of activities under the permit.<sup>138</sup></p> <p>Involvement includes both monetary and non-monetary benefits (such as those defined in the non-exhaustive list in the act<sup>139</sup>) arising from the right of access granted and the use of genetic resources.<sup>140</sup></p>

<sup>127</sup> *Ibid.*, at art. 22.

<sup>126</sup> *Ibid.*, at art. 59(2)(a).

<sup>128</sup> Kenya, Environment Management and Coordination Act (1999), no. 8 of 1999, entered into force 14 January 2000. (EMCA)

<sup>129</sup> Kenya, The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006. (EMCR)

<sup>130</sup> *Ibid.*, at s. 9(1).

<sup>131</sup> *Ibid.*, at s. 9(2).

<sup>132</sup> *Ibid.*, at s. 11(1).

<sup>133</sup> *Ibid.*, at s. 18.

<sup>134</sup> *Ibid.*, at s. 3(a).

<sup>135</sup> EMCA, at s. 43.

<sup>136</sup> *Ibid.*, at s. 50(f).

<sup>137</sup> *Ibid.*, at s. 48(1) and (2).

<sup>138</sup> EMCR., at s. 20(1).

<sup>139</sup> *Ibid.*, at s. 20(3) and (4).

<sup>140</sup> *Ibid.*, at s. 20(2).

#### 4.3 Case Study on Ivory Coast's Forest and ABS Legislation

Type of Legislation	Modalities of Access	Usage Rights	Benefit Sharing provisions
Forest Code <sup>141</sup> and regulations <sup>142</sup>	The forest domain is divided between State forests, collective forests and private forests. <sup>143</sup>	<p>Customary usage rights can take three forms: over forested land; over the fruits and products of natural forests; and those of a commercial nature in relation to certain fruits and products of natural forests.<sup>144</sup></p> <p>Usage rights related to forest land are limited in listed forests.<sup>145</sup> Usage rights over forest land can only be exercised in protected forest areas.<sup>146</sup> All Ivorian citizens, regardless of ethnicity or origin, can exercise these rights in protected forest areas on the condition of conforming with regulations and obtaining authorization.<sup>147</sup></p> <p>Usage rights over fruits and products from natural forests may be freely exercised in protected forests.<sup>148</sup> However, in listed forests, usage rights that apply to fruits and forest products are limited to: gathering dead wood, harvesting fruits and nutritional or medicinal products, the exploitation of timber for construction of traditional shelters and boats; and hunting certain animals.<sup>149</sup> These rights may only be exercised by local populations and are subordinate to the state of the forest.<sup>150</sup></p> <p>Commercial exploitation of certain products may be done freely in protected forests so long as the harvesters do not destroy the productive plants.<sup>151</sup> In listed forests, commercial exploitation requires a special</p>	

<sup>141</sup> Loi n° 65-425 portant Code forestier, 20 December 1965, Lois et décrets de la Côte d'Ivoire, 1970, J.B.Blaise,J.Nourgeon. (Law 65-425)

<sup>142</sup> Décret n° 78-231 fixant les modalités de gestion du domaine forestier de l'Etat, 15 March 1978, Journal officiel de la République de Côte d'Ivoire n° 23, 25 mai 1978. (Decree 78-231)

<sup>143</sup> *Ibid.* at art. 4.

<sup>144</sup> Law 65-425 at art. 7.

<sup>145</sup> *Ibid.* at art. 8.

<sup>146</sup> *Ibid.* at art. 9.

<sup>147</sup> *Ibid.* at art. 10.

<sup>148</sup> *Ibid.* at art. 14.

<sup>149</sup> *Ibid.* at art. 15.

<sup>150</sup> *Ibid.* at art. 16.

<sup>151</sup> *Ibid.* at art. 18.

		exploitation permit indicating the locations and modalities of harvest. <sup>152</sup> Local forest communities who make a request receive permits on a priority basis. If they do not make use of this right, any other citizen may benefit from it. <sup>153</sup>	
Indigenous Rights <sup>154</sup>	Councils of rural communities can regulate the management and exploitation of NWFP and timber. <sup>155</sup>		

#### 4.4 Case Study on Ethiopia's Forest and ABS Legislation

Type of Legislation	Modalities of Access	Usage Rights	Benefit Sharing provisions
ABS law <sup>156</sup>	<p>Access to genetic resources is subject to the prior informed consent of the Institute.<sup>157</sup> Unless otherwise explicitly expressed, the granting of permit to access genetic resources shall not be construed to constitute permit to access the community knowledge associated therewith and vice versa.<sup>158</sup> No person shall access genetic resources or community knowledge unless in possession of written access permit granted by the Institute based on prior informed consent.<sup>159</sup></p> <p>The law protects the right of local communities to regulate the access to their community knowledge.<sup>160</sup> Thus, access to community knowledge is subject to the prior informed consent of the concerned local community.<sup>161</sup> The right to</p>	<p>Ownership of GR is vested in the State and the Ethiopian people, but the ownership of community knowledge is vested in the local community.<sup>166</sup></p> <p>Local communities have an inalienable right to use or exchange genetic resources or community knowledge among themselves in the course of sustaining their livelihoods in accordance with their customary practices or norms.<sup>167</sup></p> <p>No legal restriction shall be placed on the traditional system of local communities on the use and exchange of genetic resources and community knowledge.<sup>168</sup></p> <p>Organs of the state which are empowered by law to conserve genetic resources are not required to obtain exploration permit to conduct exploration of genetic resources in the discharge of their duties.<sup>169</sup></p>	<p>The state and the concerned local community shall obtain fair and equitable share from benefits arising out of the utilization of genetic resources and community knowledge accessed.<sup>170</sup></p> <p>Local communities have the right to share from the benefit arising out of the utilization of their genetic resources and community knowledge.<sup>171</sup></p> <p>The right of local communities to share from the benefit arising out of the utilization of their community knowledge is the right to obtain 50% of the benefit shared by the state in the form of money from the</p>

<sup>152</sup> *Ibid.* at art. 19.

<sup>153</sup> *Ibid.* at art. 20.

<sup>154</sup> Loi n° 95-893 1995 relative aux communautés rurales, 27 October 1995, Journal officiel de la République de Côte d'Ivoire, 28 décembre 1995, p.1096 à 1103.

<sup>155</sup> *Ibid.* at art. 16(15).

<sup>156</sup> Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482 /2006, adopted 27 February 2006.

<sup>157</sup> *Ibid.* at art. 12(1).

<sup>158</sup> *Ibid.* at art. 11(2).

<sup>159</sup> *Ibid.*, at art. 11(1).

<sup>160</sup> *Ibid.*, at art. 6(1).

<sup>161</sup> *Ibid.*, at art. 12(2).

<sup>162</sup> *Ibid.*, at art. 5.

<sup>163</sup> *Ibid.*, at art. 6(2) and 8(1).

	<p>regulate access to community knowledge includes: the right to give PIC; the right to refuse consent when they believe that the intended access will be detrimental to the integrity of their cultural or natural heritages; the right to withdraw or place restrictions on their PIC when they find out that consent is likely to be detrimental socio-economically, or to their natural or cultural heritages; and, the right to demand restriction or withdrawal of PIC given by the Institute for access when they find out that consent is likely to be detrimental socio-economically, or to their natural or cultural heritages.<sup>162</sup></p> <p>Foreign applicants must present a letter from the competent authority of their state or domicile assuring that it shall uphold and enforce the access obligations made by the applicant.<sup>163</sup></p> <p>State organs that are legally empowered to conserve genetic resources may not be required to obtain access permit from the Institute to collect GR or TK for their mandate; provided however, that they not transfer the GR or TK to third persons or export GR or TK unless they are given explicit permit by the Institute. When collecting genetic resources and community knowledge, employees of such institutions must carry with them a letter to this effect.<sup>164</sup></p>	<p>benefits derived out of the utilization of their genetic resources in accordance with Article 18(1).<sup>172</sup></p> <p>The money obtained shall be put to the common advantage of the local communities.<sup>173</sup></p> <p>The remaining portion of the monetary benefit from access to GR, after deducting the share of the local community under Article 9(1) shall be allocated for the conservation of biodiversity and the promotion of TK.<sup>174</sup></p> <p>The rights of local communities over their GR and TK are protected as enshrined in the community's customary practices and norms.<sup>175</sup></p> <p>The kind and the amount of the benefit to be shared by the state and local communities from access to genetic resources or community knowledge shall be determined case by case in each specific access agreements to be signed.<sup>176</sup></p> <p>The sharing of non-monetary benefits from access to genetic resources among the state and the concerned local</p>
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<sup>168</sup> *Ibid.*, at art. 8(2).

<sup>169</sup> *Ibid.*, at art. 22(2).

<sup>170</sup> *Ibid.*, at art. 12(3).

<sup>171</sup> *Ibid.*, at art. 6(3).

<sup>172</sup> *Ibid.*, at art. 7(1).

<sup>173</sup> *Ibid.*, at art. 12(4)

<sup>174</sup> *Ibid.*, at art. 11(4).

	Exploration of genetic resources (permit) <sup>165</sup>		community shall be specified in each specific access agreement taking into account the kinds of benefits agreed to be shared with the access permit holder. <sup>177</sup>
Forest law <sup>178</sup>	<p>State and regional forests must be used according to the government approved management plan.<sup>179</sup> Inhabitants of state and regional forests may, in accordance with the management plan and related directives, utilize NWFP in the sums necessary to satisfy domestic needs.<sup>180</sup></p> <p>Owners are obliged to implement Ministerial directives on regional forest communities when conserving and developing private forests.<sup>181</sup></p> <p>The Ministry will either undertake or allow research on conservation, development and utilization of forests and to promote the conservation of biodiversity and GR.<sup>182</sup></p> <p>No person without a permit shall cut trees, hunt, and keep bee-hives or extract honey within a state forest and regional forest.<sup>183</sup> In protected forests, the appropriate body may allow forest products, grass and fruit to be harvested.<sup>184</sup></p>	<p>Three types of forest ownership are established by the Proclamation: 1) State; 2) Regional; and, 3) Private.<sup>185</sup></p> <p>The central government, regional organizations and concessionaries are the only legal users of state and regional forests.<sup>186</sup></p> <p>The Ministry or the appropriate regional body, when deemed necessary, may designate any forest a "protected forest" so that any trees, bushes and NWFP are developed and protected, with one rationale being the protection of genetic resources.<sup>187</sup> In protected forests, no one may cut any tree, use its products, or perform other activities.<sup>188</sup></p>	<p>Recognizes that the sustainable utilization of the country's forest resources is only possible through the public participation and benefit sharing with communities involved.</p> <p>Preamble links the sustainable utilization of forest resources to benefit sharing with a focus on communities as beneficiaries</p>

<sup>172</sup> *Ibid.*, at arts. 9(1) and (2).

<sup>173</sup> *Ibid.*, at art. 9(3).

<sup>174</sup> *Ibid.*, at art. 18(2).

<sup>175</sup> *Ibid.*, at art. 10(1).

<sup>176</sup> *Ibid.*, at art. 18(1).

<sup>165</sup> *Ibid.*, at art. 22-25.

<sup>177</sup> *Ibid.*, at art. 18(3).

<sup>178</sup> Proclamation No. 94/1994: A proclamation to provide for the conservation development and utilization of forests, Negarit Gazeta of the Transitional Government of Ethiopia, issued 28 March 1994.

<sup>179</sup> *Ibid.*, at art. 9(1).

<sup>180</sup> *Ibid.* at art. 9(3).

<sup>181</sup> *Ibid.* at art. 6(2)(e).

<sup>182</sup> *Ibid.* at art. 11(1).

<sup>183</sup> *Ibid.* at art. 13(2)(a).

<sup>184</sup> *Ibid.* at art. 10.

#### 4.5 Analysis of selected country case studies

Ownership entitlements envisaged in the ABS and Forest sectors are characterized by the existence of multiple property regimes that predicate different sets of rights and obligations for forest dependent communities. The four different countries surveyed define ownerships and land tenure arrangements differently and this diversity is largely a function of the varied legislative heritage and legal traditions found in these countries. Property rights over natural resources differ between common law and civil law countries, and land tenure in the forestry sector is one area where this comes into open view. The rights and obligations may range from traditional common tenure systems to sole state ownership of forests with vaguely defined but clearly circumscribed usage rights of forest dependent communities. Issues may include:

1. What is below ground and what is above
2. State ownership vs. private ownership
3. Dismemberment
4. Usage rights (usufruct, servitude, superficies etc.)

On the other hand, many ABS measures don't discuss who actually owns the genetic resources/biological resources/traditional knowledge. Ethiopia is the only country surveyed that makes a distinction between genetic resources which are under state ownership, and associated "community knowledge", which is owned by the relevant community holding it.<sup>189</sup> The law thus specifically recognizes the right of local communities "to regulate the access to their community knowledge", their "inalienable right to use their genetic resources and community knowledge", and "the right to share from the benefit arising out of the utilization of their genetic resources and community knowledge". The emphasis Ethiopia's laws seems to be on enshrining state control of the land while maintaining land access rights along state, private and communal models. It does however appear that the ABS law goes further by recognizing community rights over genetic resource which in turn translates into potentially more favourable benefit sharing entitlements for communities. An ambiguity could thus arise in the case forest genetic resources as these could fall under the purview of the ABS or the forest proclamation, noting that the later is less detailed in terms of benefit sharing and corresponding rights and obligations of forest communities. Ethiopian law also appears to create a distinction between access for the purposes of the exploration of genetic resources and access for all other purposes; exploration of genetic resources still requires a permit but does not involve the same benefit-sharing obligations as does the more general access procedure. This case thus aptly illustrates the need to ensure that ABS and forest measures are designed in a consonant and complementary way to ensure that their application produces consistent outcomes across sectors.

Cameroon displays the concept of state sovereignty over genetic resources, prior informed consent, benefit sharing mechanism (in this case, monetary benefits) in a Forestry law - ABS and Forests are governed by the same legislation.<sup>190</sup> Customary norms permit populations to remove NWFPs from the forest for both sustenance and barter/sale. The beneficiaries of the right of use are identified in the legal dispositions of fundamental Cameroonian law. Customary law is recognized for forest-dependent people, and the area of free application of the traditional right of usage is adapted to territorial limits of the neighbourhood of forest permits, which means that there is a certain superimposition of usage rights. The legislative framework in Cameroon envisages a number of beneficiary rights linked to regulatory conditions for commercialization of NWFP: persons entitled to sell, beneficiaries of the right of use, and beneficiaries of the right to harvest NWFP that are purchased.<sup>191</sup>

The issue of property rights over genetic resources is consequential to determining the right to participate in the decision making process of ABS and who the beneficiary of the potential benefits will be. Thus, a key element of any national ABS regime must be a

<sup>185</sup> *Ibid.* at art. 3.

<sup>186</sup> *Ibid.* at art. 9(2).

<sup>187</sup> *Ibid.* at art. 7(1)(d).

<sup>188</sup> *Ibid.* at art. 13(1)(b).

<sup>189</sup> Proclamation No. 482/2006, Article 2.14.

<sup>190</sup> Law 94/01 at Art. 12(1) and (2).

<sup>191</sup> Bonannée, Michel, Armand Asseng Zé and Sven Walter, Le Cadre Legislatif et Reglementaire Regissant L'Utilization des Produits Forestiers Non Ligneux (PFLN) en Afrique Centrale at 21. Available at: <ftp://ftp.fao.org/docrep/FAO/012/ak426f/ak426f00.pdf>

legal distinction between the owner of the land from which the specimen is collected, the owner of the specimen and the owner of the genetic resource(s). The Convention does not specifically address the issue of ownership over genetic resources; it simply states that states have sovereign rights over their genetic resources, which infers that they are entitled to ownership of these resources. The delineation of property rights is crucial to the design of functional ABS legislation as it can not only clarify the right to participate in the ABS decision making process, but can also help ascertain the potential beneficiaries of benefits that may arise from the utilization of genetic resources.

ABS legislation and measures, which are yet not in place in the majority of countries surveyed, should be elaborated while taking into account issues related to sustainable forest management. SFM often depends on the involvement of indigenous and local communities who are custodians of forest resources and manage those resources sustainably. Thus, the protection of traditional forest-related knowledge is a crucial step towards attaining SFM. Mechanisms existing under the CBD on ABS and protection of TK could provide guidance to the forest sector in regards to what can be designed to better promote, protect and recognize the crucial role of TFRK.

Equally, the forestry sector provides useful guidance as to how community management can both enhance the conservation and sustainable use of a resource. The ABS community could draw from the important lessons and experiences of the forestry sector in tackling land tenure, land ownership, and usage rights. Because national forest tenure schemes, which vary based on the legal framework, often raise access and benefit sharing considerations, many laws define customary forest ownership rights and arrangements for the access, management and use of forest resources.<sup>192</sup>

Several countries have initiated progressive tenure reform in the forestry sector through transfer of management and use rights from the state to local communities, indigenous groups, local governments, and private owners. A number of national forestry measures stipulate that usage rights can or must be exercised through participatory forest management and define how benefits arising from the use of TFRK are to be shared with the holders of that knowledge. The dilemma is how to write access to these resources into legislation. In some countries the following issues still have to be addressed with regard to land tenure:

- no security of tenure on communal land;
- no exclusivity of user rights;
- lack of community rights to the utilization of natural resources other than game on communal land;
- lack of clarity regarding rights to customary use of natural resources in ‘permanent’ forests.

What this analysis demonstrates is that tenure systems, especially in the forestry sector, are neither homogenous nor uniform across countries. Countries, based on the legislative strategies, show a wide range of ownership arrangements that range from traditional common tenure full state ownership with a few variants in between. The same issues will likely arise in the context of designing effective ABS laws and measures and in the ongoing negotiations for the elaboration of an international regime on ABS.

## 5. Conclusions

There is a need for countries, where relevant at the national level, to begin clearly defining the ownership of resources (domesticated and wild), as well as tenure/ownership of communal land, commercial land and State land, including protected forest areas. As long as the issue of land ownership or land tenure is not adequately addressed, the sharing of benefits relating to access and sustainable use of the components of biodiversity and TK will be problematic. It is thus instrumental that national forest and ABS legislation be designed in a harmonized and mutually supportive manner to ensure that ABS and forest considerations are contemporaneously taken into account. This underscores the overriding need for countries to develop access regimes and mechanisms for sharing tree germplasm and use TK that are consistent with the CBD. This has proven to be a slow process and, in some cases, governments appear unsure of how to proceed. Many are looking for guidance, including relevant model regimes on access that they could adopt. Uncertainties over ownership and the parties who can legitimately provide prior informed consent essentially point to the question of legal certainty. Users

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<sup>192</sup> It bears noting that locally based forest management schemes often rely on local structures (either traditional or modern) and on local capacities and knowledge. As such, the role of local people and their traditional forest management practices are often integral to overall forest management.

of genetic resources need to ascertain that a provider has the authority to provide such resources. Such authority or prerogative does not, in many cases, rest only with the government but also with those who have private or other rights or tenure over the land or resources. Therefore, questions of ownership and tenure invariably have an impact on the practicality of ABS in every case and are thus important elements of national legislation and policy that governments can use to “determine access” to resources. The forest sector provide useful guidance as to how ownership entitlements can be designed to induce resource conservation and the involvement of indigenous and local in the decision making process related to access to resources. These issues are also central in the current negotiations under the heading of compliance as ownership and land tenure rights could raise international compliance questions that the international regime should envisage.

Benefit sharing in the forestry sector is premised on fostering an adequate balance between the interests of forest owners and those of the state. Depending on the forest type, households and individuals owning forests may obtain benefits from environmental services or the harvest of forest products such as NWFPs. Research in the forest sector may also lead to significant markets for new biomaterials (e.g. wood, fabric, etc.) and bioenergy products. These uses suggest that the demand for access to genetic resources could join other sustainable uses of forests, such as the sourcing of NWFP and ecotourism, to support sustainable livelihoods for forest dwellers and to provide the economic justification for conserving forests. It is important to note that the concept of benefit-sharing is already being widely applied in the forestry sector to the trade in wood products, non-wood forest products and forest services through various mechanisms such as trust funds, ethical trade agreements, and certification.

Benefit sharing in the forest sector is also addressed through collaborative approaches to forest management, such as community forestry, social forestry and joint forest management. These approaches, combined with a strong international instrument, have great potential for strengthening local communities and inducing environmentally sound and economically viable use of forest products and services. It is nonetheless important to note that ABS as envisaged the CBD is narrowly linked to the use of genetic resources and associated traditional knowledge, genetic resources being “genetic materials of actual or potential value”<sup>193</sup>. The definition of genetic resources envisaged by the CBD in the context of ABS is much narrower than the broader and more general reference to biological resources see the Instrument. This question will certainly require further examination to ensure that scope of the international regime on ABS is clearly delineated and that clear criteria are adopted to justify the inclusion or exclusion of certain types of resources. This will also greatly contribute clearly outlining the relationship between the prospective international regime and other related international instruments.

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<sup>193</sup> Convention on Biological Diversity, Art. 2. The Group of Legal and Technical Experts on Concepts, Terms, Working Definitions and Sectoral Approaches<sup>193</sup> of the CBD established by COP IX in the context of the IR negotiations has reached some interesting conclusions on this matter. See<sup>193</sup> UNEP/CBD/WG-ABS/7/2, 12 December 2008

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