



CONVENTION ON BIOLOGICAL DIVERSITY

Distr.
GENERAL

UNEP/CBD/WG8J/4/7
24 November 2005

ORIGINAL: ENGLISH

AD HOC OPEN-ENDED INTER-SESSIONAL WORKING GROUP ON ARTICLE 8(j) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Fourth Meeting

Granada, Spain, 23-27 January 2006

Item 8 of the provisional agenda*

DEVELOPMENT OF ELEMENTS OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

Note by the Executive Secretary

I. INTRODUCTION

1. In paragraph 6 (b) of decision VII/16 H, the Conference of Parties requested the Working Group in collaboration with relevant international organizations, such as the United Nations Permanent Forum on Indigenous Issues, to further develop, as a priority issue, elements for *sui generis* systems for the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and ensure benefit-sharing arrangements for these communities when their traditional knowledge and associated genetic resources are accessed.

2. The Executive Secretary prepared this document to assist the Working Group in its work. Section II examines the elements for *sui generis* systems listed in the annex to decision VII/16 H. Section III suggests recommendations by the Working Group concerning future work in the area of *sui generis* systems for the protection of traditional knowledge, innovations and practices. Finally, annex I provides a tentative list of legislations and other measures at a national level of relevance to *sui generis* systems, and annex II contains suggested definitions of a number of key terms.

II. POTENTIAL ELEMENTS TO BE CONSIDERED IN THE DEVELOPMENT OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES

3. In decision VII H, paragraph 6 (b), the Conference of Parties requested the Ad Hoc Working Group on Article 8(j) and Related Provisions of the Convention to address the issue of *sui generis* systems of protection of traditional knowledge, and to further develop, as a priority issue, elements for *sui generis* systems, listed in the annex, those being:

- (a) Statement of purpose, objectives and scope;

* UNEP/CBD/WG8J/4/1.

- (b) Clarity with regard to ownership of traditional knowledge associated with biological and genetic resources;
- (c) Set of relevant definitions;
- (d) Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (i) customary rights in indigenous/traditional/local knowledge; (ii) customary rights regarding biological resources; and (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources;
- (e) A process and set of requirements governing prior informed consent, mutually agreed terms and equitable sharing of benefits with respect to traditional knowledge, innovations and practices associated with genetic resources and relevant for the conservation and sustainable use of biological diversity;
- (f) Rights of traditional knowledge holders and conditions for the grant of rights;
- (g) The rights conferred;
- (h) A system for the registration of indigenous/local knowledge/Systems for the protection and preservation of indigenous/local knowledge;
- (i) The competent authority to manage relevant procedural/administrative matters with regard to the protection of traditional knowledge and benefit-sharing arrangements;
- (j) Provisions regarding enforcement and remedies;
- (k) Relationship to other laws, including international law;
- (l) Extra-territorial protections.

4. Each of these elements is examined below with a view to assisting discussion in the Working Group.

A. Statement of purpose, objectives and scope

1. Purpose

5. The overall purpose of a *sui generis* system could be to put in place a set of measures that would respect, preserve and the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity (hereinafter referred to as “traditional knowledge”) and to ensure that they derive fair and equitable benefits from its utilization and that such utilization is based on their prior informed consent.

6. More particularly, *sui generis* systems could provide the means for Indigenous and local communities to:

- (a) Control access to, disclosure and use of traditional knowledge;
- (b) Exercise the right to require prior informed consent for any access to or disclosure and use of traditional knowledge;
- (c) Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices;
- (d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon. ^{1/}

7. *Sui generis* systems could provide safeguards against claims of third parties to intellectual property rights over traditional knowledge. Exceptions to this general protection would be clearly defined

^{1/} UNEP/CBD/WG8J/3/7.

and any consent to use would follow principles of prior informed consent, benefit sharing and other principles of customary law of the affected communities. The safeguarding of knowledge from intellectual property claims from third parties could extend to protection against unauthorized disclosure, culturally offensive or unauthorized use of traditional knowledge.

8. *Sui generis* systems could also promote a clear, transparent and effective system of traditional knowledge protection, which increases legal certainty and predictability to the benefit not only of knowledge holders, but also of society as a whole, including firms and research institutions, who are potential partners of knowledge holders. By promoting such transparency and efficiency, *sui generis* systems would aim to lower transaction costs for local and Indigenous communities for protecting their traditional knowledge or for those using it for commercial or non-commercial purposes.

9. Economic development and poverty alleviation are also both possible subsidiary purposes of *sui generis* systems. In particular, a system could work to increase access to capital for indigenous and local communities, thus facilitating the establishment of commercial ventures within traditional communities. While promoting economic development, if they so choose, *sui generis* systems would need to carefully balance the goal of protection of traditional knowledge as against the goal of promotion of use.

10. Finally, given the holistic nature of traditional knowledge and the need to respect its cultural context, *sui generis* systems should not require the separation and isolation of the different elements of traditional knowledge, but rather take a systematic and comprehensive approach.

2. Objectives

11. An important objective of *sui generis* systems could be to develop systems based on relevant principles of indigenous customary laws that would respond to the particular needs and circumstances of indigenous and local communities and nation-states in many highly diverse and complex situations.

12. *Sui generis* systems could also aim to ensure fair and equitable systems of benefit-sharing derived from the use of traditional knowledge and prevent unauthorized use through effective mechanisms. Such mechanisms would apply to any use by all persons or communities who are not legally recognized as the “owners” or “holders” of the traditional knowledge, innovations and practices under national law or the relevant community’s customary laws.

13. Furthermore, *sui generis* systems could work to promote equity through trust-building, environmental conservation, cultural diversity and sustainable innovation.

14. Finally, *sui generis* systems for the protection of traditional knowledge could recognize the important link between protecting traditional knowledge and securing tenure over lands and waters traditionally occupied or used by indigenous and local communities.

3. Scope

14. For *sui generis* systems to be effective, there will likely be a need for measures at local, national and international levels. At each of these levels, the measures could be either binding or non-binding, giving either detailed prescriptions through legislation or through more general best-practice guidelines, or as a framework. The approach taken at each level will depend on the particular objectives at each level and the main actors involved (i.e. States, indigenous and local communities, private actors).

15. Traditional knowledge encompasses three dimensions: a cultural aspect (it reflects the culture and values of a community), a temporal aspect (it is passed on through the generations, and slowly adapts to respond to changing realities) and a spatial aspect (it relates to the territory or the relationship which a community has with its lands and waters traditionally occupied or used). All three of these dimensions need to be acknowledged and protected in order for *sui generis* systems to be effective.

B. Clarity with regard to ownership of traditional knowledge associated with biological and genetic resources

16. In developing *sui generis* systems, there is a need to clarify the ownership rights and interests of indigenous and local communities over their traditional knowledge. Beyond clarity over the rights and interests a community has over its knowledge, *sui generis* systems also need to provide greater clarity with regards to ownership over the genetic resources associated with a community's traditional knowledge as well as the territories to which the traditional knowledge relates. The way in which a system defines the rights associated with traditional knowledge and associated resources and the associated lands and waters, will affect how prior and informed consent and mutual benefit-sharing will be implemented.

17. The fact that traditional knowledge is the collective property and cultural patrimony of indigenous and local communities, suggests that ownership rights in traditional knowledge should be vested in communities, rather than in individuals, although individuals are often 'custodians' of the knowledge on behalf of the collectivity. The approach to deal with this custodial relationship should therefore be in accordance with customary law of the indigenous or local community.

18. It is important for *sui generis systems* to not only recognize the importance of customary law but to actively incorporate its principles and enforce it as part of the system. The importance of customary law is particularly crucial for the attribution of rights and benefits within the community. Any measures concerning the protection and equitable sharing of benefits of traditional knowledge, both at the national and international levels, should recognize the importance of communities' customs and traditions involving the permission for individuals to use elements of traditional knowledge, within or outside the community concerned, as well as issues concerning ownership, entitlement to benefits, etc. To recognize this it may be desirable, if communities so decide, to develop a registry to record those customs and traditions together with the elements of traditional knowledge. This would ensure that protection should be created not only as regards to the appropriated elements of traditional knowledge themselves, but also in connection with benefit sharing within the community/ies.

19. Although there are commonalities among the customary laws of many Indigenous and local communities, there are also significant differences. Any *sui generis* systems developed at the national level, should adequately recognize the diversity of ownership models present in the customary legal traditions of different Indigenous and local communities.

20. In the case of the trans-boundary occurrence of some biological and genetic resources and associated traditional knowledge, as well as its occurrence amongst different indigenous and local communities within the same country, ownership of shared knowledge and resources should be seen as joint ownership and consent should be required from all parties involved. Research and development of traditional knowledge could then be coordinated and profits should be shared equitably and according to the relevant customary laws. And again, customary laws and practices should be applied in case of discrepancy among the indigenous and local communities' involved.

C. Set of relevant definitions

21. Given the diversity of indigenous and local communities around the world, definitions would have to be broad enough to cover all situations. *Sui generis* systems at local, national and international levels will have to work in collaboration with other areas of law and policy. Therefore, terms used in *sui generis* systems should strive to be coherent with other national and international laws and treaties

22. To assist the Working Group in taking forward the development of a glossary of terms as requested in decision VII/16 H, paragraph 4, and the set of definitions requested in the annex of the same decision, suggested definitions of a number of key terms are contained in Annex II.

D. Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (a) customary rights in indigenous/traditional/local knowledge; (b) customary rights regarding

biological resources; and (c) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources

23. The customary laws of Indigenous and local communities commonly govern all aspects of the community's and the individual's life and are often underpinned by a strong conservation and sustainable use and sustainable development ethic that guides interaction with biological diversity. Given the significance of customary law to indigenous and local communities, it is important that these legal systems form the backbone to any *sui generis* system for the protection of traditional knowledge.

24. Within *sui generis* systems, the principles of customary law could be used as the basis for developing a range of mechanisms (both positive and defensive) and for strengthening customary resource management, governance systems, and cultural values. This could provide a means to strengthen and maintain core traditional values, while allowing communities the flexibility to respond and adapt to changing circumstances, opportunities and threats. Establishing common principles may allow for the development of frameworks to guide the development of *sui generis* systems at various levels.

25. Customary laws are generally orally held and applied by customary institutions according to cultural values. There is no generic form of collective or community custom-based systems for the ownership and control of traditional knowledge, and there is in fact great diversity among traditional proprietary systems, many of which are highly complex. The specific definition and protection afforded to traditional knowledge under *sui generis* systems, therefore, may have to be distinguished from the full social, environmental and spiritual context of the traditional knowledge. This will be the case if *sui generis* systems are developed not to codify all existing customary law relating to traditional knowledge within a community, but rather to extend the reach of legal protection beyond its present form. It also may need to be clarified that in practice no single *sui generis* system, however broad in scope, is likely to embrace all the characteristics and the full context of traditional knowledge in its original cultural context and its related customary law.

26. In order to have *sui generis* systems based on the principles of customary law, it is imperative that the knowledge and use of customary law in local and Indigenous communities remains strong. The following is a suggested indicative list of potential measures to promote and protect the respect, use and inter-generational transfer of customary law:

(a) Recognition, accreditation and support (financial and institutional) for traditional knowledge specialists such as practitioners of traditional medicine;

(b) Promoting awareness of the value of customary law through the media and public relations campaigns, thus encouraging renewed interest and pride in traditional knowledge by community youth;

(c) Including customary law in formal school curricula;

(d) Creating tribal educational institutions, from pre-school to university levels;

(e) Training youth in customary law through local organizations;

(f) Measures to support women and older segments of the populations;

(g) Community-based and -controlled codification of customary law;

(h) Use of modern technologies such as the Internet to improve transmission among regionally disperse communities and stimulate interest by youth.

27. The question of how to provide recognition to customary law or more accurately, recognition of the principles of customary laws relevant to the conservation and sustainable use of biological diversity, may vary because of national laws and may depend on, for example, national constitutional arrangements, fulfilment of domestic treaty obligations, and the ratification of international and regional treaty commitments.

1. *Customary rights in indigenous/traditional/local knowledge*

28. Intellectual property rights, as generally understood under International Law, are often at odds with the understanding of rights in traditional knowledge of indigenous and local communities. While intellectual property rights aim at commoditizing/commercializing certain pieces of knowledge, this is generally not part of the purpose behind customary rights in traditional knowledge. The idea of 'exclusivity' of rights may, for example, be difficult to accommodate with customary law concepts of how knowledge and resources should be treated.

29. For many indigenous and local communities, traditional knowledge is connected with rights but also obligations. For example, intergenerational transfer of knowledge is an important obligation for older generations among most bodies of customary law. Similarly, there is also an obligation on youth to receive this knowledge. In many cases, youth must earn the right to receive the knowledge. Elders may in some cases be reluctant to fully share their knowledge with others, even within their own community, if they feel that the latter will not use the knowledge in the proper way.

30. Further more, under customary law, there is generally no time limit on rights and obligations related to knowledge. There is often no distinct concept of invention or permanent destruction.

2. *Customary rights regarding biological resources*

31. Although there are individual rights and obligations under customary legal systems, generally rights and responsibilities are held collectively.

32. The processes by which traditional knowledge is acquired, used and sustained are shaped by the unique cultural and spiritual values and beliefs of the relevant communities. Many traditional knowledge holders believe that all parts of the natural world are infused with spirit and that it is from these spirits or gods that knowledge is acquired. Spiritual values and beliefs are closely interlinked with, or expressed in, customary laws relating to the rights and obligations over biological resources. Thus the misappropriation that most offends communities may be cultural and spiritual, more than economic.

33. Customary law principles related to biological resources have a strong spiritual character and are closely interlinked with belief systems associated with sustainability and fairness. They are often based on fundamental values of respect for nature or Mother Earth, social equity and harmony, and serving the common good. Some of these laws promoting the common good existing in many customary law systems have been discussed by the International Institute for Environment and Development. They include:

(a) *Reciprocity*, which means that what is received, has to be given back in equal measure. It encompasses the principle of equity, and provides the basis for negotiation and exchange between humans, and with the Earth;

(b) *Duality*, which means that everything has an opposite which complements it, meaning that behaviour, cannot be individualistic. This affects interactions with nature and with each other;

(c) *Equilibrium*, which refers to balance and harmony, in both nature and society. ^{2/}

3. *Customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources*

34. The principle of prior informed consent as well as mutually agreed terms and equitable benefit sharing, are concepts present in many customary law systems.

35. Knowledge and resources are not *owned* as they are under existing intellectual property rights, they are held in custodianship. Some knowledge is restricted to particular individuals or grounds or is only used for highly spiritual occasions. Other knowledge may be more open and widely shared.

^{2/} Refer IIED Information document UNEP/CBD/WG8J/4/INF/17

Knowledge is not generally owned in the sense of individual and severable property. Having knowledge is more often linked to notions of responsibility and respect as opposed to rights.

36. Some knowledge and resources can be shared and used commercially, but rules concerning their use are determined collectively and often make specific references to the community's cultural context and beliefs.

37. The rights to use knowledge and resources are often not permanent, but are conditional on fulfilling obligations. If obligations are not met, rights to use the knowledge may be withdrawn. Many communities also believe that unauthorized use of traditional knowledge without appropriate ritual/s can cause knowledge and resources to be withdrawn by the Creator. Some communities hold the knowledge holders ultimately responsible for the unauthorized use of traditional knowledge by third parties and the knowledge holders may also be punishable under their customary law/s.

38. The principle of Equilibrium, mentioned above, yields several associated general principles and concepts that govern access and use of biological resources. For example:

(a) Benefits, goods and services should be shared equitably and proportionally according to needs, capacities, responsibilities and contributions and/or efforts, and is also used for guiding impartial decision-making.

(b) Proportionality based on recognition of relative capacities, needs and efforts, which guides participation in decision-making for the allocation of opportunities, distribution of benefits, conservation and management of agro-biodiversity and just conflict resolution.

(c) Equal sharing whereby a good or service is shared equally between people, families or institutions – with an emphasis on sharing in half or equal portions.

(d) The search for harmony between nature and humankind, establishing the obligation to respect nature and biological resources, with minimal modification, respecting what is just and necessary according to customs, but allowing innovations inasmuch as they respect and adapt to the uses and customs of communities and are not contrary to nature itself.

39. The common principle of duality has a spiritual character, based on the understanding of the world and its parts as comprising two components, which are diametrically opposed but also complementary and vital. In this context, for example, many communities may believe that the responsibilities for conservation and management of biodiversity arise from an understanding that: (i) the earth is a feminine element; (ii) water is a masculine element; (iii) the water fertilizes the earth, hence biological resources are fruits of this relationship, and these elements must be cared for, conserved and adequately managed. Anyone that does not understand this will face serious difficulties in their interactions with nature.

40. When considering customary procedures governing access to and consent to use biological resources, the Nunavut Wildlife Act provides a useful example for consideration. The Nunavut Wildlife Act lists the most important Inuit customary law principles relating to biodiversity. Many of these principles exist in other bodies of customary law around the world and some may therefore be considered 'common principles' or "norms" of customary law:

(a) A person with the power to make decisions must exercise that power to serve the people to whom he or she is responsible;

(b) The obligation of guardianship or stewardship requires a person to fulfil obligations towards something that does not belong to the person;

(c) People who wish to resolve important matters or any differences of interest must treat each other with respect and discuss them in a meaningful way, keeping in mind that just because a person is silent does not necessarily mean he or she agrees;

(d) Skills must be improved and maintained through experience and practice;

- (e) People must work together in harmony to achieve a common purpose;
 - (f) People are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill;
 - (g) The ability to be creative and flexible and to improvise with whatever is at hand to achieve a purpose or solve a problem;
 - (h) A person who is recognized by the community as having in depth knowledge of a subject;
 - (i) Hunters should hunt only what is necessary for their needs and not waste the wildlife they hunt;
 - (j) Even though wild animals are harvested for food and other purposes, malice towards them is prohibited;
 - (k) Hunters should avoid causing wild animals unnecessary suffering when harvesting them;
 - (l) Wildlife and habitat are not possessions and so hunters should avoid disputes over the wildlife they harvest or the areas in which they harvest them; and
41. All wildlife should be treated respectfully.

E. A process and set of requirements governing prior informed consent, mutually agreed terms and equitable sharing of benefits with respect to traditional knowledge, innovations and practices associated with genetic resources and relevant for the conservation and sustainable use of biological diversity

1. Prior informed consent

42. The programme of work on article 8(j) and related provisions adopted by the Conference of the Parties in the annex to decision V/16 states as a general principle that “access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or the prior informed approval from the holders of such knowledge, innovations and practices”. The elements of a prior informed consent mechanism were considered by an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, facilitated by the Permanent Forum on Indigenous Issues in January 2005. Below is a reproduction of the main elements of a common understanding of a process of free prior and informed consent from the workshop’s report. ^{3/}

Elements of a common understanding of free, prior and informed consent:

- (a) What?
 - *Free* should imply no coercion, intimidation or manipulation.
 - *Prior* should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of Indigenous consultation/consensus processes.
 - *Informed* should imply that information is provided that covers (at least) the following aspects:
 - (i) The nature, size, pace, reversibility and scope of any proposed project or activity;
 - (ii) The reason(s) for or purpose(s) of the project and/or activity;
 - (iii) The duration of the above;
 - (iv) The locality of areas that will be affected;

^{3/} Refers to the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples facilitated by the United Nations Permanent Forum on Indigenous Issues (E/C.19/2005/3).

- (v) A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
 - (vi) Personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others);
 - (vii) Procedures that the project may entail.
- *Consent:* Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of Indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.
- (b) When?
- Prior informed consent should be sought sufficiently in advance of commencement or authorization of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.
- (c) Who?
- Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In free, prior and informed consent processes, Indigenous peoples, United Nations organizations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.
- (d) How?
- Information should be accurate and in a form that is accessible and understandable, including in a language that the Indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of Indigenous peoples and their languages.
- (e) Procedures/mechanisms:
- Mechanisms and procedures should be established to verify free, prior and informed consent as described above, *inter alia*, mechanisms of oversight and redress, including the creation of national ones.
 - As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in Indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
 - Free, prior and informed consent could be strengthened by establishing procedures to challenge and to independently review these processes.
 - Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.
- (f) Mutually agreed terms:

The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization sets out the basic requirements for mutually agreed terms (MAT), potential contractual parameters for an agreements of MAT and offers a possible list of mutually agreed terms. *Sui generis* systems for the protection of traditional knowledge could borrow from the Bonn Guidelines, while ensuring any guidelines properly reflect customary law and the concerns of Indigenous and local communities.

(g) Equitable sharing of benefits:

- (i) Equitable benefit-sharing mechanisms and processes are fundamental to any *sui generis* system that hopes to successfully protect and promote the use of traditional knowledge. Benefits arising from commercial use of traditional knowledge should be shared in a fair and equitable way with the community/ies, whose knowledge is being used.
- (ii) The nature of the benefits that could be anticipated from accessing traditional knowledge fall into two general categories: monetary and non-monetary. Appendix II of the Bonn Guidelines contains an indicative list of both. While not specifically tailored to the needs of Indigenous and local community as providers of biological resources and associated knowledge, many of the listed benefits will nevertheless be appropriate in many circumstances.
- (iii) Given that direct payment of monetary benefits (such as shared profits, or royalties) to Indigenous and local communities may not be appropriate or sufficient in some instances, other forms of benefits should be considered. In fact, perhaps the most beneficial measures in access agreements may be non-monetary, such as capacity building, technology transfer, free licensing of developed products or processes, joint research, development of local industries and training.
- (iv) An important issue when considering what constitutes equitable benefit sharing is the economic value of the traditional knowledge (and associated resource) at issue. The economic value of traditional knowledge can vary enormously depending on the needs of particular industries, availability of the knowledge and resource, whether there is a need for ongoing supply, and the usefulness of knowledge.
- (v) At the international level, the Bonn Guidelines provide an agreed basis for dealing with issues regarding the equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, innovations and practices. Thus, the Guidelines should be taken into account in the development of *sui generis* systems for the protection of traditional knowledge related to genetic resources.

F. *Rights of traditional knowledge holders and conditions for the grant of rights*

1. Rights of traditional knowledge holders

43. While in many indigenous and local communities the ownership of traditional knowledge may be communally held, ownership may be nonetheless expressed more in terms of personal responsibility, as custodians, stewards, etc. This is particularly the case in relation to who has the right to access resources or to give permission to access the knowledge and resources. Thus, rights and responsibilities to knowledge may vary between individuals within a community. Knowledge may also be common to a number of communities, but may vary in significance, thus giving rise to different rights and interests.

2. Conditions for the granting of rights

44. Conditions for the granting of rights may include:

- (i) General requirements,

- (ii) Categories of traditional knowledge that will be protected,
- (iii) Conditions of confidentiality,
- (iv) Clarity surrounding issues of novelty, originality, public domain and protection.

45. *Sui generis* systems could either recognize the inherent right to all traditional knowledge (perhaps within certain categories) or establish that the subject matter of protection needs to be documented and fixed, for example in inventories, collections, compilations, or databases. Based on the oral traditions of many indigenous and local communities, as well as the objective of recognizing customary law in *sui generis* systems, as well as the difficulty of documenting all traditional knowledge, particularly in communities that are impoverished, lack capacity, have limited access to mainstream societies or do not want to document their knowledge, it seems that recognizing the inherent rights related to traditional knowledge may be a more equitable option. In this case, rights would arise simply out of the existence of the knowledge.

46. *Sui generis* systems will also need to address the status of traditional knowledge which has already entered the public domain (either under present definitions, or a new definition adapted to the issues and values of indigenous and local communities).

47. If decided that it is necessary to limit the scope of traditional knowledge that is to be protected under *sui generis* systems, there are a range of potential elements that may be either specifically included or excluded. Some of these elements are:

- (a) Elements of traditional knowledge that are linked to the expression of the cultural identity of a given community;
- (b) Elements that are susceptible to commercial use.
- (c) Elements that are useful for academic use.
- (d) Elements of traditional knowledge that remain “traditional,” in the sense that they remain intrinsically linked to the community that has originated them, compared to traditional knowledge which have lost that link (this classification would have to be done by the community themselves).^{4/}
- (e) Elements that are useful for promoting environmentally sustainable practices.

48. It is conceivable to create *sui generis* systems that exclude traditional knowledge that is not susceptible of commercial use. By limiting the scope of traditional knowledge, costs of compliance and enforcement would be reduced. However, it should be noted that the classification of traditional knowledge between that which has commercial utility, and that which doesn't, may run counter to the very holistic nature of traditional knowledge.

49. *Sui generis* systems may establish that the subject matter, which is contained in inventories, collections, compilations or, simply, databases of traditional knowledge is automatically protected. However, to say that to be protected the traditional knowledge must be documented and fixed would leave out large amounts of traditional knowledge and would run counter to the traditions and ways of holding knowledge of many indigenous and local communities.

50. If communities are not interested or willing to document their traditional knowledge, another option could be to create a system of protection that requires no legal formalities. In other words, protection is available as of the date the element of traditional knowledge became known, irrespective of any formality. However, that option may give rise to problems of practicality, such as evidentiary difficulties needed for enforcement.

^{4/} They can nevertheless be protected under other forms of intellectual property. Some forms of handicrafts, for example, have been subject to intensive industrialization and modernization, thereby losing their traditional characteristics and consequently ceasing to function as elements of cultural identification. Those handicrafts may be protected under the industrial design system, because they have become essentially consumption products.

51. There are two possible ways to deal with the issue of how rights are lost. One approach is to establish protection for an indefinite period. This approach speaks to the intergenerational and incremental nature of traditional knowledge and recognizes that its commercial application, once the protection is secured, may take an extremely long time. But if the protection of traditional knowledge is to be established upon an initial act of commercial use (for example, a period of fifty years counted from the first commercial act involving the protected element of traditional knowledge, which could be renewable for a certain number of successive periods), then it is possible to have a predefined expiration, provided it would apply exclusively to those elements of traditional knowledge with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.

G. The rights conferred

52. Potential rights of traditional knowledge holders recognized under sui generis systems may include:

- (a) Inalienable rights held in perpetuity as long as the knowledge exists;
- (b) The right to assign transfer and license rights in traditional-knowledge with a commercial use;
- (c) Protection against the reproduction, use or exploitation of any kind of the traditional knowledge;
- (d) The rights to all components of the bio-cultural heritage associated with the traditional knowledge – including rights over the biodiversity, customary laws, cultural and spiritual values and lands and waters traditionally occupied or used by Indigenous and local communities;
- (e) The potential of a different set of rights over knowledge that is acknowledged to be in the ‘public domain’;
- (f) The right to pass on information as well as the rights associated with the knowledge to future generations;

53. Some of the rights conferred under sui generis systems could be similar to intellectual property rights that have been adapted to better reflect the nature of traditional knowledge. Potential adaptations of intellectual property instruments which may better meet the needs of traditional knowledge-holders could include the right, if desired by the community, to register patents with IP offices collectively.

54. When clarifying the rights conferred, it will be important to consider how the consideration of new sui generis systems for the protection of traditional knowledge may need to be situated within a broader policy and legal environment, and draw on legal concepts and jurisprudence from a range of related areas, both IP-related and non-IP, for instance concepts of equity, unjust enrichment, misappropriation of reputation, human rights, moral rights, environmental rights, civil rights and so on.

55. The recognized rights in traditional knowledge in sui generis systems should safeguard the free and equitable exchange of resources between individuals, families and neighbouring communities, if that is part of the customary laws of the affected communities. If done appropriately, the free exchange of resources helps ensure the livelihoods and survival of indigenous and local communities and promotes the conservation and sustainable use of biodiversity and the maintenance of traditional knowledge. For many communities, the obligation to share is particularly strong in relation to seeds. Sharing ensures access to new seeds and knowledge, essential for sustaining subsistence economies that rely largely on biodiversity as opposed to markets.

56. If desired by the community, sui generis systems could also incorporate customary laws which limit the rights a holder has in their traditional knowledge, such as codes of ethics to ensure that knowledge is used properly, for the good of the community and according to traditional values. These

may include rules for ensuring medicinal knowledge is transmitted only to people who are committed to its wise and proper use. The system could also incorporate indigenous and local communities rules and practices for conservation of biodiversity, such as sustainable harvesting, restrictions or bans on harvesting trees or vulnerable species, as well as sanctions often imposed on those that do not comply with conservation norms.

H. *A system for the registration of Indigenous/local knowledge/Systems for the protection and preservation of Indigenous/local knowledge*

57. A registration system for traditional knowledge would likely need to be divided between local, national and international levels. Any local system for the registration of traditional knowledge would need to be consistent with customary law. This would inform the design, management and decision-making structure of the register. It seems desirable that control remain at the community level, otherwise many communities may not put their knowledge in the registry for fear of losing control over its use. Any national registry should incorporate general principles of customary law and would also need to be used and managed by indigenous and local community representatives. An international registry taking into account the agreed common principles of customary law could be developed to address extra-territorial and/or trans-boundary issues. Again such a structure should be developed with the full and effective participation of indigenous and local communities and should be managed by them.

58. As well as helping to prevent unauthorized use of a community's knowledge, a community-based registration system could preserve traditional knowledge found in many forms, including: language, spiritual beliefs and practices, traditional songs and dances, and oral history. It is also able to stem the loss of knowledge about the uses of culturally important plants and animals and traditional land management practices. Some data can be secured for internal use whilst some can be made available as general non-proprietary information.

59. Traditional knowledge registries or databases have been developed through various communities around the world. They are generally compiled by communities for their own benefit. They have been found useful for organizing knowledge to enable better protection and improved management of the community resources. Existing databases and registries vary greatly in what they seek to protect, and how they operate: whether their main aim is to conserve and disseminate such material for wider public access, or whether they seek to protect and restrict access to it. Some of the purposes of existing databases/registers are:

(a) Maintenance and preservation of traditional knowledge by virtue of recording and documenting it;

Protection against the inappropriate granting of intellectual property rights by providing evidence of prior art;

Raise awareness of communities with respect to the values of traditional knowledge;

Encourage long term conservation and promotion of natural resources and their related traditional knowledge;

Provide information to interested parties who may be interested in obtaining information available in the registry, in exchange for a fee;

To be used as part of a legislative system for the assertion of intellectual property rights over traditional knowledge (e.g. a national *sui generis* system to protect Indigenous and local knowledge).

60. While in some cases databases and registers may play a role in the protection of traditional knowledge, such databases and registers are only one approach in the effective protection of traditional knowledge and their establishment should be voluntary, not a requirement for protection, and established with the prior informed consent of indigenous and local communities concerned. If Indigenous and local

communities decide to use such databases and registers, there will be a need for funding and capacity building for Indigenous and local communities regarding the establishment and maintenance of such databases and registers.

61. Registers or databases would facilitate the recognition of prior art in the processing of patent applications and thereby prevent its unauthorised appropriation. However, if the traditional knowledge is secret, its inclusion in a registry or database could facilitate its unauthorized appropriation if adequate measures are not taken to protect it. In this respect, there will need to be more research on how to deal with confidentiality issues within registration system/s.

62. Further information of registers is available in document UNEP/CBD/WG8J/4/INF/9, Phase One – Revised – Composite report – “assessment of the success of measures and initiatives to support the retention and use of traditional knowledge, including the advantages and limitations of registers as a measure to protect traditional knowledge, innovations and practices”. A summary of the report on registers is also available in document UNEP/CBD/WG8J/4/4, Executive Summary of the revised Phase One and Phase Two of the Composite Report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity

I. The competent authority to manage relevant procedural/administrative matters with regard to the protection of traditional knowledge and benefit-sharing arrangements

63. A national competent authority to manage procedural and administrative matters should ensure a balanced representation of indigenous and local communities from within the State. As well, given that there will likely need to be local and national levels of sui generis systems, there will need to be local competent authorities as well, which are completely run by the community.

64. A competent authority could have several or all of the following functions:

- (a) Process requests for access to traditional biodiversity related knowledge;
- (b) Facilitate the prior informed consent of Indigenous and local communities regarding access;
- (c) Establishment and maintenance of registers;
- (d) Ensure the equitable distribution of benefits arising from the use of traditional knowledge and associated biological resources within the community;
- (e) Management of any trust established to hold and disburse income derived from the utilization of traditional knowledge (if this is required);
- (f) Liaison with any national competent authority established as part of a national regime governing access to genetic resources and benefit-sharing;
- (g) Liaison with relevant intellectual property offices;
- (h) Provide legal assistance to local communities to file objections;
- (i) Ensure that traditional knowledge is incorporated into national development projects, as appropriate, and where appropriate, at all levels, such as development project design, implementation, monitoring and evaluation in order to increase project impact, effectiveness and sustainability;
- (j) Helping to incorporating existing community institutions and appropriate Indigenous technology into the *sui generis* system to increase community empowerment, increase cost-effectiveness and sustainability;
- (k) Ensure that traditional knowledge is included into environmental impact assessments;
- (l) Promote the use and further development of traditional knowledge by, for example:

- (i) Supporting traditional knowledge-holding communities;
 - (ii) Promoting traditional knowledge-based innovations;
 - (iii) Facilitating communication and sharing of traditional knowledge among traditional knowledge-holders;
 - (iv) Enhancing interaction between traditional knowledge and other knowledge systems;
- (m) Encourage research on traditional knowledge-related matter and involving traditional knowledge-holders;
- (n) Stimulate the diffusion of traditional knowledge and the access to the knowledge by the community;
- (o) Promote lateral learning in order to decrease the isolation of communities from one another and to lower the cost of learning by pooling best practices and generating optimal solutions to common problems;
- (p) Ensure prior informed consent mechanisms are properly adhered to;
- (q) Promote traditional knowledge based economic development or at least help link communities who are interested in business opportunities linked to their knowledge with other economic development and capacity-building institutions, thus, community-based development is key. This is especially important considering that Indigenous communities are generally tied to their land. It is necessary to promote economic opportunities on their traditional territories. Otherwise, communities feel forced to migrate, thus eroding their cultural identity.

J. Provisions regarding enforcement and remedies

65. The protection of traditional knowledge would not be effective without the availability of effective and expeditious remedies against unauthorized use. Enforcement and remedies should be developed according to customary law principles, and supported by strong institutions and legal processes.

66. Remedies under *sui generis* systems could be complemented with remedies for wrongs under others areas of law. Some of these wrongs include:

- (a) Truth requirements in advertising laws to prevent misrepresentation (ie. Indian Arts and Craft Act of the United States);
- (b) Tort of appropriation of use, which allows remedies to be sought for the unauthorized, improper or unlawful use of property for purposes other than that for which it was originally intended;
- (c) Criminalization of unauthorized access or use of traditional knowledge.

67. There may be practical difficulties for holders of traditional knowledge to enforce their rights, such as difficult questions of proof, the complexity of appropriate remedies or the need for specialized awareness of traditional knowledge and customary law. This raises the potential need for the administration of rights in traditional knowledge through a distinct mechanism or agency responsible for all unauthorised appropriation of traditional knowledge. This body or mechanism could include administrative and judicial review processes as well as tribunals to mandate and enforce compliance and remedies.

68. Other factors that may need to be further considered concern the possibility that unauthorized appropriation or abuse may be committed by individual members of an indigenous or local community or by a community claiming exclusive ownership of knowledge actually shared with another community (or communities).

K. Relationship to other laws, including international law

National level

96. The implementation of effective *sui generis* systems may require the strengthening of local institutions governing sustainable land-use and the management of biodiversity and related knowledge. This could involve the recognition of customary rights of indigenous and local communities over biodiversity, and traditional knowledge, the rights to resource use, as well as strengthening their capacity to exercise such rights. Finally, strengthening local institutions requires sufficient tools to enforce rights and remedies. In this regard, effective *sui generis* systems with sufficient institutional and legal support may require legal reform at both the national and international levels in several areas of law and policy.

97. In order for *sui generis* systems for the protection of traditional knowledge to be effectively situated within a broader policy and legal environment, it may need to draw on legal concepts and jurisprudence from a range of related areas, both IP-related and non-IP, for instance:

- (a) Unfair competition, unjust enrichment, misappropriation of reputation and goodwill;
- (b) Recognition of equitable interests and expressions of collective interests such as those relating to natural resources;
- (c) Moral rights, in particular the rights of integrity and attribution;
- (d) Human rights, and in particular economic, cultural and social rights;
- (e) Conceptions of ownership and custodianship associated with traditional cultures;
- (f) Preservation of cultures and cultural materials;
- (g) Environmental protection, including the conservation of biodiversity;
- (h) Conceptions of morality and public order in legal systems; and
- (i) Approaches to defining and recognizing farmers' rights.

98. A possible approach discussed by WIPO ^{5/} to harmonizing *sui generis* systems with other national laws is to determine to what extent the law of intellectual property is relevant to meeting national objectives and addressing policy issues related to traditional knowledge. If there are points of relevance, then determine how existing IP laws can be used. Determine which non-IPR tools, programs and measures can also be used to meet the objectives. Where gaps are identified, adapt IP laws and develop *sui generis* measures, laws and systems to complement existing IP and non-IP tools and to fill the gaps and respond to the particular characteristics of traditional cultural expressions. Take practical steps to make sure that existing and new measures and laws are easily accessible to and usable by intended beneficiaries (e.g. provision of legal advice, funding for court cases, appropriate institutions to help with rights management and enforcement).

International level:

99. At the international level *sui generis* systems need to be in harmony with international obligations including environmental law, human rights law and relevant Intellectual Property Law (IP).

100. So far, *sui generis* systems to protect traditional knowledge are being developed on a national or regional basis. Since traditional knowledge, like IP, is an intangible asset that is readily communicated and reproduced, it can cross national borders with no barriers other than legal protection. Concern generally arises when traditional knowledge is removed from its traditional context, and transmitted to or used in different jurisdictions altogether. In addition the development of national *sui generis* systems may

^{5/} Refer WIPO Document "Protection of Traditional Knowledge: overview of policy objectives and core principles", wipo/grtkf/ic/7/5.

not provide adequate protection for traditional knowledge in cases where the same knowledge is found in more than one country. Therefore there is a need to consider how to achieve international recognition of sui generis rights granted under national systems or through an international framework. Such a multilateral framework may therefore be necessary to ensure protection of all stakeholders involved. To address this issue an international sui generis framework could be considered to set minimum standards.



III. RECOMMENDATIONS FOR FUTURE WORK IN THE AREA OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

The Working Group may wish to recommend that the Conference of the Parties:

1. *Urges* Parties and Governments to develop national and local *sui generis* models for the protection of traditional knowledge and to report on these initiatives through the national reporting process and share experiences through the Clearing House Mechanism;
2. *Invites* Parties with trans-boundary distribution of some biological and genetic resources and associated traditional knowledge to establish regional *sui generis* frameworks for the protection of traditional knowledge;
3. *Requests* the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, indigenous and local communities, to further develop as a priority issue, possible elements of an international *sui generis* framework to address trans-boundary issues for consideration by the Working Group at its next meeting;
4. *Invites* the Parties and Governments, and non-governmental organizations to communicate their views on the definitions attached to this decision to the Secretariat and requests the Executive Secretary to compile these views and propose a glossary of terms for consideration at the next Working Group.

*Annex I***NATIONAL LEGISLATION, PRACTICES AND EXPERIENCES WITH RESPECT TO
SUI GENERIS SYSTEMS AND CUSTOMARY LAWS PRACTICES****African Union**

[AU Model Law on Rights of Local Communities, Farmers, Breeders and Access](#) (2000, formally endorsed)(Size: 115kb)

 (133kb)  (143kb) Endorsed and recommended by all AU Heads of State

Translation: [Législation Modèle Africaine pour la Protection des Droits des Communautés Locales](#) (2000, formally endorsed)

 (87kb) *Législation Modèle Africaine pour la Protection des Droits des Communautés Locales, des Agriculteurs et des Obteniteurs et pour les Règles d'Accès aux Ressources Biologiques*

► [An explanatory booklet of the AU Model Law](#)

 (301kb) by Prof J A Ekpere

Andean Community

Decisión 391: Regimen Común de Acceso a los Recursos Genéticos (1996, in force)

<http://www.sice.oas.org/trade/JUNAC/decisiones/DEC391S.asp>

Translation: *Decision 391: Common Regime on Access to Genetic Resources* (1996, in force)

<http://www.sice.oas.org/trade/JUNAC/decisiones/DEC391e.asp>

Decisión 486: Régimen Común sobre Propiedad Industrial (2000, in force)



<http://www.sice.oas.org/Trade/Junac/Decisiones/dec486si.asp>

Translation: *Decision 486: Common Regime on Industrial Property* (2000, in force)



<http://www.sice.oas.org/Trade/Junac/Decisiones/dec486e.asp>

ASEAN

[ASEAN Framework Agreement on Access to Biological and Genetic Resources](#) (2000, draft)(Size: 37kb)

 (100kb)  (57kb) Association of South East Asian Nations (ASEAN)

Bangladesh

[Plant Varieties Act \(1998, draft\)](#) (1998, draft)(Size: 77kb)  (101kb)  (71kb)

[Biodiversity and Community Knowledge Protection Act](#) (1998, draft)(Size: 97kb)  (120kb)  (119kb)

Bolivia

Reglamento de la Decision 391 Regimen Comum de Acceso a los Recursos Genticos (1997, in force)

<http://www.lclark.edu/org/ielp/boliviaspanish.html>

Translation: *Supreme Decree No. 24676 Regulating Decision 391 on the Common Regime for Access to Genetic Resources* (1997, in force) <http://www.lclark.edu/org/ielp/boliviaeng.html>

Brazil

Acre State Law - Acesso a recursos genéticos lei estadual (1997, in force)

<http://www.lclark.edu/org/ielp/acre.html>

Lei Dispõe sobre os instrumentos de controle do acesso à biodiversidade (1997, in force)

<http://www.lclark.edu/org/ielp/amapaportuguese.html>

Translation: *Amapá State Law on Access to Genetic Resources* (1997, in force)

<http://www.lclark.edu/org/ielp/amapaenglish.html>



Medida provisória sobre o acesso ao patrimônio genético (2001, in force as provisional measure)

http://www.planalto.gov.br/ccivil_03/MPV/2186-16.htm


Translation: [Provisional measure on access to genetic resources and traditional knowledge](#) (2001, in force as provisional measure)(Size: 58kb)

Costa Rica

[Ley de Biodiversidad](#) (1998, in force)(Size: 130kb)



 (291kb)  (152kb)

Translation: [Biodiversity Law](#) (1998, in force)



 (272kb)

China



[Regulations of the People's Republic of China on the Protection of New Varieties of Plants](#) (1999, in force)(Size: 44kb)

 (28kb)  (77kb)

► [Implementing Rules for the Regulations on the Protection of New Varieties of Plants \(Agriculture Part\)](#)



 (137kb)  (105kb)

► [Implementing Rules for the Regulations on Protection of New Varieties of Plants \(Forestry Part\) \(1997, in force\)](#)



 (123kb)  (65kb)

India


[Community Intellectual Rights Act \(1994, NGO proposal\)](#) (1994, draft)(Size: 46kb)

 (34kb)  (39kb)


[Karnataka Community Intellectual Rights Bill](#) (1994, draft)(Size: 27kb)

 (70kb)  (32kb)

[Biological Diversity Act](#) (2002, in force)(Size: 206kb)

 (69kb)

► [Biological Diversity Rules \(2004\)](#)

 (189kb)



Latin America

[Area Libre Comercio de las Américas \(ALCA\)](#) (2003, draft)(Size: 304kb) 3er borrador de capitulo sobre derechos de propiedad intelectual

Translation: [Free Trade Area of the Americas \(FTAA\)](#) (2003, draft)(Size: 215kb) Draft Agreement, Chapter on Intellectual Property Rights Latin America (potentially all countries except Cuba)

Pacific Forum

[Protection of Traditional knowledge and Expressions of Culture Act](#) (2001, draft)(Size: 56kb)

 (36kb)  (50kb)

Pakistan

[Draft law on access and community rights](#) (2004, draft)(Size: 35kb) Date not known

Panama

Régimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indígenas (2000, in force) http://www.mici.gob.pa/digerpi/ley_20.html

Translation: [Special intellectual property regime](#) (2000, in force)(Size: 69kb) On the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge


Peru

[Propuesta de Regimen de Proteccion de los Conocimientos Colectivos de los Pueblos y Comunidades Indigenas Vinculados a los Recursos Biologicos](#) (2002, in force)(Size: 73kb)

 (47kb)  (129kb)

Translation: [Law introducing a protection regime for the collective knowledge of indiginous peoples derived from biological resources](#) (2002, in force)(Size: 63kb) Version submitted to Congress and subsequently approved as Law 27811 of 10 August 2002

[Convenio CIP-Parque de la Papa](#) (2005, in force)

 (101kb) "Convenio para la repatriación, restauración y seguimiento de la agrobiodiversidad de papa nativa y de los sistemas de conocimiento comunitarios asociados" entre la Asociación de Comunidades



del Parque de la Papa, representada por ANDES, y el Centro Internacional de la Papa. More info in English is available [here](#)

Translation: [Asociacion Andes - Potato Park - International Potato Centre](#) (2005, in force)(Size: 36kb)



Philippines

[Community Intellectual Rights Protection Act - CIRPA](#) (2001, draft)(Size: 38kb)

[Traditional and Alternative Medicine Act](#) (1997, in force)(Size: 42kb)


 (66kb)  (49kb)

[Indigenous Peoples Rights Act](#) (1997, in force)(Size: 98kb)

 (124kb)  (25kb)

Venezuela

[Ley de Diversidad Biológica](#) (2000, in force)(Size: 118kb)

 (63kb)

*Annex II***SET OF RELEVANT DEFINITIONS/GLOSSARY OF TERMS FOR ARTICLE 8(j) AND RELATED PROVISIONS**

1. The following draft definitions have been collated from various sources including the United Nations Permanent Forum on Indigenous Issues, the World Intellectual Property Organization, the International Institute (the International Institute for Environment and Development), Kechua-Aymara Association for Nature and Sustainable Development (ANDES, Peru), Fundacion Dobbo Yala (Panama), University of Panama, Ecoserve (India), Centre for Indigenous Farming Systems (India), Herbal and Folklore Research Centre (India), Centre for Chinese Agricultural Policy (CCAP, China), Southern Environmental and Agricultural Policy Research Institute (ICIPE, Kenya), the Pacific Island Countries Regional Framework for the Protection of Traditional knowledge and Expressions of Culture, the Kenya Forestry Research Institute and the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.

Application/use/utilization of traditional knowledge: the acts of making, using, offering for sale, selling, or importing for these purposes the protected traditional product, or, where the subject matter of protection is a process, the acts of using the processes as well as the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by the traditional process.

Bio-prospecting: The scientific research of biological resources for commercial or other purposes. Bio-prospecting may also include research into the traditional knowledge associated with the biological resources.

Bio-Cultural Heritage: the knowledge, innovations, practices of Indigenous and local communities which are often collectively held and inextricably linked to traditional resources and lands and waters traditionally occupied and used by indigenous and local communities; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities. By emphasizing the collective rather than individual rights, and addressing biodiversity and culture together, this concept reflects the holistic approach of many indigenous and local communities. This concept also is linked to knowledge as ‘heritage’ as opposed to ‘property’, thereby reflecting its custodianship and intergenerational character.

Cultural Heritage (tangible and intangible): The physical and/or non-physical manifestation of an indigenous and local communities’ cultural heritage includes, but is not limited to, cultural landscapes, sites, structures, and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic value or significance, human remains, songs, dances artistic expressions, stores and histories.

Customary Law: Written and/or unwritten (including oral traditions) rules, usages, customs, practices and beliefs, traditionally and continually recognized and accepted as legal requirements or obligatory rules of conduct and consequently treated as if they were laws, by the group concerned.

Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity include:

- (i) Customary rights in Indigenous/traditional/local knowledge;
- (ii) Customary rights regarding biological resources (traditional resource rights); and
- (iii) Customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.

Customary Use of Biological Diversity: Use in relation to local traditions and customary laws, while allowing for innovation.

Innovation: In the context of traditional knowledge *sui generis* systems, innovation should be understood through the filter of tradition. In other words, tradition could act as a filter through which innovation occurs, that is, innovation and creation occur within a framework of tradition and culture.

[For further exploration of this definition of innovation, consider the African Model Law: “Any generation of a new, or an improvement of an existing, collective and /or cumulative knowledge or technology through alteration or modification, or the use of properties, values or processes of any biological material or any party thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing.”^{6/}

As this concept gets further refined within the context of *sui generis* systems, it will be necessary to consider how this term relates to ideas of improvement or invention. There will also need to be consideration of whether *sui generis* systems will include innovations from traditional knowledge or whether traditional IP regimes cover innovations of traditional knowledge.]

Prior Informed Consent: the procedure through which national governments or the Indigenous or local communities, as the case may be, properly supplied with all the required information, allow or refuse access to their biological resources and traditional knowledge innovation and practices, under mutually agreed conditions of equality, respect and fair compensation.^{7/}

Protected Area: A geographically defined area, which is designated or regulated and managed, to achieve specific conservation objectives.

Research: includes but is not limited to collecting and/or analysing information, data and/or statistics concerning knowledge, innovations and practices of Indigenous and local communities relevant for the conservation and sustainable use of biological diversity.

Sacred Site: A site, object, structure, area or natural feature or area, held by national Governments or indigenous and local communities to be of particular importance in accordance with the custom of an indigenous or local community because of its religious and/or spiritual significance.

Sacred Species: A plant or animal held by Indigenous and local communities to be of particular importance in accordance with the traditions and/or customs because of its religious or spiritual significance.

Traditional knowledge: the knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

^{6/} African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, Part II, Definitions and Scope, page 4.

^{7/} Refer to the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples facilitated by the United Nations Permanent Forum on Indigenous Issues (E/C.19/2005/3).

[The World Intellectual Property Organization also has a working definition of traditional knowledge: “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.^{8/}]

Traditional Owner: The group, clan or community or people, or an individual who is recognized by a group, clan or community of people as the individual who, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.

Traditional Resources: are tangible or intangible assets of biological, spiritual, aesthetic, cultural and economic value used traditionally by an indigenous and local community.

Traditional Territories: lands, and waters traditionally occupied, or used by indigenous and local communities.

^{8/} *Intellectual Property Needs and Expectations of Traditional knowledge Holders*, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional knowledge (1998-1999) (WIPO Publication 768E), at 25.