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

Fifth meeting

Montreal, 15-19 October 2007

**COMPILATION OF VIEWS CONCERNING SUI GENERIS SYSTEMS AND A GLOSSARY OF  
TERMS RELEVANT TO ARTICLE 8(J)**

*Note by the Executive Secretary*

The Executive Secretary is circulating herewith, for the consideration of participants in the Second meeting of the Advisory Group on Article 8(j) and Related Provisions, the above-mentioned document containing views and comments received by the Secretariat in response to a Notification 2006-073, which will be used as input to further develop the issue.

Submissions from Parties, non-Parties and relevant organizations received by the Secretariat have been reproduced in the form and language in which they were provided.

In order to minimize the environmental impacts of the Secretariat's processes, and to contribute to the Secretary-General's initiative for a C-Neutral UN, this document is printed in limited numbers. Delegates are kindly requested to bring their copies to meetings and not to request additional copies.

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## I. SUBMISSIONS FROM PARTIES

### 1. Argentina

(Original in Spanish)

Technical Report Issued by the  
Native Peoples and Natural Resources Division  
Respecting the Annex to Decision VII/16 H

#### **POSSIBLE ELEMENTS TO CONSIDER IN THE DEVELOPMENT OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES**

### 1. Statement of purpose, objectives and scope

#### **Purpose**

The overall purpose of developing *sui generis* systems for the protection of the traditional knowledge, innovations and practices of indigenous peoples is to protect the use of those elements owned by indigenous peoples that embody traditional lifestyles, and were developed for the conservation and sustainable use of biological diversity, including biological and related genetic resources.

This will be achieved through the development of a set of measures based on customary law, aimed at respecting, protecting and safeguarding the use of traditional knowledge, innovations and practices of indigenous communities with their free prior informed consent (FPIC), and ensuring that fair and equitable benefits are derived.

*Sui generis* systems are based on the recognition that the resources in question are the collective property of indigenous and local communities and, therefore, may not be considered *res nullius* or free for appropriation.

*Sui generis* systems for the protection of the traditional knowledge of indigenous peoples recognize the important link between protecting traditional knowledge and securing ownership over land and control over natural resources.

#### **Objectives**

*Sui generis* systems can provide the means for indigenous and local communities, with regard to their traditional knowledge (TK), to:

- (a) Recognize and register, as appropriate, the ownership of TK by the indigenous Community that is the holder of said TK
- (b) Control access to, disclosure and use of traditional knowledge;
- (c) Exercise the right to require free prior informed consent for any use of traditional knowledge;
- (d) Exclude improper use by third parties;

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- (e) Ensure that they derive fair and equitable benefits from the wider application of their TK;
- (f) Generate protection mechanisms at the international and national government levels, and within customary law.

## Scope

The scope of *sui generis* systems includes all traditional knowledge in its various dimensions: (a) *cultural*, as a reflection of the culture and values of a community, (b) *temporal*, as it is passed down and slowly adapts to respond to changing realities, and (c) *spatial*, as it relates to the traditional uses of the land and its resources.

*Sui generis* systems therefore require binding measures at the local, national and international levels. These systems will act *ex officio* pursuant to the State's obligation to protect knowledge<sup>1</sup> or at the request of stakeholder parties.

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

TK is the collective property and part of the patrimony of indigenous and local communities. Therefore, ownership rights cannot be vested in individuals.

In fact, TK and related biological and genetic resources constitute a *bio-cultural heritage*, as they are the product of collective practices developed over thousands of years of living on the part of indigenous peoples. The concept of bio-cultural heritage goes beyond the classic view of property, particularly with regard to the inclusion of natural resources.

Consequently, any protection system must comply with the customary law of the indigenous people or community, as appropriate.

In the case of TK shared by the same people living on lands divided by the borders of national states, or limits pertaining to the political structure within a given country, the ownership of the shared TK and resources should be considered joint collective property and should require the consent of all parties involved, in each case.

## 3. Set of relevant definitions

The suggested definitions for a glossary of various key terms are presented in Annex I.

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<sup>1</sup> The Inter-American Court of Human Rights has recognized indigenous peoples' right not to be thwarted in their ownership of lands, including the intangibility of their natural resources. It has thus clearly set out "the right to have the State (...) abstain from carrying out, until delineation, demarcation and titling has been performed, acts that could lead agents of the State, or third parties acting with the State's tolerance or acquiescence, affect the existence, value, use or enjoyment of the goods located in the geographic area where the members of the Community live and carry out their activities." Similarly, Article 15 of Convention 169 establishes that "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." (Community of the [Mayagna \(Sumo\) Indigenous Community of Awas Tingni vs. Nicaragua](#), Judgment of August 31, 2001, Series C No. 79, paragraph 153)

#### **4. 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**

*Sui generis* systems must be based on, and therefore recognize the validity of, the customary laws of indigenous peoples linked to the sustainable use of biological diversity, particularly in relation to: (a) traditional knowledge; (b) the biological and genetic resources associated with its use; and (c) the customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.

*Indigenous customary law* is the set of rules based on the customs of each indigenous community. They are moral and material rules used to manage community activities over time. The indigenous peoples of Argentina, for example, have been practicing it forever. These administrative, civil, penal and religious rules have made it possible to maintain their cultural identity and their material and spiritual rights, such as preserving the earth and their lands, their indigenous awareness and way of seeing the world, resisting the destruction of indigenous personality by dominant groups from the Spanish colony and Republican States.” (Eulogio Frites, *El derecho indígena consuetudinario y positivo argentino*, 1995).

It furthermore fits within the framework of a legal pluralism that recognizes the peoples who existed before the creation of the national state.<sup>2</sup>

The principles of customary law are the basis for developing protection mechanisms (both positive and defensive) and for strengthening customary resource management, governance systems, and the underlying values held by indigenous peoples and communities.

Customary laws do not make up a single whole, but are rather developed by each indigenous people; however, there are some cross-cutting premises that are common to all. We agree that customary laws promote the common good and include the following principles: Reciprocity, Duality, Equilibrium<sup>3</sup>.

It should also be understood that customary laws include other principles, such as:

- 1) *Mutual recognition*: use of the benefits of biological and genetic resources is conditional on a recognition of (respect for) nature that is based on the notion that nature is made up of a group of living beings, of which indigenous peoples feel they are a part, which is why they act within nature, rather than separately from its elements.
- 2) *Least damage*: one rule of conduct is to cause the least damage or suffering through use, which is based on the interdependence of the beings who inhabit nature.
- 3) *Vision of the future*: This vision is based on putting back for future intergenerational uses. It is based on a circular view of life, in which a plant is born, grows and dies, and has its cycle and function.

In conclusion, we can say that indigenous peoples speak on behalf of biological diversity, and their concept of life includes all interdependent elements of nature.

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<sup>2</sup> National Constitution of Argentina, Section 75, Subsection 17, paragraph 1

<sup>3</sup> UNEP/CBD/WG8J/4/7

<sup>4</sup> *Sui generis* systems for the protection of (line not visible) traditional knowledge and related biological and genetic rights must therefore develop conditions that, according to the view of the world held by the indigenous people in question, guarantee the proper respect thereof.

**5. 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**

Free prior informed consent (FPIC)<sup>5</sup> is a mandatory process which must be guaranteed by the State with regard to any potential project or activity likely to affect the lands and, in the case of *sui generis* systems, the traditional knowledge of indigenous peoples and communities.<sup>6</sup>

It is the indigenous people that holds the right to give consent and must specify which representative institutions are authorized to give consent on its behalf.

A basic principle that should govern the entire process is the “equal opportunity” that all parties must have to debate any proposed agreement/development/project. This should be understood as equal access to financial, human and material resources so that the peoples and communities may debate fully and meaningfully in the corresponding indigenous language or languages, or via any other agreed means, any agreement or project that will or may have an impact, be it positive or negative, on their development as distinct peoples, or an impact on their rights over their lands and/or natural resources.

It is therefore understood that a process of FPIC has taken place when the process is:

- 1) *Free*, meaning that it does not involve any coercion, intimidation or manipulation, according to measures guaranteeing equal opportunity;
- 2) *Prior*, meaning that the process should be carried out sufficiently in advance of any authorization or commencement of activities, taking into account indigenous peoples’ own decision-making processes (types and time requirements), for all phases of the project or activity.
- 3) *Informed*, meaning that the information provided is:
  - a. *Sufficient*, meaning complete and precise, and covering (at least) the following aspects of the proposed project or activity: its nature, size, pace, reversibility and scope; reason or purpose; duration; the locality of affected areas; 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; the personnel likely to be involved in the execution of the proposed project (including

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<sup>4</sup> One useful example for consideration is Inuit customary law regarding Nunavut wildlife (*see* UNEP/CBD/WG8J/4/7).

<sup>5</sup> See 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).

<sup>6</sup> The State’s obligation has been enshrined in international human rights law and established by the IACHR, which has stipulated that “Articles XVIII and XXIII of the American Declaration [on the Rights and Duties of Man] specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole (...) This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives (*see* Case of Mary and Carrie Dann vs. U.S. Report 75/02, points 140 to 142).

indigenous peoples, private sector staff, research institutions, government employees and others); procedures that the project may entail.

- b. *Culturally adapted* to the language, way of life and organization of the indigenous peoples or communities involved.

Consultation and participation are crucial components of a consent process. 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, in order to create mutually agreed terms of equality, respect and fair compensation.

Mechanisms and procedures should be established to verify FPIC, including mechanisms of oversight and redress, as well as legal and extralegal procedures at the national and international level to challenge and provide independent review of these processes. Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.<sup>7</sup>

### *Mutually agreed terms*

*Sui generis* systems for the protection of traditional knowledge could borrow elements from the Bonn Guidelines, particularly Article 14, while ensuring that any guidelines properly reflect customary law and the concerns of indigenous and local communities.

## **6. Rights of traditional knowledge holders and conditions for the granting of rights**

### **Rights of traditional knowledge holders**

The ownership of traditional knowledge shall be communally held, recognized as belonging to indigenous peoples, and in particular to their respective indigenous communities.

### **Conditions for the granting of rights**

*Sui generis* systems could recognize the inherent right to all traditional knowledge. Based on the oral traditions of many indigenous and local communities, as well as the objective of recognizing customary law in *sui generis* systems. In this case, rights would arise simply out of the existence of the knowledge.

*Sui generis* systems will also need to address the status of traditional knowledge which has already entered the public domain.

The range of potential elements of traditional knowledge that must be protected by *sui generis* systems include:

- 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.

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<sup>7</sup> The Inter-American Commission on Human Rights (IACHR) has dictated a precautionary measure, which obligates the Ecuadorian State to “Adopt the necessary measures to protect the Sarayacu Community’s special relationship with its territory” (5 May 2003)

- 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 has lost that link (this classification would have to come from the community itself).<sup>8/</sup>
- e) Elements that are useful for promoting environmentally sustainable practices.

## 7. The rights conferred

The rights of traditional knowledge holders recognized under *sui generis* systems include, among others:

- a) Inalienable rights held in perpetuity;
- b) The right to assign, transfer and license rights over 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;

The recognized rights over 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 (*see* section 4). 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.

If desired by the community, *sui generis* systems could also incorporate customary laws which limit the rights a holder has over 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.

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

The conditions for establishing a registration system do not yet exist. However, in order to provide guarantees and contribute to the protection of traditional knowledge, systems for the registration of traditional knowledge should probably be divided between the community and international levels

The *community system* (dubbed “local” in the source document) is organized and managed by the authorities of each indigenous community, following their own rules. Customary law therefore governs the design, management and decision-making structure of the register. Control would remain at the community level, otherwise many communities may not put their knowledge in the registry for fear of losing control over its use.

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<sup>8</sup> 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 essentially become consumer products.

Any *national system* should incorporate general principles of customary law and would also need to be used and managed by indigenous and local community representatives.

With regard to traditional knowledge that is jointly held by one or more indigenous peoples divided by frontiers established by national states, rules could be established through multilateral agreements recorded in the respective registries.

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 detailed 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.

Databases and registers play a role in the protection of traditional knowledge. They should not be a requirement for protection, and they should be established with the prior informed consent of the 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.

The application of *sui generis* systems may require strengthening the local institutions that govern sustainable land use and management of biological diversity and related knowledge. This entails recognition of the customary rights of indigenous and local communities over biological diversity, and over traditional knowledge, as well as the right to use resources, along with the strengthening of their capacity to exercise said rights.

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

A competent state authority to manage procedural and administrative matters should ensure a balanced representation of indigenous and local communities. As stated above, community systems will be managed by the indigenous peoples themselves.

The competent state authority shall have the following functions, among others:

- 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; in order to obtain information on improper use of the traditional knowledge by third parties;
- 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 incorporate 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 in 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 matters and involving traditional knowledge-holders;
- n) Stimulate the diffusion of traditional knowledge and 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.

## 10. Provisions regarding enforcement and remedies

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.

Remedies under *sui generis* systems could be complemented with remedies for wrongs under others areas of law, including:

- a) 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;
- b) Criminalization of unauthorized access or use of traditional knowledge;
- c) Unauthorized appropriation or abuse that 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).

The enforcing authority shall contribute, upon request, to the gathering of proof and joint filing in the event of complexity of appropriate remedies or the need for specialized awareness of traditional knowledge and customary law. This mechanism could include administrative and judicial review processes as well as tribunals to mandate and enforce compliance and remedies.

Steps must be taken with regard to provisions for border officials and safety, health, trade and immigration authorities to articulate information regarding the obstacles to enforcement of the present regulations, and basically to facilitate fulfilment of these purposes.

## 11. Relationship to other laws, including international law

### *National level*

With regard to national legislation, and in order to make the protection of traditional knowledge effective within a broader legal and policy context, it is necessary to enforce intellectual property-related laws and jurisprudence, reinterpreted according to the issues raised by the federal constitutionality aspect of indigenous peoples' rights. In fact, Section 75, subsection t, and the treatment of human rights under international law are sufficient grounds for a new interpretation of the various forms of ownership when it comes to the rights of indigenous peoples.

### *International level*

At the international level, it is necessary to harmonize the international regulations currently governing intellectual property and its relationship to the customary rights of indigenous peoples.

So far, *sui generis* systems to protect traditional knowledge are being developed on a national or regional basis. Since traditional knowledge, like intellectual property, 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, it is proposed that, when developing national *sui generis* systems for traditional knowledge that is found in more than one country, there is a need to consider how to achieve international recognition of *sui generis* rights granted under national systems or through a *sui generis* international framework.

**UNEP/CBD/WG8J/4/7 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.

**COMMENT:** The notion of “making” should be circumscribed within the scope of “innovation”.

***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.”

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.<sup>9</sup> /

**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.

**COMMENT:** It is worth adding that “Traditional Knowledge” is made up of thousand-year-old practices and a process of interrelation between men and women and nature, passed down from generation to generation. Indigenous traditional knowledge is part of a holistic view of the world, which is why we would include that it “is characterized comprehensiveness as one of its features”. The definition provided by WIPO is a concrete example of how versatile TK can be in its expressions, which in some cases are related to biological diversity, and in other cases are not.

[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.]

**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.

## 2. European Commission

### EU submission in reply to Notification 2006-073

#### Views by the European Community and its Member States on the definitions contained in document UNEP/CBD/WG8J/4/7, Annex II

The EU is in favour of international agreed *sui generis* models that leave it to national governments to decide on the specific approach taken to the protection of traditional knowledge. It also remains convinced that the CBD has an important contribution to make to the development of such an international framework with regard to the three objectives of the Convention.

It is therefore important to ensure that work on *sui generis* systems for the protection of traditional knowledge, innovations and practices in the CBD framework is consistent with and complementary to work in other international fora outside the CBD, most importantly, in the WIPO IGC.

The EU has repeatedly emphasised that, for the time being, it regards the WIPO IGC as the primary forum for discussions on intellectual property law aspects involved in the protection of traditional knowledge.

Against this background, the EU stresses the need for continuous consultation of the CBD Secretariat with the WIPO IGC, the WTO TRIPS Council and the IT PGRFA.

Within the CBD framework itself, it is also important to ensure consistency with other ongoing processes. In this respect, the EU notes that some of the terms listed in Annex II of document UNEP/CBD/WG8j/4/7 are of direct relevance to the ongoing negotiations on an international regime on access and benefit-sharing. Before further discussing terms and definitions directly related to the ABS negotiations, it seems desirable that parties clearly spell out the specific contribution, the Article 8j Working Group can and should make to the ABS negotiations.

In addition, it seems important to clearly identify the origin and sources of specific terms and definitions, such as those contained in Annex II of document UNEP/CBD/WG8j/4/7, in further discussions on potential elements of *sui generis* systems. Where there are deviations from established international terms and definitions, these should be identified and reasons given for such deviation.

### 3. Indigenous and Local Communities organizations

UN PERMANENT FORUM ON INDIGENOUS ISSUES, Sixth Session, New York, 14-25 May, 2007

Agenda Item (9) – Future Work of the Forum – Protection of Traditional Knowledge

Presented by the Pacific Caucus

Endorsed by the Asia Caucus, Arctic Caucus, Asociación Kunas Unidos Napguana

Centro de Asistencia Legal Popular, Corporación de Abogados Indígena, Comisión Juristas Indígenas de la Republica Argentina (CJIRA)

[...]The role of customary law and institutions, in relation to domestic legislation, regional policies and international law, needs to be understood and better defined in constructing effective *sui generis* regimes for the protection of traditional knowledge, which can be elaborated under the guidance of the UNPFII.

#### [...]ACTIONS BY THE UN PERMANENT FORUM ON INDIGENOUS ISSUES

2. The UNPFII to appoint Mr. Michael Dodson as a Special Rapporteur to undertake a study considering a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, at national and regional levels.

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