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WORKING GROUP ON ARTICLE 8(j) AND
RELATED PROVISIONS OF THE
CONVENTION ON BIOLOGICAL
DIVERSITY

Seventh meeting

Montreal, 31 October-4 November 2011

**EXTRACTS COVERING THE EVOLUTION OF THE ISSUE OF DEFINITIONS WITHIN THE
SUI GENERIS AGENDA ITEM FROM THE WORKING GROUP ON ARTICLE 8(j) AND
RELATED PROVISIONS**

Note by the Executive Secretary

INTRODUCTION

1. The three extracts contained in this document cover the evolution of the issue of definitions within the *sui generis* agenda item, from 2004 to the current date. The extracts are taken from the third, fourth and fifth meetings of the Working Group on Article 8(j) and Related Provisions. This document is a contribution to the discussions on *sui generis* systems for the protection of traditional knowledge (item 6(c) of the provisional agenda) and on tasks 7, 10 and 12 (item 6(a) of the provisional agenda).

2. These extracts have been reproduced in the form and language in which they were originally produced.

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EXTRACTS FROM THE THIRD, FOURTH AND FIFTH MEETINGS OF THE WORKING GROUP ON ARTICLE 8(j) REGARDING *SUI GENERIS* SYSTEMS AND DEFINITIONS

UNEP/CBD/WG8J/3/7 EXTRACT

24 October 2003

CLARIFICATION OF RELEVANT TERMINOLOGY

The need for a rigorous use of terminology in discussions on traditional knowledge has been widely recognised. Some Parties have argued that agreed definitions are essential before entering into further discussions on the protection of traditional knowledge in the context of the Convention on Biological Diversity.¹ The need for greater clarity in the use of terms has also been raised in the Working Group on Access and Benefit Sharing in connection with the Bonn Guidelines.

Discussions on terminology relevant to Article 8(j) and related provisions for the purposes of national legislation, policies and strategies to implement the Convention are fraught with difficulties. Internationally agreed generic definitions—"a one size fits all" approach, while desirable, may not be possible from a practical point of view. Governments typically adopt legislation taking into account national circumstances that depend on historical, social and cultural backgrounds and the ethnic diversity and composition of their national populations.

Another consideration is that discussions on terminology relating to traditional knowledge are of relevance not only to the Convention on Biological Diversity, but also to other processes such as the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) (Articles 16 (g) and 17.1 (c)), the International Treaty on Plant Genetic Resources for Food and Agriculture (Article 9.2 (a)) and the work of the WIPO Intergovernmental Committee on Intellectual Property Rights, Genetic Resources, Traditional Knowledge and Folklore.

In light of the difficulties inherent to the formulation of definitions or a glossary of terms, the Working Group may wish to consider carefully how best to carry out this task. One approach could be to reach agreement on a list of terms that need to be defined and invite Parties and other stakeholders to submit tentative definitions of these terms, along the lines of a similar approach adopted by the Working Group on Access and Benefit-sharing with respect to the use of terms in the Bonn Guidelines. The submissions could be compiled by the Secretariat and submitted to the Working Group or to a group of experts established for this purpose. Alternatively, the Secretariat could be requested to draft a tentative definition of each term based on submissions received. The Working Group could recommend to the seventh meeting of the Conference of the Parties the convening of a meeting of technical experts in order to agree on those definitions.

The terms listed in annex would seem to be the most relevant to discussions on *sui generis* systems for the protection of traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity. This non-exhaustive list is in addition to the terms listed under Article 2 of the Convention. It is assumed that, in the context of *sui generis* systems, the terms such as "prior informed consent", "mutually agreed terms" and "equitable sharing of benefits" would be given the same meaning as in the Bonn Guidelines, given the high degree of complementarity between the two processes.

¹ Thematic reports on access and benefit-sharing by Austria, Switzerland, and Norway, and also discussions on the Bonn Guidelines at sixth meeting of the Conference of the Parties.

Annex

Terminology

1. The present annex sets forth several key terms that may be most relevant in discussions on *sui generis* systems for the protection of traditional knowledge and provides a short commentary for each.

A. *Indigenous and local communities*

2. While the term “indigenous and local communities embodying traditional lifestyles” is used in the Convention, many countries and indigenous and local communities use different terms. This reflects not only the diversity of situations between countries, but also within countries. However, “indigenous” and “local” are generally not seen as synonymous and there would appear to be a preference to use one or the other in national legislation. With regard to “indigenous community” other terms are often used in national legislation, such as “indigenous people/s”, “indigenous populations”, “Indians”, “native communities”, “A/aboriginal people/s”, “tribal people/s”, and “First Nations”.² Work has been undertaken on definitions of “indigenous”, or who constitutes an indigenous person/people, in the Working Group on Indigenous Populations of the Commission on Human Rights, and the International Labour Organization in relation to Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. It should also be noted that the Convention to Combat Desertification uses the terms “local populations” and “local communities”, but does not define them.

3. Another term/concept has also emerged, namely, “cultural community”, which, depending on national circumstances, may be used to encompass both indigenous and local communities. This term is used in the UNESCO first preliminary draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage but not defined.³ The Indigenous Peoples Rights Act 1997 of the Philippines, in addition to “indigenous peoples”, also employs a variation of this term, namely, “indigenous cultural communities”.

4. Local communities in many countries are comprised of people who are indigenous to the country. However, definitions of “indigenous people/s” which largely refer to such people/s as “colonized people/s”, as in the case of definitions based on the work of the Working Group on Indigenous Populations of the Commission on Human Rights, in many cases are considered inappropriate. For example, it has been said that in Africa “a definition of indigenous people in terms of colonized people and colonizers, or generations of settlers, is out of date with both past experience and recent reality”.⁴ This situation notwithstanding, the African Model Law for The Protection of The Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (the African Model Law), for example, only employs the term “local community”, even though members of such communities, in most cases, are also indigenous. Article 1 of the African Model Law defines local community as “a human population in a distinct geographical area, with ownership over its biological resources, innovations, practices, knowledge, and technologies governed partially or completely by its own customs, traditions or laws”.

5. In decision 391 of the Andean Community, on a common regime on access to genetic resources, a single definition is used to embrace communities of three distinct ethnicities. In article 1, a native, Afro-American or local community is defined as “a human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, that is governed totally or partially by its own customs or traditions or by special legislation and that, irrespective of its legal status, conserves its own social, economic, cultural and political institutions or a part of them”.

² See also WIPO/GRTKF/IC/1/3, Annex 3, p. 2.

³ CLT-2002/CONF.203/3, Paris 26 July 2002

⁴ Ambassador Sophie Asimenye Kalinde, OAU Permanent Observer to IGC, 3rd Session June 13-21, 2002, Intervention, para 13.

6. Practice to date suggests, therefore, that no single definition of “indigenous and local community” would find acceptance worldwide and that Governments prefer to adopt definitions which not only reflect the spirit and requirements of Article 8(j), but also their national circumstances.

B. *Traditional lifestyle (embodying a traditional lifestyle)*

7. All communities are, to some degrees, subject to the outside influences of the modern world and thus their cultures and lifestyles are experiencing change. For many indigenous and local communities, many aspects of their traditional ways of life have undergone considerable change with the introduction and access to new technologies, while core values relating to their traditional view of the world have remained comparatively constant. In today’s world, it is therefore exceedingly difficult to determine what is or is not, or who is practising, a “traditional lifestyle”, and particularly for definitional purposes when constructing a law.

8. In some cases “traditional lifestyle” is bound to ethnic identity, and the national constitutions and laws often define or accommodate the ethnic diversity of their populations with due regard to their country’s historical and social evolution. In some cases, members are accorded “status” in accordance with domestic laws, taking into account increasing relationships between different segments or ethnic groups that comprise the population. This “status” is usually accorded/defined on the basis of kinship and descent, and may or may not take into account traditional customs governing such matters.

C. *Knowledge, innovations and practices*

9. While the phrase “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles” is used in the Convention on Biological Diversity, how these terms are defined and used in national legislative contexts may vary from one country to another. For example, a definition which limits knowledge, innovations and practices to that relevant to the conservation and sustainable use of biodiversity (as in the Andean Community decision 391, article 1) as opposed to a comprehensive, holistic definition which includes traditional knowledge as part of a broader definition which encompasses cultural expressions, folklore, etc, in which traditional knowledge could be referred to as a sub-class of either (as is the case in the Philippines Indigenous Peoples Rights Act 1997).

10. In the first approach, efforts to protect traditional knowledge, particularly from an intellectual property perspective, may tend to focus on its more technical aspects, such as plant breeding, animal husbandry, conservation and sustainable use technologies, and medicinal remedies. Age-old bodies of traditional knowledge also have implications with respect to the public domain. The term “innovations”, which can also imply inventions and improvements, also has intellectual property implications, particularly in the domain of patents, plant breeders rights and industrial property generally. Ownership of, and rights to innovations both within a community (including individual rights within a community) as well as those outside a community who innovate and invent using a component of traditional knowledge, pose challenging issues in creating workable *sui generis* systems to protect traditional knowledge, innovations and practices.

11. The term traditional knowledge attracts a number of variants, such as traditional ecological/environmental knowledge, indigenous knowledge, community knowledge, local and traditional knowledge. Of particular note, however, is the use of the phrase “traditional and local technology, know-how and practices” used in Article 17.1 (c), 18.2 (a) and (b) of the Convention to Combat Desertification, which may be seen as synonymous with the “knowledge, innovations and practices” of Article 8(j) of the Convention on Biological Diversity. For the purposes of the Convention to Combat Desertification, “traditional knowledge” was defined by a group of experts to mean: subject matter which “consists of practical (instrumental) and normative (enabling) knowledge about the ecological, socio-economic and cultural environment. Traditional knowledge is people-centred (generated and transmitted by people as knowledgeable, competent and entitled actors), systemic (inter-sectoral and holistic), experimental

(empirical and practical), transmitted from one generation to the next and culturally valorised. This type of knowledge promotes diversity; it valorises and reproduces the local (internal) resources”.⁵

12. In the Andean Community decision 391, traditional knowledge is subsumed under the umbrella of the “intangible component” associated with genetic resources. “Intangible component” is defined as “all know-how, innovation or individual or collective practice, with a real or potential value, that is associated with the genetic resource, its by-products or the biological resource that contains them, whether or not protected by intellectual property regimes.” (article 1). The African Model Law, in article 1, community knowledge or indigenous knowledge “is the accumulated knowledge that is vital for conservation and sustainable use of biological resources and/or which is of socio-economic value, and which has been developed over the years in indigenous/local communities”.

13. Given the vast array of subject matter that could be potentially encompassed by the term “traditional knowledge”, “folklore” and “cultural expressions”, the WIPO Intergovernmental Committee, in order to better delineate the scope of the subject matter in respect of the application of intellectual property protection,⁶ has suggested that the term “traditional knowledge” be used more to refer to technical knowledge, and that this term be more closely allied to the kinds of traditional knowledge, innovations and practices referred to in the Convention on Biological Diversity. From an intellectual property perspective and for the purposes of framing *sui generis* legislation, traditional knowledge as technical knowledge places it more within the domain of patent and industrial property law, as distinct from folklore and cultural expressions, which raise issues more closely associated with laws relating to copyright and related rights.⁷

14. Based on an approach whereby traditional knowledge is to be equated with technical knowledge, a working definition of traditional knowledge, is a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. Bodies of traditional knowledge generally exhibit the following features:

Information about the various physical, biological, spiritual and social components of a particular landscape;

Rules for using them without damaging them irreparably;

Relationships among their users;

Technologies for using them to meet the subsistence, health, trade and ritual needs of local people; and

A view of the world that incorporates and makes sense of all the above in the context of a long-term and holistic perspective in decision-making.⁸

15. Many commentators have emphasized that, in the context of traditional knowledge systems, innovation is a feature of such systems whereby tradition acts as a filter through which innovation occurs, that is, innovation and creation occur within a framework of tradition.⁹ In this context, it is traditional methods of observation, research and application and not always particular pieces of knowledge that persist.

16. Unlike the term “traditional knowledge”, few definitions of “innovation” in the context of Article 8(j) have been put forward. Under article 1 of the African Model Law, innovation is defined as “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

⁵ ICCD/COP(4)/CST/2, PARAGRAPH 30.

⁶ WIPO/GRTKF/IC/1/3, Annex 4, and paragraphs 78-80.

⁷ WIPO/GRTKF/IC/1/3, Annex 3, p. 2.

⁸ UNEP/CBD/COP/3/19.

⁹ WIPO/GRTKF/IC/4/3, para. 30.

biological material or any part thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing”. In another model law, the Community Intellectual Rights Act, innovation:

“[S]hall include any collective and cumulative knowledge or technology of the use, properties, values and processes of any biological material or any part thereof rendered of any, or enhanced, use or values as a result of the said cumulative knowledge or technology whether documented, recorded, oral, written or howsoever otherwise existing including any alteration, modification, improvement thereof and shall include derivatives which utilize the knowledge of local communities in the commercialization of any product as well as to a more sophisticated process of extracting, isolating, or synthesizing the active chemicals in the composition of biological extracts used by the local communities. The knowledge is recognized complete with its rituals and sacredness as practised by the community.”¹⁰

17. The term “innovation” can also be considered synonymous with the terms “invention” and “improvement” and can have clear implications with regard to intellectual property law, particularly patent law. Some argue that innovations based on traditional knowledge, and particularly where these are carried out by members of the local community, should be protected under a *sui generis* law/system – a solution offered under the Community Intellectual Rights Act and the South Pacific Model Law—while others argue that the protection of such innovations can be sought under the existing regime of intellectual property rights. The term “innovation” also has important implications in terms of *positive* and *defensive* measures in designing *sui generis* systems. The inclusion of *positive* measures should enable community members to have their innovations/inventions acknowledged, protected and rewarded without necessarily having to resort to standard forms of intellectual property protection. The latter option, however, should remain available.

D. Customary law

18. Customary law has been defined as “enforceable rules and norms of conduct existing within and applying to a tribal group or other community living within a socio-cultural system distinct from the dominant system of the state within whose territory the community resides”.^{11/} In section 3 (f) of the Philippines Indigenous Peoples Rights Act 1997, customary laws refer to “a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective indigenous cultural communities/indigenous peoples”.

19. Many countries recognize customary-law systems within the legal framework of the State: for example, Malaysia, Indonesia and the Philippines. However, such recognition tends to be confined to customary laws regarding social customs, ownership and inheritance of land, and property, but does not extend to recognizing intellectual property rights in traditional knowledge.^{12/}

20. If the recognition of customary law—or those elements relevant to the conservation and sustainable use of biological diversity—is to be part of *sui generis* systems for the protection of traditional knowledge, it may be necessary to incorporate a definition of such, or at least identify the salient elements in the system.

21. Alternatively, it may be possible to codify relevant aspects of customary law. In countries, such as Malaysia, and in some parts of Africa, that maintain systems of legal pluralism, codification is practised. However, codification of customary law may run counter to the spirit of such law, particularly in non-literate communities. It may be possible in these situations to develop protocols or guidelines regarding relevant customary practices.

¹⁰ In Mugabe J, Barber CV, Henne G, Glowka L and La Vina A (eds) 1997 *Access to Genetic Resources: Strategies for Sharing Benefits*. African Centre for Technology Studies, Nairobi, Kenya. p. 353

¹¹ Laird S (ed) 2002. *Traditional Knowledge and Biological Diversity*. Earthscan Publications, London, UK. p. 456.

¹² See Kutty PV, WIPO/GTRKF/STUDY/1, November 25, 2002, pp. 35-36.

E. Customary use of biological diversity

22. It may be necessary to define, in general terms, what constitutes customary uses of biological diversity as this can raise certain legal and policy issues, particularly as many indigenous and local communities may no longer use traditional technologies for hunting, gathering, growing and preparing particular biological resources for food and other customary purposes, although the original (traditional) purpose or reason for using the biological resource remains. From this perspective, “customary use” may need to be defined *vis-à-vis* laws regarding the “taking of wildlife” emphasizing the overall purpose of taking the biological resource rather than the manner.

23. The customary use of biological diversity may also be considered an “access issue” within the context of policies for access to genetic resources and benefit-sharing. Access by outsiders to biological resources on lands and waters traditionally used or occupied by indigenous and local communities may threaten the sustainability of customary uses of biological resources, a matter addressed in the Bonn Guidelines (paras. 16 (a) (iii) and 16 (b) (ii)). Customary practices, including uses of biological resources, may be protected by being excluded from the purview of laws governing access to genetic resources, as is the case in Brazil law (see Article 8), the African Model Law and Andean Community decision 391 (see article 4(b)).

VII/16, H, paragraph 4, *Requests* the Executive Secretary, based on submissions by Parties, Governments, indigenous and local communities and relevant international organizations, to develop, in cooperation with the ongoing work on the use of terms in the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing and in consultation with Parties, indigenous and local communities and relevant international organizations, a glossary of terms relevant to Article 8(j) and related provisions for the consideration by the fourth meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention;

UNEP/CBD/WG8J/4/7 EXTRACT

January 2006

II. CLARIFICATION OF RELEVANT TERMINOLOGY

The need for a rigorous use of terminology in discussions on traditional knowledge has been widely recognised. Some Parties have argued that agreed definitions are essential before entering into further discussions on the protection of traditional knowledge in the context of the Convention on Biological Diversity.^{13/} The need for greater clarity in the use of terms has also been raised in the Working Group on Access and Benefit Sharing in connection with the Bonn Guidelines.

Discussions on terminology relevant to Article 8(j) and related provisions for the purposes of national legislation, policies and strategies to implement the Convention are fraught with difficulties. Internationally agreed generic definitions—“a one size fits all” approach, while desirable, may not be possible from a practical point of view. Governments typically adopt legislation taking into account national circumstances that depend on historical, social and cultural backgrounds and the ethnic diversity and composition of their national populations.

Another consideration is that discussions on terminology relating to traditional knowledge are of relevance not only to the Convention on Biological Diversity, but also to other processes such as the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) (Articles 16 (g) and 17.1 (c)), the International Treaty on Plant Genetic Resources for Food and Agriculture (Article 9.2 (a)) and the work of the WIPO Inter-

¹³ Thematic reports on access and benefit-sharing by Austria, Switzerland, and Norway, and also discussions on the Bonn Guidelines at sixth meeting of the Conference of the Parties.

Governmental Committee on Intellectual Property Rights, Genetic Resources, Traditional Knowledge and Folklore.

In light of the difficulties inherent to the formulation of definitions or a glossary of terms, the Working Group may wish to consider carefully how best to carry out this task. One approach could be to reach agreement on a list of terms that need to be defined and invite Parties and other stakeholders to submit tentative definitions of these terms, along the lines of a similar approach adopted by the Working Group on Access and Benefit-sharing with respect to the use of terms in the Bonn Guidelines. The submissions could be compiled by the Secretariat and submitted to the Working Group or to a group of experts established for this purpose. Alternatively, the Secretariat could be requested to draft a tentative definition of each term based on submissions received. The Working Group could recommend to the seventh meeting of the Conference of the Parties the convening of a meeting of technical experts in order to agree on those definitions.

The terms listed in annex would seem to be the most relevant to discussions on *sui generis* systems for the protection of traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity. This non-exhaustive list is in addition to the terms listed under Article 2 of the Convention. It is assumed that, in the context of *sui generis* systems, the terms such as “prior informed consent”, “mutually agreed terms” and “equitable sharing of benefits” would be given the same meaning as in the Bonn Guidelines, given the high degree of complementarity between the two processes.

Original (UNEP/CBD/WG8J/4/7, annex II)

January 2006

Annex II

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

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.”¹⁴

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

¹⁴ 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.

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.¹⁵

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. (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.¹⁶)

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.

¹⁵ 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).

¹⁶ 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.

Extract from *sui generis* systems for the protection of traditional knowledge (UNEP/CBD/WG8J/5/6) and a compilation of views, including definitions (UNEP/CBD/WG8J/5/INF/16).

November 2009

Reworked based on submissions to the sixth meeting of the Working Group on Article 8(j)

Sui generis systems, terms and definitions

Decision VIII/5, E, paragraph 8, invited Parties and Governments, indigenous and local communities, and non-governmental organizations to communicate to the Secretariat their views on the definitions (UNEP/CBD/WG8J/4/7, annex I) related to decision VII/5, E¹⁷, on *sui generis* systems and requested the Executive Secretary to compile these views for consideration at the fifth meeting of the Working Group on Article 8(j) and Related Provisions. To this end a compilation, was been prepared for the consideration of the Working Group and is available along with the definitions (annex I) in UNEP/CBD/WG8J/5/INF/15.

COP 9 did not take any actions regarding terms and definitions in the decision IX/13, F, on *sui generis* systems, pending the outcome of the ABS negotiations.

SET OF RELEVANT DEFINITIONS/GLOSSARY OF TERMS FOR ARTICLE 8(j) AND RELATED PROVISIONS INCLUDING COMMENTS SUBMITTED AND COMPILED IN UNEP/CBD/WG8J/5/INF/16

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.

¹⁷ Paragraph 8.Invites the Parties and Governments, indigenous and local communities, and non-governmental organizations to communicate to the Secretariat their views on the definitions (UNEP/CBD/WG8J/4/7, annex II), related to the present decision and requests the Executive Secretary to compile these views for consideration at the fifth meeting of the Working Group on Article 8(j) and Related Provisions;

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.

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 analyzing 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.