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POSSIBLE ELEMENTS OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGENOUS AND LOCAL COMMUNITIES

1. In paragraph 4 of decision VIII/5 E, the Conference of the Parties requested the Working Group on Article 8(j) and Related Provisions to identify priority elements of *sui generis* systems as listed in the annex to decision VII/16 H. To date, no Party or others has suggested a particular priority order for the elements, and thus the order below does not imply any greater or lesser importance of individual elements.

2. Each of these elements should be transmitted for future consideration as an indicative list to the agenda item on tasks 7, 10 and 12, as indicated under these tasks. Elements that may be considered as possible priorities include:

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.

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.[1]

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* UNEP/CBD/WG8J/8/1.

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3. Should Parties wish to take this approach, other elements may be considered, as the need arises, after consideration of those prioritized within tasks 7, 10 and 12.

A. Statement of purpose, objectives and scope

Purpose

4. The overall purpose of *sui generis* systems could be to put in place a set of measures that would ensure respect for, preservation and promotion of the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity including biological and related genetic resources[2] (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. As such, *sui generis* systems and measures may be broad and may not focus solely on protection but could take on other focuses, including preservation and promotion. This purpose would ensure that the system to be established is within the mandate of the Convention.

5. 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 their 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;[3]

(e) Assist in the inter-generational transmission of traditional knowledge and its application on traditional lands and waters;

(f) To ensure obligations arising from customary law are transmitted to potential users of traditional knowledge (i.e., through community protocols and mutually agreed terms).

6. *Sui generis* systems are based on recognition that the knowledge and related resources are collective property and hence *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 and any consent to use would follow principles of prior informed consent, benefit-sharing, mutually agreed terms 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 and culturally offensive or unauthorized use of traditional knowledge.

7. *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 in the pursuit of the goals of the Convention. 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.

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[2] Views received from Argentina.

[3] UNEP/CBD/WG8J/3/7.

8. Sustainable development and poverty alleviation are also both possible side-benefits 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 sustainable 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, in particular as it related to conservation and sustainable use.

9. 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.

Objectives

10. An overall objective of *sui generis* systems should be holistic in nature and allow for a comprehensive approach to the needs and concerns of the communities involved. The objectives should be informed by meaningful consultation of the relevant communities and be formulated after the consultation. An important objective of national and/or international dimension of *sui generis* systems could be to develop frameworks and/or guidelines that support local systems of protection based on relevant principles of indigenous customary laws.

Sui generis systems could:

(a) Recognize and register, as appropriate, the ownership of traditional knowledge by the indigenous and local community that is the holder of said knowledge;

(b) Control access to and disclosure and use of traditional knowledge;

(c) Exercise the right to require free prior informed consent and development of mutually agreed terms for any use of traditional knowledge;

(d) Raise awareness of any obligations arising from customary law for the users of traditional knowledge;

(e) Exclude improper use by third parties;

(f) Ensure that they derive fair and equitable benefits from the wider application of their knowledge;

(g) Generate protection mechanisms at the international and national government levels, and within relevant customary law;

(h) In a broad sense, focus on preservation and promotion of traditional knowledge and thus contribute indirectly to the protection of traditional knowledge.

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

Scope

12. The scope of *sui generis* systems should consider the collective nature of indigenous and local communities and their holistic approach to resource use and management, including its ideology and relationship to local environment. For *sui generis* systems to be effective there will likely be a need for measures at local, national and international levels. It is highly desirable that local measures be based closely on the relevant customary laws of the indigenous and local communities concerned and developed with their full and effective participation and their prior informed consent. In fact, traditionally, there may already be *sui generis* protection in place, through customary law; however such measures require formal recognition and support by the State, to ensure their effectiveness and continuity. Community protocols may offer a tool to translate customary law into understandable obligations for potential users of traditional knowledge and should be developed by the relevant indigenous and local communities, with a

focus on women. National and international measures should therefore be more general in nature and provide best-practice guidelines, or a framework that recognizes and supports local measures. It is important to clarify that in practice no single overarching international, regional or national *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 and the cultural and legal diversity of the world's indigenous and local communities. It is therefore vital that *sui generis* protection be local in nature but supported by national and international frameworks and/or guidelines, which may establish minimal standards.

13. 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 at the various levels in order for *sui generis* systems to be effective.

14. Furthermore, regarding scope, calls by indigenous and local communities for recognition of customary law must be interpreted in the context of traditional knowledge and the goals of the Convention. Indigenous and local communities are not calling for the wholesale adoption of customary law, in its totality or as it was practised at some time in the past but are calling for the respect and recognition of particular elements of customary law, relevant to traditional knowledge, as it exists today.

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

15. 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 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 and obligations 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.

16. 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 or specific families may be 'custodians' of the knowledge on behalf of the collective. The approach to deal with this custodial relationship should therefore be in accordance with relevant customary laws of the indigenous or local community concerned.

17. It is important for *sui generis* systems at the local level to be based on the relevant customary laws of the communities concerned. 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 respect the communities' customs and traditions involving 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.

18. In the case of the trans-boundary occurrence of some biological and genetic resources and associated traditional knowledge, as well as its occurrence among 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 according to their respective community protocols. Research and development of traditional knowledge could then be coordinated and profits should be shared equitably and according to the relevant customary laws.

C. Set of relevant definitions

19. The Working Group considered the revised terms and definitions at its fifth meeting and took note of the draft glossary of terms relevant for Article 8(j) in annex I to document UNEP/CBD/WG8J/5/INF/15. To assist the Working Group in taking forward the development of a glossary of terms, as requested in paragraph 4 of decision VII/16 H, and in light of the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefit Arising from its Utilization, and taking into account task 12 of the multi-year programme of work on Article 8(j), a draft glossary of terms is made available in the annex to this document.

20. In order to avoid duplication with the programme of work on Article 8(j) and related provisions and noting the need for harmony of terms throughout the Convention, its Protocols and the international system, the Working Group may wish to transmit this indicative draft glossary for further consideration under task 12, at its next meeting.

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

21. 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* systems for the protection of traditional knowledge.

Community protocols

22. Community protocols are participatory tools that articulate indigenous and local community values, procedures, and priorities, and set out rights and responsibilities under customary law, as the basis for engaging with external actors, such as governments, companies, academics, and NGOs. They can be used as catalysts for constructive and proactive responses to threats and opportunities posed by land and resource development, conservation, research, and other legal and policy frameworks.

23. Community protocols are increasingly referenced in international law and policy and regarded by many as effective community level *sui generis* systems for the protection, preservation and promotion of traditional knowledge. They are referred to in several decisions of the Convention on Biological Diversity (including decisions XI/1, XI/5 and XI/14) and in the Nagoya Protocol on Access and Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from its Utilization (Articles 12(1), 12(3)(a) and 21(i)). They are recognized and referenced in other international processes[4] as a means to provide a framework for external stakeholders when engaging with indigenous and local communities. They are also listed in annex VII to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent on tools and resources.[5] There is a great deal of experience, lessons learned, and literature concerning the documentation, development and use of community protocols in a wide range of contexts.

24. Every process of developing and using a community protocol is as unique and diverse as the communities who undertake them. Whilst there is no template or way to "do" a community protocol, there are lessons learned and guidance on good practices and core principles, particularly concerning facilitation of the process according to the community's objectives, priorities, timelines, and approaches. There are also several locally adaptable methods and tools that can assist with different aspects of a community protocol process, including self-determination, endogenous development, documentation and

[4] Such as IPBES/1/INF/5 Consideration of initial elements: recognizing indigenous and local knowledge and building synergies with science

[5] UN-REDD Programme, 2013. *Guidelines on Free, Prior and Informed Consent*. FAO, UNDP and UNEP. Available online at: http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53.

communication, social mobilization, legal empowerment, strategic advocacy, and reflective monitoring and evaluation. A dedicated toolkit provides initial guidance on protocol processes.[6]

25. Community protocols based on customary laws and developed by the indigenous and local communities themselves may provide a way of translating customary laws and obligations arising from customary laws for users of traditional knowledge and thus provide the community with an effective tool in managing access to traditional knowledge and in ensuring the equitable sharing of benefits. Community protocols are enjoying increasing acceptance by both Parties and indigenous and local communities and have been given increased visibility and further encouraged through the adoption of the Nagoya Protocol.

26. Within *sui generis* systems such as community protocols, general 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 national frameworks to guide the development and/or the recognition of *sui generis* systems at community levels.

27. At the national level, 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, including through recognition of community protocols, may vary because of the national legal landscape and may depend, for example, on national constitutional arrangements, fulfilment of domestic treaty obligations, and the ratification of international and regional treaty commitments. However, despite some obstacles and encouraged by the need to effectively implement the Nagoya Protocol, Parties are increasingly interested in the role that community protocols can play in access and benefit-sharing within and beyond the national landscape.

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 as perceived by indigenous and local communities. Traditional knowledge at the community level works under customary rules and this context is lost when the knowledge escapes into foreign systems. While intellectual property rights aim at commodifying/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, conflict with customary law concepts of how knowledge and resources should be treated.

29. For many indigenous and local communities, traditional knowledge is connected not only with rights but also with 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 be prepared 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 respectful way.

30. Furthermore, 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.

Customary rights regarding biological resources

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

[6] Shrumm and Jonas, 2012a.

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.

32. Customary practices relating to use of biological resources are often guided by specific sanctions, moral codes, and ethical norms that help to ensure that individuals comply with *sui generis* systems. These sanctions and norms can include, for example, beliefs that breaking traditional laws can lead to illness or misfortune (which may be viewed as evidence of individual transgression).

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. [7]

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, but 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. Knowledge is not generally owned in the sense of individual and severable property. Having knowledge is more often linked to notions of responsibility, respect and obligation 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 and/or the perpetrator 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 are used for guiding impartial decision-making;

[7] Refer IIED Information document UNEP/CBD/WG8J/4/INF/17

(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) Equitable sharing whereby a good or service is shared equitably between people, families or institutions – with an emphasis on sharing on a needs basis i.e. – nutritious cuts of meat may be provided to the elderly, children and the infirmed;

(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[8] Wildlife Act provides a useful example for consideration. The Nunavut Wildlife Act lists the most important Inuit customary law principles relating to biodiversity. Although these principles are specific to customary practices of the Inuit, they can be considered representative of the *kinds* of principles that exist in other *sui generis* systems:

(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) Creativity and flexibility are highly valued, as is the ability 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 is respected as a teacher;

(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;

[8] Nunavut is the largest, northernmost and newest territory of Canada.

(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

(m) All wildlife should be treated respectfully.

41. Customary laws may include other common principles,[9] such as (but not limited to):

(a) *Mutual recognition*: use of the benefits of biological and genetic resources is conditional on 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 and local communities feel they are a part, which is why they act within nature, rather than separately from its elements;

(b) *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;

(c) *Avoidance of waste:* Greed, wastefulness, and overuse are often discouraged in *sui generis* systems; for example, the principle of "take only what you need" may be encouraged, and there may be additional prohibitions against killing certain animals such as very young or pregnant animals;

(d) *Protection of sacred species:* Some species of plants and animals are viewed as sacred according to local belief systems; in these cases, cutting or harvesting of trees and plants and killing of animals may be forbidden or limited to only certain knowledge holders;

(e) *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 each being is born, grows and dies, and has its cycle and function.

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

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". This suggests that prior and informed consent could be considered a mandatory process which should be guaranteed by the State regarding access to the knowledge, innovations and practices of indigenous and local communities. A basic principle guiding the entire process of prior and informed consent should be "equal opportunity" which should be understood that all parties including indigenous and local communities should have equal access to financial, human and materials resources.

43. 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 (see document E/C.19/2005/3), which outlined the main elements of a common understanding of a process of prior and informed consent.[10] As such, these elements may help guide the development of processes of prior informed consent, which should be developed with the full and effective participation of the communities concerned. It should be for the communities concerned to inform interested parties about processes, timeframes and participants in such processes. It is also important to note that local norms and customs

[9] Input received from Argentina.

[10] 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).

need to be considered in this entire process, in order to avoid a homogenous prior informed consent process, which may entail many dangers.

Mutually agreed terms

44. Both the Nagoya Protocol and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization set 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. S*ui generis* systems for the protection of traditional knowledge could build on the Nagoya Protocol provisions and/or the Bonn Guidelines, while ensuring that any guidelines properly reflect the relevant customary law and the concerns of the appropriate indigenous and local communities.

Equitable sharing of benefits

45. 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 communities, whose knowledge is being used. The nature of the benefits that could be anticipated from accessing traditional knowledge fall into two general categories: monetary and non-monetary. Appendix II to the Bonn Guidelines contains an indicative list of both. While not specifically tailored to the needs of indigenous and local communities as providers of biological resources and associated knowledge, many of the listed benefits will nevertheless be appropriate in many circumstances.

46. 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. An important issue when considering what constitutes equitable benefit-sharing is the economic value of the traditional knowledge (and associated resource/s) 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 on-going supply, and the usefulness of knowledge.

47. The value of traditional knowledge concerning conservation, sustainable use and maintaining ecosystems services, as well as its contribution to maintaining biological and hence genetic diversity and thus its contribution to the greater good of humanity in general should also be fully considered in benefit-sharing arrangements. 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.

48. In order to suggest some prioritization of the elements of *sui generis* systems based on the submissions received, and taking into account related and ongoing work under task 12, prior and informed consent (PIC) and mutually agreed terms (MAT), and equitable benefit-sharing, could be the cornerstones on which *sui generis* systems are constructed. In particular, MAT could ensure that obligations arising from customary laws are taken into account without the need to reveal or codify customary legal systems.

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

Rights of traditional knowledge holders

49. 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.

Conditions for the granting of rights

50. Conditions for the granting of rights may include:

(a) General requirements;

(b) Categories of traditional knowledge that will be protected;

(c) Conditions of confidentiality;

(d) Clarity surrounding issues of novelty, originality, public domain and protection.

51. *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.

52. *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), noting that the "public domain" is not a universal concept in customary systems and may not be easily compatible with those systems.

53. Under current intellectual property laws, intellectual property rights cannot be granted on traditional knowledge found in the public domain. Many indigenous and local communities however believe that traditional knowledge found in the public domain remains the property of indigenous and local communities and therefore should require prior informed consent before being used. The distinction between public availability and the public domain needs to be carefully considered. For instance, there is a critical distinction between traditional knowledge associated with genetic resources being in the "public domain" versus being "publically available". In many respects the term public domain, which is used to indicate free availability, has been taken out of context and applied to traditional knowledge associated with genetic resources that is publicly available. The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access. Traditional knowledge has often been judged to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. But it cannot be assumed that traditional knowledge associated with genetic resources that has been made available publicly does not belong to somebody. Within the concept of public availability, due diligence in identifying the knowledge holder would still apply and prior informed consent from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable, including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State. The phrase public domain in the context of traditional knowledge may need to be more correctly re-phrased as publicly available.

54. 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 may have lost that link (this classification would have to be done by the community themselves);[11]

(e) Elements that are useful for promoting environmentally sustainable practices, conservation, etc.

55. It is conceivable to create *sui generis* systems that exclude traditional knowledge that is not susceptible to commercial use. By limiting the scope of traditional knowledge, costs of compliance and enforcement would be reduced. However, 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.

56. *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, including innovations and practices.

57. 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.

58. 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

59. 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;

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[11] 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.

(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;

60. 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.

61. 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.

62. 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.

63. 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

64. 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.

65. 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.

66. 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;

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

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

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

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

(f) 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).

67. 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.

68. Registers or databases would facilitate the recognition of prior art in the processing of patent applications and thereby prevent its unauthorized 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.

69. Further information on registers is available in the composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities – the advantages and limitations of registers (UNEP/CBD/WG8J/4/INF/9). A summary of the report on registers is also available in a document from the Executive Secretary on 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 (UNEP/CBD/WG8J/4/4).

70. Furthermore the World Intellectual Property Organization is currently developing a traditional knowledge toolkit, in partnership with other relevant agencies including the Secretariat of the Convention on Biological Diversity, which is designed to provide indigenous and local communities with the information they need to make informed judgement about whether or not to document their traditional knowledge, including possible benefits and threats of documentation. A summary of the WIPO toolkit is available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_5-annex1.doc

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

71. A national competent authority, such as those called for under the Nagoya Protocol, to manage procedural and administrative matters regarding access and benefit-sharing could include a balanced representative advisory group of indigenous and local communities from within the State or interact directly with indigenous or local community competent authorities. There should be adequate liaison

between knowledge holders and the level of government responsible for the system of protection. The role of community competent authorities could be fulfilled by already established indigenous and local organizations. Although initial financial support may be needed for the establishment of such organizations/authorities, they may later be self-supporting, namely out of benefit-sharing. A local indigenous or local community competent authority could also develop community protocols and other tools to assist in managing traditional knowledge and requests from potential users of traditional knowledge.

72. An indigenous or local community 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) Promoting knowledge, innovations and practices for the common good – such as for conservation and sustainable use;

(iv) Facilitating communication and sharing of traditional knowledge among traditional knowledge-holders;

(v) 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.

(r) Develop community protocols which provide for prior and informed consent and mutually agreed terms as tools for management of traditional knowledge and potential users of such knowledge.

J. Provisions regarding enforcement and remedies

73. 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.

74. 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 (i.e. Indian Arts and Craft Act of the United States of America);

(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.

75. 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 unauthorized 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.

76. 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

77. 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.

78. In order for *sui generis* systems for the protection of traditional knowledge to be effectively situated within a broader policy and legal environment, they 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.

79. A possible approach discussed by WIPO [12] 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, programmes 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).

80. However, national laws and measures should not only be taken into account in order to prevent contradiction, but should also be considered as potential facilitators for implementation of the *sui generis* system of protection. For instance, the national coast guard can collaborate with the community in monitoring the use of marine resources; border and port authorities may help in determining whether certain species are exported. As such, integrating the *sui generis* system of protection into the general workings of national legislation may be beneficial. Adequate liaison for the indigenous and local communities would have to be assured with competent authorities.

International level

81. 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). 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 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.

[12] See WIPO document "Protection of Traditional Knowledge: overview of policy objectives and core principles" (WIPO/GRTKF/IC/7/5).

L. Regional measures that have been taken to protect, preserve and promote traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity, including knowledge held across national and international boundaries[13]

82. Five regional *sui generis* laws were analysed for the purposes of this discussion:

(i) African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000 ("African Model Law")[14]

(ii) Decision 391 – Common Regime on Access to Genetic Resources ("Andean Community Decision 391") [15]

(iii) The ASEAN Framework Agreement on Access to Biological and Genetic Resources (draft) ("ASEAN Framework Agreement")[16]

(iv) Model Law for the Protection of Traditional Knowledge and Expressions of Culture ("Pacific Model Law") [17]

(v) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore ("Swakopmund Protocol")[18]

Policy context, purpose, objectives

83. The overall purpose of the surveyed regional laws depends, among other things, upon whether it is binding or non-binding. Whereas the Andean Decision, for example, binds the member states of the Andean Community of Nations, the African Model Law is merely a template, from which member states

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[13] In paragraph 4 of decision XI/14, the Conference of the Parties invited Parties and Governments, in the light of the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, to report on any regional measures that have been taken to protect traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity held across national and international boundaries, including *sui generis* systems that are being developed or have been developed. As requested, the Executive Secretary has analysed information received and included it, as a new element on regional measures in the revision of this note, for the consideration of the Working Group

[14] 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 was inspired by the Convention on Biological Diversity (CBD) and prepared in 1997 by an Organization of African Unity (OAU) Task Force. The OAU Ministerial Session, followed by the OAU Summit of Heads of State and Government, adopted this Model Law in Ouagadougou in 1998, and recommended that it be the basis of African national laws.

[15] Andean Community Decision No. 391 of July 2, 1996 - Common Regime on Access to Genetic Resources. The **Andean Community** (Spanish: ***Comunidad Andina***, **CAN**) is a customs union comprising the South American countries of Bolivia, Colombia, Ecuador, and Peru. The trade bloc was called the **Andean Pact** until 1996 and came into existence with the signing of the **Cartagena Agreement** in 1969. Its headquarters are located in Lima, Peru.

[16] The **Association of Southeast Asian Nations** (**ASEAN**) is a geo-political and economic organization of ten countries located in Southeast Asia, which was formed on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Since then, membership has expanded to include Brunei, Burma (Myanmar), Cambodia, Laos, and Viet Nam. Its aims include accelerating economic growth, social progress, and cultural development among its members, protection of regional peace and stability, and opportunities for member countries to discuss differences peacefully. According to the Hanoi Plan of Action adopted during the 6th ASEAN Summit in 1998, the draft Framework Agreement was to have been adopted in 2004, although this does not appear to have occurred.55

[17] The Model Law for the Protection of Traditional Knowledge and Expressions of Culture is a draft model law (2002) establishing a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture. The model law provides a basis for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture.

[18] At the African Regional Intellectual Property Organization (ARIPO) diplomatic conference on 9-10 August 2010, in Swakopmund, Namibia, the protocol on the Protection of Traditional Knowledge and Expressions of Folklore was signed by nine states.

can base national legislation should they choose to protect traditional knowledge through a *sui generis* legal mechanism.

84. Whilst the scope of protection in all cases is intangible intellectual property, in the form of traditional knowledge or expressions of culture, the end goal is significantly different among the regional laws. Generally, the regional laws either protect traditional knowledge and/or expressions of culture in their own right (i.e. Pacific Model Law, Swakopmund Protocol), or they are aimed at protecting access to genetic resources and thus only offer protection to traditional knowledge that is associated with the underlying biological and/or genetic resources (Andean Decision 391, African Model Law, ASEAN Framework Agreement). As the former two examples include all forms of traditional knowledge and expressions thereof, they presumably include associated traditional knowledge, being a subset of traditional knowledge generally. The Pacific Model Law and Swakopmund Protocol offer a *sui generis* form of intellectual property protection to *all* traditional knowledge or expressions of culture within adopting member countries, and thus comprise a scope that is much broader than the Convention on Biological Diversity, let alone associated traditional knowledge as contemplated by the Nagoya Protocol. The Convention seeks to protect, preserve and maintain knowledge, innovations and practices of traditional lifestyles *relevant for the conservation and sustainable use of biological diversity*,[19] which is of course only a fraction of all traditional knowledge generated.

85. Given this divergence in scope, it can generally be stated that the regional laws protecting associated traditional knowledge more closely resemble national access and benefit-sharing legislation and thus are worth further exploration as potential avenues for the effective implementation of the Nagoya Protocol (notably ABS provisions (Arts. 5, 6, 7, 12, and 16), and Article 11, regarding Transboundary Cooperation). While protection, preservation and promotion of traditional knowledge and expressions of folklore in general ('un-associated' traditional knowledge) will certainly aid in achieving the goals of the Nagoya Protocol (awareness raising, capacity-building, enhancing the status of women, etc.), regional laws with this more general scope will likely do more to further the implementation of Article 8(j) and 10(c) of the Convention by advancing tasks 7, 10, and 12 of the revised programme of work on the implementation of Article 8(j) and relation provisions (decisions V/16; X/43).

86. While the scope of protection diverges on the protection of associated traditional knowledge, all regional laws surveyed contain similar conditions of prior informed consent and the development of mutually agreed terms before the knowledge can be accessed, whether or not there are also genetic resources underlying that knowledge.

The protected subject matter (scope)

87. As previously discussed, the scope of protection can be divided into two main classes depending upon whether the regional law is primarily an access and benefit scheme for genetic resources and associated traditional knowledge, or whether it is primarily a *sui generis* intellectual property scheme. But the scope also can vary significantly within these classifications. For example, one of the key differences between the Andean Community Decision 391, on the one hand, and the African Model Law and ASEAN Framework Agreement, on the other, is the contentious issue of patentability of biological or genetic resources and derivatives thereof. While the former does not preclude patentability, the latter two regimes explicitly seek to reject or prohibit the application of any patent system on biological or genetic resources on ethical and/or moral grounds. Human genetic resources and their by-products are a common exclusion in scope in most cases, and remain beyond the mandate of the Convention on Biological Diversity.

88. Most regional systems distinguish between protection for biological/genetic resources and protection for associated traditional knowledge, such that access to the resource does not automatically allow access to the associated intangible components (the traditional knowledge specifically associated with that resource). This distinction is crucial, as it can allow for access to genetic resources to be granted in accordance with relevant national legislation, including the prior informed consent of the relevant

[19] Article 8(j)

competent national authority, whereas access to the associated traditional knowledge is to be given through the consent of knowledge holders, in accordance with their customary laws or community protocols. In essence there is a two-track system within most of the assessed regional frameworks that allow the parallel imposition of both conventional and customary law on an access application. For example, the ASEAN Framework Agreement states: *"The Framework Agreement shall cover all biological and genetic resources including the traditional knowledge associated therein. However, access to biological and genetic resources shall not automatically mean access to the traditional knowledge associated with the resource. Access to such traditional knowledge shall be explicitly indicated in the application for access."* (Art. 4). Customary law and protocols are discussed further, below.

89. Generally, the scope of the regional laws includes any traditional knowledge (defined uniquely in each case) whether or not the knowledge might otherwise be capable of protection under conventional intellectual property regimes. For example, the Andean Community Decision 391 defines "Intangible Component" 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*." (Art. 1).

90. In almost all cases where the regional regimes seek to control access to genetic resources and/or associated/un-associated traditional knowledge, there is a proviso that allows for the traditional uses, including exchanges, by the relevant traditional knowledge holders to continue unaffected by the legislation. This includes trade in, and access to, the genetic resources that are otherwise protected by the legislation. These 'savings clauses' are likely essential for the 'buy-in' of indigenous and local communities to these regional laws.

Criteria for protection of traditional knowledge

91. The criteria for protection vary considerably among the regional laws, however they typically (although not necessarily) require that the traditional knowledge be held collectively by an identifiable community. Some laws require that it be inter-generational in character, whereas others require only that it be developed over many years.

92. Additional feedback from Parties to the Convention in regions where these regional laws have been implemented in some form or another would be useful to determine whether there have been disputes about what constitutes 'traditional knowledge' and how these disputes, if any, where resolved.

Rights holder (who owns the rights in traditional knowledge)

93. With the exception of the African Model Law, the holders of rights in traditional knowledge are generally indigenous and local communities who self-identify as such in accordance with their own customary laws. The African Model Law goes further in that it carves out rights for farmers and plant breeders as well.

The rights conferred on traditional knowledge holders (including exemptions and free uses)

94. All regional laws re-affirm the sovereignty of enacting nations over their genetic resources and access thereto, in accordance with Article 15 of the Convention on Biological Diversity.[20] Indigenous and local communities are often regarded as the *custodians* of biological and genetic resources, and *owners* of traditional knowledge, whether associated with the genetic resource or not. The African Model Law recognizes the *rights* to access and use, of indigenous and local communities, although not necessarily ownership, over biological resources and the right to collectively benefit from them (referring to them as 'legitimate custodians and users').

[20] Article 15.1 states: *Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.*

95. Again, the exchange of biological/genetic resources within and among Indigenous and local communities represents a free use that falls outside the scope of most regional laws. The right to refuse access to traditional knowledge, whether secret-sacred or not, is an integral part of most regional schemes. The right can be explicit (African Model Law, Pacific Model Law), or implicit (Andean Community Decision 391), but there can also be exceptions for matters of public security or health (Swakopmund Protocol).

96. Along with the rights to traditional knowledge and/or expressions of culture, some regional schemes (Pacific Model Law) offer protection to secret-sacred aspects (as determined by customary law) and/or the moral rights attached to expressions of culture (the right of attribution, right against false attribution, and the right not to be subjected to derogatory treatment). In general the rights conferred by the various regional schemes surveyed are as diverse as the myriad of national laws that have sought to protect traditional knowledge.

Procedures and Formalities for the recognition of traditional knowledge

97. Most regional laws require a prospective user to make a formal application in a prescribed form to the government department responsible for access (usually referred to as the 'competent national authority'). The level of prescription varies considerably from one regional law to the next, with some laying out intricate and precise requirements, and others only suggesting the types of information that each enacting country could require for their own competent national authorities.

98. For the purposes of this discussion, some commentary on the perceived differences between regional and national law in terms of the procedures and formalities is warranted. While the requirements for applications to be submitted to competent national authorities are quite similar, in most cases, to comparable national legislation (and of course, they are meant to be models for national legislation), the main feature that sets some regional laws apart are requirements for information sharing between competent national authorities in neighbouring enacting countries. For example, the Andean Community Decision 391 has provisions on subregional cooperation, transfer of technology, and reciprocity agreements between member countries. Regional laws can also have provisions offering or mandating reciprocal national treatment and most-favoured nation protection to traditional knowledge. Such regional protection is discussed further below.

99. The Andean Community Decision 391 is perhaps the most prescriptive, requiring that "the Member Countries shall notify each other immediately through the Board, of all applications for access resolutions and authorizations, as well as of the suspension and termination of such contracts as are signed. They shall also advise each other about the signing of any bilateral or multilateral agreements on the subject, which must be in keeping with the provisions of this Decision. Without prejudice to the stipulations of the previous article, the Member Countries shall immediately inform each other through the Board of all provisions, decisions, regulations, judgments, resolutions and other rules and acts adopted nationally that have to do with the provision of this Decision." (Arts. 48-49).

Responsibilities of new or existing authorities and institutions (Competent National Authorities)

100. Like similar national laws, regional schemes tend to establish a competent national authority which administers the act at the national level. The establishment of such a body can be mandatory, where the scheme is imposed on member countries (Andean Community Decision 391, Art. 50), or permissive, where countries are given flexibility in either creating a new body, or adding the functions of the competent national authority to existing departments (African Model Law, Art. 57; Pacific Model Law, clause 36; ASEAN Framework Agreement, Art. 8; Swakopmund Protocol, section 3).

101. Noticeably absent from the composition of competent national authority panels or boards are representatives of indigenous and local communities. The authorities, as created under most regional laws, tend to be centrally-run, national-level institutions that exercise autonomous power to make determinations that have the potential to affect indigenous and local communities. Some regional laws suggest or require mechanisms for participation and consultation at the application stage, whereas others

provide no opportunity for stakeholder involvement or engagement, leaving it to the court system to deal with issues of appeals where access is granted contrary to a community's wishes.

Provisions regarding enforcement and remedies

102. Enforcement and civil remedies are within the jurisdiction of sovereign nations, and thus the regional laws allow for considerably flexibility for adopting countries to determine procedures in accordance with their established legal systems.

103. The complex nature of traditional knowledge and evidentiary issues in customary legal traditions mean that conventional national legal systems may not be appropriate to settle disputes arising under these regional schemes. Some regional laws allow the competent national authority to engage stakeholders early in the process, and/or to revisit its approval of an application upon the complaint by an affected community.

104. Some regional systems (Pacific Model Law) go even further and require disputes about ownership of traditional knowledge to be resolved according to customary law or any other means as agreed to by the parties. The results of the customary dispute settlement are then ultimately approved by the competent national authority. Article 18(1) reads: *If the Cultural Authority [i.e. the competent national authority] is not satisfied that is has identified all of the traditional owners or [if] there is a dispute about ownership, the Cultural Authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.* The Pacific Model Law also allows for the use of customary law as a form of alternative dispute resolution of civil claims (Art. 33(c)).

Term of protection

105. Providing for protection of traditional knowledge and expressions of culture in perpetuity is an essential component of *sui generis* systems, including regional systems. Most regional laws offer this protection explicitly, with some simply stating that the State shall recognize the rights of indigenous and local communities to their knowledge, from which protection in perpetuity can be inferred in the absence of any contrary language. The rights also tend to be inalienable, although there is divergence on whether such rights can be waived or transferred.

Relationship and interaction with existing laws, including international law and intellectual property law

106. There is a significant divide among regional schemes in terms of their relationship with existing laws, including international and intellectual property law. Regional laws tend to either accept or reject the notion of patents of life forms, genetic resources and/or derivatives. Both the African Model Law and the ASEAN Framework Agreement reject the patent system entirely, on moral/ethical grounds. The African Model Law contains the following in the preamble: *Whereas, all forms of life are the basis for human survival, and, therefore, the patenting of life, or the exclusive appropriation of any life form or part or derivative thereof violates the fundamental human right to life.* The ASEAN Framework contains similar sentiments: *The Member States...Have agreed as follows: That the Member States regard biological and genetic resources as a sacred heritage for all humankind and reject the application of the patent system thereon.*

107. The other regional laws do not prohibit an applicant from applying for patents on the derivatives of genetic resources, but some stipulate disclosure of origin requirements to form part of the patent application. These laws tend to explicitly state that the law does not affect any existing rights in intellectual property.

108. The African Model Law has the potential of conflicting with Article 27.3(b) of the Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPs), which precludes countries from excluding microorganisms from patent protection, with limited exceptions. Where an African Union country adopts the Model Law and is also a WTO member, this conflict has the potential to lead to disputes, which will

likely involve a determination of whether patents on microorganisms can be rejected for reasons of *ordre public* or morality. However, the African Model Law does provide protection to plant varieties, in conformity with TRIPs, Art. 27.3(b).

Access and Benefit-sharing

109. Perhaps the most crucial aspects of any *sui generis* system for the protection of traditional knowledge, whether regional or national in scope, are those dealing with prior informed consent and mutually agreed terms (access and benefit-sharing), in accordance with Articles 15 and 8(j) of the Convention on Biological Diversity as well as the Nagoya Protocol. Whereas the Pacific Model Law and Swakopmund Protocol deal primarily with access to traditional knowledge *per se*, the African Model Law, Decision 391, and the ASEAN Framework focus on genetic resources, with associated traditional knowledge protected as a secondary concern.

110. Some common elements of regional systems are:

(i) The requirement of prior informed consent on behalf of indigenous and local communities, who supply the intangible traditional knowledge either in its own right or in conjunction with underlying genetic resources, is a feature of all regional systems. Likewise the access agreement must contain terms that are mutually agreeable to the suppliers of the intangible components;

(ii) For the laws that primarily deal with access to genetic resources, there is often the caveat that access to the genetic resources does not imply access to the associated traditional knowledge, and vice versa – they are separate and distinct considerations;

(iii) With the exception of the African Model Law, which stipulates that 50% of the benefits arising from use of traditional knowledge must be channelled to the relevant local community, all other regional schemes use much more open-ended wording; examples include ‘fair’, ‘equitable compensation’, and ‘equitable distribution of profits’. The actual amount of compensation, whether monetary or non-monetary, could lead to animosity or conflict where traditional knowledge holders feel inadequately compensated.

Inclusion of customary laws and protocols

111. The right to exchange resources and use traditional knowledge in accordance with the customary practices of one’s local community is a prominent feature of all assessed regional laws. Regional laws are meant to protect appropriation by outside users, not regulate an internal system.

112. However, actual use of customary laws or community protocols is only envisioned by the Pacific Model Law, which refers disputes about the proper ‘owner’ of traditional knowledge to dispute resolution according to customary practices, and the law does not preclude the use of customary law as a form of alternative dispute resolution in the case of civil lawsuits involving unlawful appropriation.

113. There is a noticeable lacking in the regional systems of recognition of customary law as a prominent feature in protecting traditional knowledge. The Andean Community Decision 391, for example, requires the applicant to identify any relevant communities who might be providing traditional knowledge associated with the genetic resources. The competent national authority may then make a determination without consulting the relevant communities (the national circumstances may differ, but the regional legislation does not mandate consultation). Nothing precludes indigenous and local communities from using their own customary laws and protocols in deciding whether to sign the access and benefit agreement, but customary law plays no part in determining the merits of the application in the first place. This contrasts with the procedure in the Pacific Model Law described above, where preliminary disputes are resolved in accordance with customary law of the relevant community(ies), according to their specific community protocols.

Regional and international protection (protection of regional knowledge and folklore)

114. The degree to which the regional law promotes international protection for traditional knowledge completely depends on the implementing countries and the degree of flexibility provided to them in the language of the regional law. For example, the Andean Community Decision 391 is a binding regional law that is incorporated into the legal system of each member country. The provisions regarding subregional cooperation and transfer of biological resources, as well as the national treatment and reciprocity clauses necessarily will be more effective than equivalent clauses in 'model' legislation, where adopting countries can pick and choose the provisions that suit their unique circumstances. Model laws, while aimed at specific regions and geared towards amelioration of the unique problem faced by indigenous and local communities within the region, fail in many regards to harmonize the law across the region. When countries can select and tailor provisions as they like, the regional benefits can be lost and the resultant national legislation is really no different than if the country endeavoured to create a *sui generis* regime of its own devise.

115. For regional laws to be assessed separate and distinct from national laws, there likely has to be wholesale adoption of the law by the relevant member nations, so as to ensure reciprocity between adopting nations within the region. In this regard, regional laws that have stronger or more mandatory language for the wholesale adoption of the scheme will likely come closer to achieving this regional coordination. The regional laws can thus be characterized, roughly, in the following manner, in order from most to least effective:

(a) Regional Laws that bind several nations to a common framework (e.g. Andean Community Decision 391);

(b) Regional Laws where the language is mandatory, not permissive, and requires adopting nations to either 'take it or leave it'. These laws contain a complete articulation of rights and procedures and can be adopted wholesale by nations (with minor tweaking to suit national circumstances), such that adopting nations will have coordinated regional frameworks (e.g. Pacific Model Law, African Model Law, Swakopmund Protocol);

(c) Regional Laws that simply provide a guiding framework and recommended provisions (e.g. ASEAN Framework Agreement).

116. It should be noted that a higher degree of regional cohesion does not necessarily equate with a higher degree of specificity. The Swakopmund Protocol is ranked higher in the above classification as it is a protocol that must be adopted wholesale and thus the language is mandatory. However, the procedures for access to the traditional knowledge and expressions of folklore in that protocol are considerably less precise and formalistic than the African or Pacific Model Laws. For example, the Swakopmund Protocol states that: *The protection to be extended to traditional knowledge holders shall include the fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties* (Art. 9.1). This requirement says nothing with regard to how this is to be accomplished, or the procedures to be followed. This is perhaps the trade-off between regional and national protection for traditional knowledge – as you attempt to cover a larger and more diverse geographic and political area within the ambit of the law, you necessarily need to maintain a degree of flexibility in how the law is implemented at the national level.

117. The goal for regional laws should be an attempt to find a balance between these competing objectives, while still seeking maximum 'buy-in' from target countries and communities. Perhaps allowing flexibility in national access and benefit procedures, while requiring wholesale adoption of regional coordination and reciprocity provisions could further this objective.

Annex I

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

The following annex is divided into two sections. Section I is a compilation of adopted definitions from Convention sources, including the text of the Convention and its Protocols, which may be of relevance to Article 8(j) and related provisions. Section II is a collation of terms that have been submitted and collated from various sources.[21] The collated list is proposed in the context of common understandings/characteristics or working definitions as a possible draft glossary for use within the context of Article 8(j) and related provisions and may contribute to related discussions under task 12, at future meetings of the Working Group on Article 8(j) and Related Provisions. .

Section I

DEFINITIONS ADOPTED UNDER THE CBD

The Convention of the CBD (Article 2)

"Biological diversity" means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

"Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

"Biotechnology" means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

"Country of origin of genetic resources" means the country which possesses those genetic resources in in-situ conditions.

"Country providing genetic resources" means the country supplying genetic resources collected from in-situ sources, including populations of both wild and domesticated species, or taken from *ex-situ* sources, which may or may not have originated in that country.

"Domesticated or cultivated species" means species in which the evolutionary process has been influenced by humans to meet their needs.

"Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

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[21] Including the United Nations Permanent Forum on Indigenous Issues, the World Intellectual Property Organization, the International Institute (the International Institute for Environment and Development), and submissions received from 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, and Natural Justice.

"*Ex-situ* conservation" means the conservation of components of biological diversity outside their natural habitats.

"Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity.

"Genetic resources" means genetic material of actual or potential value.

"Habitat" means the place or type of site where an organism or population naturally occurs.

"*In-situ* conditions" means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

"*In-situ* conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

"Protected area" means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.

"Regional economic integration organization" means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.

"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

"Technology" includes biotechnology.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Article 2)

(a) **"Conference of the Parties"** means the Conference of the Parties to the Convention;

(b) **"Convention"** means the Convention on Biological Diversity;

(c) **"Utilization of genetic resources"** means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention;

(d) **"Biotechnology"** as defined in Article 2 of the Convention means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use;

(e) **"Derivative"** means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

Akwé: Kon Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (Decision VII/16 F)

(a) **Cultural impact assessment** - is a process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people: a cultural impact assessment will generally address the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community;

(b) **Cultural heritage impact assessment** - is a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development on the physical manifestations of a community's cultural heritage including sites, structures, and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic value or significance;

(c) **Customary law** - law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws;

(d) **Environmental impact assessment** - is a process of evaluating the likely environmental impacts of, and proposing appropriate mitigation measures for, a proposed development, taking into account interrelated socio‑economic, cultural and human health impacts, both beneficial and adverse;

(e) **Sacred site** - may refer to a site, object, structure, area or natural feature or area, held by national Governments or indigenous communities to be of particular importance in accordance with the customs of an indigenous or local community because of its religious and/or spiritual significance;

(f) **Social impact assessment** - is a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community - that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure, services;

(g) **Strategic environmental assessment** - is a process of evaluating the likely environmental impacts of proposed policies, plans or programmes to ensure that they are fully included and addressed at an early stage of decision‑making, together with economic, social and cultural considerations;

(h) **Traditional knowledge** - refers to the traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Section II

A DRAFT GLOSSARY OF TERMS (WORKING DEFINITIONS OR COMMON CHARACTERISTICS) FOR USE WITHIN THE CONTEXT OF ARTICLE 8(j) AND RELATED PROVISIONS

Application/use/utilization of traditional knowledge: the acts of making, using, offering for sale, selling, or importing for these purposes the protected traditional product,[22] 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,[23] species and ecosystems; cultural and spiritual values; and customary rights laws[24] 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.

Community protocols :Community protocols use participatory tools that articulate indigenous peoples' and community-determined values, procedures, and priorities, and set out rights and responsibilities under customary, state, as the basis for engaging with external actors, such as governments, companies, academics, and NGOs. They can be used as catalysts for constructive and proactive responses to threats and opportunities posed by land and resource development, conservation, research, and other legal and policy frameworks.

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, and traditional cultural expressions[25] including but not limited to songs, dances, artistic expressions, stories 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.

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[22] Peru has a question regarding the meaning of "protected traditional products".

[23] Peru would prefer to delete the word varieties because this category of biological diversity is an expression of genetic biodiversity.

[24] Peru has recommended that "laws" be replaced by "rights".

[25] Peru suggested the addition of the word "traditional". Peru believes the term cultural heritage may be already covered by the previous term "Bio-cultural Heritage".

Customary use of biological diversity*:* Use in relation to local traditions and customary norms/laws,[26] 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."[27] 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,[28] based on national legislation 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.[29]

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.

Traditional Custodian ~~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.[30]

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[26] Peru prefers "norms" instead of "laws" as the word "norms" includes oral and written rules, while "laws" includes only written ones.

[27] 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.

[28] Peru proposes "based on national legislation" to replace "as the case may be".

[29] 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).

[30] The Peruvian Working Group expressed its opposition to the term and the definition proposed because traditional knowledge has a collective nature, so a person cannot be considered an owner of the collective knowledge. This could mean that the negotiations or the decision to give to a third party the use of traditional knowledge (owned by an indigenous people) fall on one person, contravening the collective nature of the right. Exploring alternative terms: for example, traditional custodian or possessor.

***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.[31]

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[31] The Peruvian Working Group recommended complementing the definition with what is established under Article 14 of Convention No. 169. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.