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DRAFT DOCUMENT CONCERNING FURTHER DEVELOPMENT OF ELEMENTS OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES TO IDENTIFY PRIORITY ELEMENTS

Note by the Executive Secretary

INTRODUCTION

1. In paragraph 4 of decision VIII/5 E, the Conference of Parties requested the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, indigenous and local communities, to further develop as a priority issue, the possible elements listed in the annex to decision VII/16 H for consideration by the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions at its fifth meeting and further requests the Working Group on Article 8(j) to identify priority elements of sui generis systems.

2. The Secretariat has prepared this document to assist the Advisory Group in its work. The purpose of this paper is to further develop and prioritise the twelve elements (as per decision VII/16, H, annex), building on document UNEP/CBD/WG8J/4/7. Additionally, to provide a context for the elements, this document addresses in Section I, values that should be kept in mind by policy or law makers in elaborating sui generis protection mechanisms and in dealing with indigenous and local communities; Section II, the further development of the elements for sui generis systems listed in the annex to decision VII/16 H, including concrete examples; and Section III, draft guidelines for the consideration of policy and law makers for elaborating systems of sui generis protection. Finally, Section IV. provides draft recommendations for future work regarding priority elements of sui generis systems. Annex I provides a list of countries with existing sui generis systems and Annex II provides a set of draft relevant definitions/glossary for Article 8(j) and relevant provisions, which may be expanded upon for the fifth meeting of the Working Group on Article 8(j) on the receipt of further input from interested parties.

SECTION I VALUES TO CONSIDER IN THE ELABORATION OF SUI GENERIS SYSTEMS OF PROTECTION AND PROMOTION OF KNOWLEDGE, INNOVATIONS AND PRACTICES OF INDIGNEOUS AND LOCAL COMMUNITIES

3. The value of establishing sui generis systems as opposed to fitting traditional knowledge into an intellectual property rights system has been examined in depth by United Nations Permanent Forum Expert, Dr. Mick Dodson in document E/C.19/2007/10 prepared for the sixth session of the Permanent Forum (May 2007). "*In addition to providing international recognition of the right of indigenous peoples to protect and enjoy their traditional knowledge from misappropriation and misuse and subsequently providing guidance to States, a framework that recognises the relationship between indigenous traditional knowledge and customary law and provides space for the operation of indigenous legal systems will provide additional benefits to indigenous peoples that flow from the recognition of ownership*"[1].

4. Given this, policy and law makers should keep in mind the values set forth below, which are intended to provide a context to policy or law makers in their approach to and interaction with indigenous and local communities, in order to elaborate sui generis systems of protection that would respond to the needs and concerns of those communities.

5. Although it is undeniable that indigenous and local communities are diverse and vary greatly in their customary beliefs and laws, there are certain values that are common to larger numbers of indigenous and local communities, albeit not all. Those values should be kept in mind in elaborating sui generis systems of protection of traditional knowledge.

6. It is apparent that most indigenous and local communities, if not all, place great importance on their relationship with land and waters traditionally occupied or used by them. This relationship is a moral and spiritual one, but does not exclude an economic value and property rights. Indigenous and local communities have definitions of landscape that are different from those of the occidental world. These communities also maintain a dynamic relationship with the landscape. This relationship is characterized by custodianship, or obligations towards the environment, as well as towards ancestors and future generations.

7. As such, their knowledge tends to be holistic in nature. It is not sufficient to hold a particular set of data. The data must be understood in relation to other elements of the environment and of the culture. The full extent of the knowledge can only be appreciated in the context where it evolved. As such, customary systems are closely related to the biodiversity and landscape in which they have evolved, where they are transmitted and are used, upon which they rely and on which they have an influence. The holistic nature of this knowledge is consistent with the ecosystem approach fostered by the Convention on Biological Diversity.

8. Indigenous law systems are also dynamic and fluid. They are seldom written; they are mostly passed down orally from generation to generation, sometimes over millennia. The oral aspect of transmitting such knowledge allows for flexibility and adaptability to changing circumstances. To write down the knowledge would be to constrain them to a particular place in time and would detract from their flexibility and adaptability. Moreover, the transmission of such knowledge also has a strong cultural and social component.

9. Collectivity is an essential aspect of most customary systems. Examples of 'collectivity' in customary law include collective ownership of territories, resources and knowledge and responsibilities for sacred sites. Collectivity may also be reflected in how use of and property rights to resources are viewed. Finally, collectivity may appear in the importance of trust and cooperation in the workings of the

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[1] Mick Dodson (2007) "Report on Indigenous Traditional Knowledge". Prepared for the Permanent Forum on Indigenous Issues, E/C.19/2007/10 at para. 23.

community and applies to both rights and obligations. Thus most customary systems have some element of collective rights and responsibilities and it is a key component of the workings of their customary laws. Rights and obligations vary depending on the social relationship of the peoples concerned and the relationship to the territory and resources.

10. In customary legal systems, obligations are emphasized rather than rights. What matters is not that one has a right to something, but that someone has an obligation towards a given recipient or object or the resource itself. Additionally, customary systems are generally based on kinship ties. Kinship ties may determine elements such as access to resources. Similarly, these systems are also highly communal in nature. The impact of given actions on the community is a key component of customary systems.

11. Furthermore, there is usually a close relationship between law and spirituality. It may also be that law is inseparable from spirituality and that the rules of conduct spring from customary beliefs about the relationship of humans to their environment and to each other, including their ancestors and descendants. As such, customary laws may not be fully understood without considering spirituality. In a sense, some laws may not be compelling without taking into account spiritual beliefs.

12. The above characteristics can be deemed common to many indigenous and local communities and should be considered in elaborating a preamble to rules and guidelines for protecting traditional knowledge, innovations and practices of indigenous and local communities. Above all, sui generis systems based on customary laws should be developed with the prior informed consent and full and effective participation of the knowledge holders. Establishing and implementing such systems should been seen as an exercise in equal partnership.

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

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

(a) Statement of purpose, objectives and scope;

(b) Clarity with regard to ownership of traditional knowledge associated with biological and genetic resources;

(c) Set of relevant definitions;

(d) Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (i) customary rights in indigenous/traditional/local knowledge; (ii) customary rights regarding biological resources; and (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources;

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

(f) Rights of traditional knowledge holders and conditions for the grant of rights;

(g) The rights conferred;

(h) A system for the registration of indigenous/local knowledge/Systems for the protection and preservation of indigenous/local knowledge;

(i) The competent authority to manage relevant procedural/administrative matters with regard to the protection of traditional knowledge and benefit-sharing arrangements;

(j) Provisions regarding enforcement and remedies;

(k) Relationship to other laws, including international law;

(l) Extra-territorial protections.

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

A. Statement of purpose, objectives and scope

1. Purpose

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

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

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

(b) Exercise the right to require prior informed consent for any access to or disclosure and use of traditional knowledge;

(c) Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices;

(d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon. [2]

17. *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, culturally offensive or unauthorized use of traditional knowledge.

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

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

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

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

2. Objectives

21. An overall objective of the system is that it should be holistic in nature and allow for a comprehensive approach to the needs and concerns of the community involved. An important objective of *sui generis* systems could be to develop systems based on relevant principles of indigenous customary laws that would respond to the particular needs and circumstances of indigenous and local communities and nation-states in many highly diverse and complex situations.

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

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

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

3. Scope

25. The scope of such a system should consider the collective nature of the group and its 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. At each of these levels, the measures could be either binding or non-binding, giving either detailed prescriptions through legislation or through more general best-practice guidelines, or as a framework. The approach taken at each level will depend on the particular objectives at each level and the main actors involved (i.e. States, indigenous and local communities, private actors).

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

CASE STUDY- Northern Communities in Russia and Poaching[3]

In the Russian North, poaching constitutes an important threat to traditional livelihoods and to biodiversity. Poaching is carried out by employees of extraction companies, members of the military, elites, persons who trade illegally and some members of communities. It threatens biodiversity as it increases pressure on ecosystems, and interferes with traditional activities, including traditional management and protection of biological resources. For instance, it has been reported that members of the military shoot herders' reindeers. Poaching also often entails forest fires, as poachers set fires in order to concentrate animals in one place.

Several groups are conducting surveys in indigenous communities to determine the threats to traditional knowledge and biodiversity. Poaching and forest fires have been ranked as the first and second largest threats to traditional livelihoods in the Russian North. It is clear that different kinds of poaching require

[3] RAIPON (2002) "Arctic Indigenous Peoples and Traditional Way of Life". Prepared for the Arctic Council Ministerial Meeting, Inari (Finland), October 9-10, 2002. Online at: http://www.arctic-council.org/Meetings/Ministeral/2002/Haruchi_E.pdf

different types of systems of protection. Indigenous and local communities are a key solution but need to be empowered to stop such illegal activities.

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

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

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

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

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

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

CASE STUDY - Kenyan Populations and their Land Tenure System [4]

Customary laws relating to customary land tenure in Kenya operate on a collective basis. Each family within a village is entitled to user rights of well-defined plots for homestead or pastoral or agricultural use. The ownership is thus communal within each family. County councils hold the lands in trust for various ethnic groups. This trust land system is being eroding due to various factors.

However, what is called neo-customary land tenure is somewhat popular in many Sub-Saharan African cities, namely due to the failure of formal land delivery systems to meet the demand for land from low-income or marginalized groups. These new systems combine the contemporary urban land tenure land with customary systems. In Nairobi, there are three ways of carrying out neo-customary schemes: (1) through organized groups (cooperatives, companies, associations) that buy a large parcel and then divide it among themselves; (2) occupation of private or public land by an individual who then invites friends and relatives at the initial stages; or (3) settlement of landless individuals or individuals who have been displaced by ethnic clashes on vacant private or public land by the Provincial Administration.

In all these schemes, administration of transactions by the leader on behalf of the group reproduces a line of authority that is familiar with the traditional decision making process of families, clans and ethnic groups. Customary leaders and public administration work in an informal relationship, in which the customary leaders enjoy great respect. The members of an organization like those mentioned above share a common ethnic background and the need to access affordable land. Neo-customary land tenure schemes strive to simplify land delivery procedures while ensuring that the official requirements of approval are met.

C. Set of relevant definitions

32. Decision VIII/5, E, paragraph 8, invited Parties and governments, indigenous and local communities, and non-governmental organizations to communicate to the Secretariat their views on the definitions (UNEP/CBD/WG8J/4/7, annex I) related to the current decision on sui generis systems and requests the Executive Secretary to compile these views for consideration at the fifth meeting of the Working Group on Article 8(j) and Related Provisions. To this end a compilation, will be prepared for the consideration of the Working Group and the definitions contained in UNEP/CBD/WG8J/4/7, annex II are attached here also as annex II.

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

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

34. Within *sui generis* systems, the principles of customary law could be used as the basis for developing a range of mechanisms (both positive and defensive) and for strengthening customary resource management, governance systems, and cultural values. This could provide a means to strengthen and maintain core traditional values, while allowing communities the flexibility to respond and

[4] Obala, Luke & Njambi Kinyungu (date unknown) "Current Changes in Customary / Traditional Land Delivery Systems in Sub Saharan African Cities – Case Study of Nairobi". University of Nairobi, Kenya. Online at: http://www.ucl.ac.uk/dpu/research/housing/Kenyacasev3%202%20.pdf

adapt to changing circumstances, opportunities and threats. Establishing common principles may allow for the development of frameworks to guide the development of sui generis systems at various levels.

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

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

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

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

(c) Including customary law in formal school curricula;

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

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

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

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

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

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

1. Customary rights in indigenous/traditional/local knowledge

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

39. For many indigenous and local communities, traditional knowledge is connected with rights but also obligations. For example, intergenerational transfer of knowledge is an important obligation for older generations among most bodies of customary law. Similarly, there is also an obligation on youth to receive this knowledge. In many cases, youth must earn the right to receive the knowledge. Elders may

in some cases be reluctant to fully share their knowledge with others, even within their own community, if they feel that the latter will not use the knowledge in the proper way.

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

2. Customary rights regarding biological resources

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

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

43. 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. 5/

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

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

45. Knowledge and resources are not *owned* as they are under existing intellectual property rights, they are held in custodianship. Some knowledge is restricted to particular individuals or grounds or is only used for highly spiritual occasions. Other knowledge may be more open and widely shared. Knowledge is not generally owned in the sense of individual and severable property. Having knowledge is more often linked to notions of responsibility and respect as opposed to rights.

46. 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.

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

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

5/ Refer IIED Information document UNEP/CBD/WG8J/4/INF/17

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

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

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

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

49. 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.

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

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

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

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

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

(e) People must work together in harmony to achieve a common purpose;

(f) People are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill;

(g) The ability to be creative and flexible and to improvise with whatever is at hand to achieve a purpose or solve a problem;

(h) A person who is recognized by the community as having in depth knowledge of a subject;

(i) Hunters should hunt only what is necessary for their needs and not waste the wildlife they hunt;

(j) Even though wild animals are harvested for food and other purposes, malice towards them is prohibited;

(k) Hunters should avoid causing wild animals unnecessary suffering when harvesting them;

(l) Wildlife and habitat are not possessions and so hunters should avoid disputes over the wildlife they harvest or the areas in which they harvest them; and

(m) All wildlife should be treated respectfully.

CASE STUDY - Cook Islanders and their Marine Resource Management

Pacific Islanders have customary systems of prohibitions or restrictions relating to the use of a natural resource until the resource is replenished. This custom is called the *Ra'ui* in the Cook Islanders' society and has recently been reinstated by local chiefs, the Koutu Nui, to establish five marine protected areas within the lagoon on Rarotonga, which represents 8% of the reef circumference of Rarotonga. Harvest of marine resources, particularly those used as traditional food, is prohibited or restricted6.

It has been shown that a relatively short period of *Ra'ui* entailed an increase in the abundance of marine life. However, constraints in monitoring and control leave room for poaching. Better community capacity to enforce the *Ra'ui* is needed7.

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

1. Prior informed consent

51. The programme of work on article 8(j) and related provisions adopted by the Conference of the Parties in the annex to decision V/16 states as a general principle that "access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or the prior informed approval from the holders of such knowledge, innovations and practices". The elements of a prior informed consent mechanism were considered by an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, facilitated by the Permanent Forum on Indigenous Issues in January 2005 (refer document E/C.19/2005/3). Below is a reproduction of the main elements of a common understanding of a process of free prior and informed consent from the workshop's report. 8/

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

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

6 WWF (2007) "The Ra'ui System: Traditional Marine Protection". Online at: http://www.wwfpacific.org.fj/where_we_work/cook_islands/protected_areas.cfm

7 Tiraa, Anna (April 2006) "Ra'ui in the Cook Islands – Today's Context in Rarotonga". *SPC Traditional Marine Resource Management and Knowledge Information Bulletin* # 19. Online at: http://www.spc.int/coastfish/news/Trad/19/Tiraa.pdf

8/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).

(iv) The locality of areas that will be affected;
(v) A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;
(vi) Personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others);
(vii) Procedures that the project may entail.

- *Consent:* Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of Indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

(b) When?
- Prior informed consent should be sought sufficiently in advance of commencement or authorization of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

(c) Who?
- Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In free, prior and informed consent processes, Indigenous peoples, United Nations organizations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.

(d) How?
- Information should be accurate and in a form that is accessible and understandable, including in a language that the Indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of Indigenous peoples and their languages.

(e) Procedures/mechanisms:
- Mechanisms and procedures should be established to verify free, prior and informed consent as described above, *inter alia*, mechanisms of oversight and redress, including the creation of national ones.
- As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in Indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
- Free, prior and informed consent could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.

(f) Mutually agreed terms:

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

(g) Equitable sharing of benefits:

(i) Equitable benefit-sharing mechanisms and processes are fundamental to any *sui generis* system that hopes to successfully protect and promote the use of traditional knowledge. Benefits arising from commercial use of traditional knowledge should be shared in a fair and equitable way with the community/ies, whose knowledge is being used.

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

(iii) Given that direct payment of monetary benefits (such as shared profits, or royalties) to Indigenous and local communities may not be appropriate or sufficient in some instances, other forms of benefits should be considered. In fact, perhaps the most beneficial measures in access agreements may be non-monetary, such as capacity building, technology transfer, free licensing of developed products or processes, joint research, development of local industries and training.

(iv) An important issue when considering what constitutes equitable benefit sharing is the economic value of the traditional knowledge (and associated resource) at issue. The economic value of traditional knowledge can vary enormously depending on the needs of particular industries, availability of the knowledge and resource, whether there is a need for ongoing supply, and the usefulness of knowledge.

(v) At the international level, the Bonn Guidelines provide an agreed basis for dealing with issues regarding the equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, innovations and practices. Thus, the Guidelines should be taken into account in the development of sui generis systems for the protection of traditional knowledge related to genetic resources.

CASE STUDY - The San[9] *and Benefit Sharing for the Hoodia*[10]

The San people of the Kalahari hold traditional knowledge relating to the *Hoodia gordonii*, which is used to suppress hunger. Without their knowledge, a patent was issued to the Council for Scientific and Industrial Research (CSIR) and right were sold to pharmaceutical companies for the development of Hoodia products. The South African San Council argued that the San people had not been consulted or appropriately recognized as holders of knowledge relating to the properties of the Hoodia, which was contrary to the CBD and the Bonn Guidelines. The lack of a regulatory framework regarding benefit sharing in South Africa has rendered the assertion of the rights of the San more difficult. Although the validity of the patent was not legally challenged, the San negotiated an agreement with the CSIR regarding sharing of royalties flowing from the commercialization of Hoodia products. The agreement is restrictive for the San and is not without its critics.

9 The San people live in the Kalahari Desert area of South Africa and Botswana and are speakers of Khoisan languages.

10 Berne Declaration (2006) "The Hoodia Case: the San Experiences with Benefit-Sharing Agreements". Prepared for the Hoodia Case – a Side Event at the COP in Curitiba, March 29th, 2006. Online at: http://www.evb.ch/en/p25011028.html

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

1. Rights of traditional knowledge holders

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

2. Conditions for the granting of rights

53. Conditions for the granting of rights may include:

(i) General requirements,

(ii) Categories of traditional knowledge that will be protected,

(iii) Conditions of confidentiality,

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

54. S*ui 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.

55. *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).

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

(a) Elements of traditional knowledge that are linked to the expression of the cultural identity of a given community;

(b) Elements that are susceptible to commercial use.

(c) Elements that are useful for academic use.

(d) Elements of traditional knowledge that remain "traditional," in the sense that they remain intrinsically linked to the community that has originated them, compared to traditional knowledge which have lost that link (this classification would have to be done by the community themselves).11/

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

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

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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 loosing 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.

knowledge between that which has commercial utility, and that which doesn't, may run counter to the very holistic nature of traditional knowledge.

58. *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.

59. 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.

60. 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.

CASE STUDY - The Fijians and Benefit Sharing[12]

In Fiji, 83% of the land is owned communally by native Fijians. Families manage their land and coast, and the resources found therein. Traditional authority is respected and protected by the government. The government consults with chiefs on fishing licenses and other resource use permits, and outsiders pay compensation to mataqali (land owning family groups) for local uses.

Through the recognition of indigenous ownership over land and marine resources and thanks to the collaborative attitude of the government, native Fijians were able to negotiate with pharmaceutical companies engaged in bioprospecting. The company pays the community for access to marine resources, as well as for the right to remove and test the resources. It has also been agreed that in the event that a resource is used for a commercial product, the community will receive a share of the profits.

G. The rights conferred

61. 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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12 http://www.idrc.ca/en/ev-67677-201-1-DO_TOPIC.html

(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;

62. 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.

63. 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.

64. 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.

65. 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.

CASE STUDY - The Kanaka Maoli[13] and their Water System[14]

The Kanaka Maoli, like many other indigenous peoples, have adopted a system of resource management that is based on sustainability. For instance, the Kanaka Maoli land management system (*ahupua'a*) functions on a watershed basis. As such, it adopts an approach that is more consistent with ecosystem management than most Western land management systems. An approach based on watersheds as a whole has the potential of protecting its biological resources in a more comprehensive manner. (The watershed approach has gained some recognition in American legislation and academic debate.) At the same time, the *ahupua'a* delineation allows for inclusion of all natural resources necessary for the sustenance of the community that lives within its boundaries.

The customary system was granted recognition and protection in the *Waiahole Ditch* case of the Hawaii Supreme Court and in the Hawaii Water Code of 1987. Through the common law doctrine of public trust,

13 The Kanaka Maoli are indigenous Hawaiians, living on the islands that constitute the American state of Hawaii.

14 Kanebe, Le'a Malia & Isaac Harp (2006) "Ahupua'a Land Management and Kanaka Maoli Law: A Case Study on Conservation and Sustainable Use of Island Biodiversity in Hawai'i". In Sam Grey, ed. (2006) *Indigenous Peoples' Contributions to COP-8 of the Convention on Biological Diversity*. International Indigenous Forum on Biodiversity, at 97.

the Supreme Court confirmed three objectives that serve conservation of water resources, but that may well be applicable to all natural resources: the first is conservation of biodiversity, the second is sustainable use and the third is protection of Native Hawaiian rights. Indeed, the Supreme Court described the public trust doctrine as "the right of the people to have the waters protected for their use [which] demands adequate provision for traditional and customary Hawaiian rights, wildlife, maintenance of ecological balance and scenic beauty, and the preservation and enhancement of waters".

CASE STUDY - The Quechua[15] *and their Potato Park*[16]

Quechua farming communities have signed an agreement with the International Potato Centre, which aims at protecting the diversity of the regions potato varieties and the rights of indigenous communities to control access to these local genetic resources. The agreement fosters the 15,000 hectare Potato Park, which serves both as a food source for the six communities that own the land and as a living library of potato varieties. Although the agreement does not secure intellectual property rights for the indigenous communities involved, it is meant to ensure that the genetic material does not become subject to intellectual property rights and that the diversity of the varieties is maintained. Furthermore, the Potato Park helps maintain traditional knowledge about the potato and its cultivation. The Park also serves to preserve landscapes and sites that were of value to the Inca.

The Potato Park is a one of the few conservation initiatives in the world where the local people themselves are managing and protecting local genetic resources and traditional knowledge about their health, food and agriculture. The management regime of the Potato Park is based on customary laws and traditional knowledge, although newer technologies, such as greenhouses, are also used.

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

67. 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.

68. 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.

69. 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

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15 Quechua speakers live primarily in Peru, Ecuador, Colombia, Chile, Brazil, Bolivia and Argentina.

16 Colchester, Marcus (2003) "Visit to a Potato Park". Earthlore Communications. Online at: http://www.earthlore.ca/clients/WPC/English/grfx/sessions/PDFs/session_2/Colchester.pdf

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).

70. 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.

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

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

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

73. A national competent authority to manage procedural and administrative matters should ensure a balanced representation of indigenous and local communities from within the State. As well, given that there will likely need to be local and national levels of sui generis systems, there will need to be local competent authorities as well, which are completely run by the community. This would indicate the need for adequate liaison between the community and the level of government responsible for the system of protection. This role could be fulfilled by indigenous organizations and adequate infrastructure. Although the authority would be organized at a national or sub-national level, the basis should remain at the community level. Although financial support will likely be needed for the establishment of such an organization, it may later be self-supporting, namely out of benefit sharing.

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

(a) Process requests for access to traditional biodiversity related knowledge;

(b) Facilitate the prior informed consent of Indigenous and local communities regarding access;

(c) Establishment and maintenance of registers;

(d) Ensure the equitable distribution of benefits arising from the use of traditional knowledge and associated biological resources within the community;

(e) Management of any trust established to hold and disburse income derived from the utilization of traditional knowledge (if this is required);

(f) Liaison with any national competent authority established as part of a national regime governing access to genetic resources and benefit-sharing;

(g) Liaison with relevant intellectual property offices;

(h) Provide legal assistance to local communities to file objections;

(i) Ensure that traditional knowledge is incorporated into national development projects, as appropriate, and where appropriate, at all levels, such as development project design, implementation, monitoring and evaluation in order to increase project impact, effectiveness and sustainability;

(j) Helping to incorporating existing community institutions and appropriate Indigenous technology into the *sui generis* system to increase community empowerment, increase cost-effectiveness and sustainability;

(k) Ensure that traditional knowledge is included into environmental impact assessments;

(l) Promote the use and further development of traditional knowledge by, for example:

(i) Supporting traditional knowledge-holding communities;
(ii) Promoting traditional knowledge-based innovations;
(iii) Facilitating communication and sharing of traditional knowledge among traditional knowledge-holders;
(iv) Enhancing interaction between traditional knowledge and other knowledge systems;

(m) Encourage research on traditional knowledge-related matter and involving traditional knowledge-holders;

(n) Stimulate the diffusion of traditional knowledge and the access to the knowledge by the community;

(o) Promote lateral learning in order to decrease the isolation of communities from one another and to lower the cost of learning by pooling best practices and generating optimal solutions to common problems;

(p) Ensure prior informed consent mechanisms are properly adhered to;

(q) Promote traditional knowledge based economic development or at least help link communities who are interested in business opportunities linked to their knowledge with other economic development and capacity-building institutions, thus, community-based development is key. This is especially important considering that Indigenous communities are generally tied to their land. It is necessary to promote economic opportunities on their traditional territories. Otherwise, communities feel forced to migrate, thus eroding their cultural identity.

J. Provisions regarding enforcement and remedies

75. 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.

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

(a) Truth requirements in advertising laws to prevent misrepresentation (ie. Indian Arts and Craft Act of the United States);

(b) Tort of appropriation of use, which allows remedies to be sought for the unauthorized, improper or unlawful use of property for purposes other than that for which it was originally intended;

(c) Criminalization of unauthorized access or use of traditional knowledge.

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

78. 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).

CASE STUDY - The Talaandig[17] and Access to Resources[18]

Customary Talaandig law governs the collection and use of the resources on Mt. Kitanglad, a historical landmark and a spiritual site for the Talaandig. Talaandig traditional knowledge addresses those botanical resources, which are namely used for food and medicine and thus provide for the well-being of the people that live in the area. Unauthorized collection of those resources disrupted the Talaandig home. In 1995, a group of researchers from the Philippine National Museum and the Botanical Research Institute of Texas collected botanical specimens from Mt. Kitanglad. The specimens were gathered without the prior consent of the Talaandig.

The Talaandig understood the collection to be a serious assault against their culture, their identity and their territory. The community was granted autonomy by local authorities in deciding of the sanction against the offenders. The community decided to confiscate the specimens and to impose a symbolic fine on the research team, based upon customary laws and oral history. The research team was compelled to comply by local authorities as it had also violated national laws. The dispute was ultimately settled through negotiations between the Talaandig community and the research team. A reconciliation ritual, which was attended by many communities, was performed, as part of this alternative dispute resolution process.

The success of the Talaandig people rested on four main factors. First, the Elders' experience and knowledge in addressing such situations was given great consideration. Second, the Talaandig people are

[17] The Talaandig are a people of the province of Bukidnon, Mindanao in the Philippines.

[18] Saway, Datu Migketay Victorino L. (2006) "A Case of Indigenous Knowledge Protection in Mount Kitanglad, the Philippines"

well organized, which expedited their reaction. Third, customary law and authority was firmly asserted; deference was not given to national laws or mainstream systems. Finally, national laws and international agreements were known by the Talaandig and helped in supporting their claims and their assertion of authority.

CASE STUDY - The Navajo[19] and their Justice System

This case study provides an example of what dispute resolution mechanisms and sanctions are found in customary systems. The traditional Navajo justice system is called peacemaking, where the mediator or chair of the event is a peacemaker.

The Navajo, like many other indigenous groups, believe that crimes and disputes in general should not be resolved by a single judge. It would be contrary to Navajo values if one individual could decide for others. Decisions are taken in a communal fashion, where members of the community "talk things out", to restore the order in the community. What is important is not what happened, but how it affected the group and its dynamics. There is no written or set code of law. The emphasis is put on the communal nature of the offence and of its resolution.

Peacemaking takes into account kinship and family obligations. An offender is someone who disregarded and disrespected his/her family and his/her community. The individual wrongdoing has an impact on a larger circle of people, and not solely on the offender and the victim. The victim's family and the offender's family are therefore involved in the process that seeks not primarily to punish the offender, but to restore balance in the community. Anyone involved in the matter may attend the "hearing". Anyone interested may attend it too. At the "trial", all people are invited to state what they know about the situation, but most importantly to tell how they feel about it, how they were affected by the offence. The communal aspect of criminal law is also apparent in the resolution of the case and in the determination of the right sanction.

Thus in Navajo peacemaking, considering that crimes and offences are a community problem, it is up to the community to resolve them and to find balance once again. It is a matter of restoring relationships.[20] Today, more people are turning to peacemakers rather than judges to settle disputes. The peacemaking process, which may be characterized as an alternative dispute resolution process, has received official recognition in the American justice system.

CASE STUDY The Gwich'in[21] and their Policy on Research[22]

The Gwich'in of northern Canada have produced a document entitled *Working with Gwich'in Traditional Knowledge in the Gwich'in Settlement Region*. In its preamble, the Gwich'in Tribal Council stated that their knowledge is the foundation of their identity and survival, that it is held in trust for future generations and that the best way of ensuring its survival is to continue to use it and share it in a manner that respects the knowledge. The policy elaborated in the document applies to organizations within the Gwich'in Settlement Area, defined as the lands lying within the North West Territories as described in the *Gwich'in Comprehensive Land Claim Agreement* of 1992 (GCLCA).

Under this document, which is still in a draft form, authority to implement the policy lies in the Gwich'in Tribal Council, the Gwich'in Social and Cultural Institute (GSCI) and any other designated organization.

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19 The Navajo Nation lives in the plateau region of Arizona, Utah and New Mexico, USA. They speak a Southern Athabascan language.

20 Robert Yazzie, C. J. "The Navajo Response to Crime". *Justice as Healing*, vol. 3, no. 2 (Summer 1998). Online at: http://www.usask.ca/nativelaw/publications/jah/yazzie2.html

21 The Gwich'in live in Alaska (USA), Yukon and the Northwest Territories (Canada) and speak a Northern Athabascan language.

22 GTCTK (2004) *Working with Gwich'in Traditional Knowledge in the Gwich'in Settlement Region*. Draft. Online at: http://www.gwichin.ca/TheGwichin/GTCTKPolicy.pdf#10.pdf

The GSCI will review all research permits and licenses issued under various Canadian laws for compliance with the policy guidelines prior to providing advice to the authority issuing the permit or license. Furthermore, the GSCI will, among others, monitor Gwich'in traditional knowledge projects, studies and other initiatives inside and outside the Gwich'in Settlement Region and communicate the objectives of its policy and its guidelines to all Gwich'in organizations, government departments, researchers and institutions of public government. The GSCI will also educate Elders and other beneficiaries about their individual rights with respect to their participation in all research. The document provides, in annex, a blank research agreement with the GSCI, essential elements of an informed consent statement and traditional knowledge research guidelines.

The GSCI was established under the GCLCA, as the cultural and heritage arm of the Gwich'in Tribal Council. The objective of the GSCI is to conduct research in the areas of culture, language and traditional knowledge so that programs appropriate for Gwich'in needs can be developed.

K. Relationship to other laws, including international law

National level

79. 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.

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

81. A possible approach discussed by WIPO 23/ to harmonizing sui generis systems with other national laws is to determine to what extent the law of intellectual property is relevant to meeting national objectives and addressing policy issues related to traditional knowledge. If there are points of relevance, then determine how existing IP laws can be used. Determine which non-IPR tools, programs and measures can also be used to meet the objectives. Where gaps are identified, adapt IP laws and develop

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

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).

82. 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.

CASE STUDY - The Katukina[24] and their Frog Poison Vaccines[25]

The Katukina indigenous community has long used tree frog poison as a vaccine to purge the body from illness (including sexual diseases and leishmaniasis) and to add stamina and vigor. Although there are about eighteen species of tree frogs, the Katukina only use three of them, as others' poison concentration may be too high. Other tribes living in Brazil and Peru also use tree frog poison vaccines. The Katukina found out that their knowledge was taken to international laboratories in 2003, fourteen years after the first patent was requested.

Today, there are approximately twenty patents on laboratory experiments made with the frog's poison, but none of them was filed or developed in Brazil. The active ingredient in the poison is available on the market, particularly for technology-based companies specialized in biochemical and pharmaceutical compounds, but it is unclear what the buyers do with the compounds. Furthermore, it is hard for Brazilian researchers to determine whether the poison has become a product, as the results of their studies are rather preliminary. However, the Katukina demand a share of the benefits.

Brazil and ten other developing countries that are rich in biodiversity and ILCs request that the Trade Related Aspects of Property Rights Agreement (TRIPS) be amended to mention that ILCs have the right to benefit from scientific or commercial developments based on their knowledge. The Brazilian proposal is contested at the World Trade Organization (WTO) by the United States, who argue that no amendment is needed on TRIPS because community rights can be guaranteed by private contracts between ILCs and institutions interested in working with their knowledge and resources. The EU, on the other hand, contests the Brazilian proposal that asks patents to be cancelled when not in accordance with the principles of previous consent and benefit sharing. The Brazilian Ministry of the Environment created a special project for the vaccine and trained three tribes to negotiate the development of a product based on the poison with private companies. However, the experience showed that business and traditional knowledge are not an easy combination.

International level:

83. 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

24 The Katukina live in the Amazonas and Acre states of Brazil.

25 Galvani, Carolina (2007) "Brazil's Poisonous Tree Frog Vaccine Hasn't Made Indians Immune to Foreign Greed". *Brazzil Magazine*, March 11th, 2007. Online at: http://www.brazzil.com/content/view/9833/80/

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.

III. GUIDELINES FOR ELABORATING SUI GENERIS SYSTEMS OF PROTECTION

84. Set forth below are steps and considerations that may guide the policy or law maker in his elaboration of a sui generis system of protection.

Objectives

85. First and foremost, it is important to remember what the sui generis system is meant to achieve. Such a system should ensure that traditions and values and the knowledge and innovations of the communities are respected, preserved and maintained, that the customary use of biological resources in accordance with traditional practices is protected and encouraged and that the benefits arising from the collection activities are shared fairly and equitably with the communities[26]. The system should allow, as much as possible, a holistic approach. As such, we are not looking to protect merely intellectual property rights, but also to provide for the preservation of cultural and biological diversity, within the mandate and goals of the CBD.

86. This system is called 'sui generis' as it is a stand-alone system established because the existing system does not adequately protect TK. What it means is that the system is not meant to function upon conventional intellectual property law or patent law, because they are inadequate in providing such a holistic approach, and in recognizing the distinctive nature of indigenous / traditional / local knowledge in general and its relevance to the conservation of biodiversity.

87. The system should promote the respect and recognition of the culture and of its knowledge and to promote their intrinsic value. Indigenous / traditional / local knowledge, although difficult to quantify in economic terms, is of immense value to both culture and biodiversity.

Meaningful Consultation Process

88. Consultation and dialogue with the communities and groups concerned is the key to developing useful and effective systems. The system must respond to the concerns and needs of the communities involved and must also fit into the customary systems of those communities. A sui generis system of protection that does not adequately reflect the social organization and workings of the given community could not be applied effectively and usefully. As such, the consultation process must be carried out in a spirit of collaboration rather than confrontation.

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26 Haini Tainsong & Jannie Lasimbang (2006) "Draft Rules to the *Sabah Biodiversity Enactment 2000*: a Case Study of Indigenous Peoples' Involvement in Sabah, Malaysia". In Sam Grey, ed. (2006) *Indigenous Peoples' Contributions to COP-8 of the Convention on Biological Diversity*. International Indigenous Forum on Biodiversity, at 180.

89. As a preliminary matter, most state actors go through a determination of the level or size of the consultation required, given the issues at stake. However, considering that the consultation process addressed in this document concerns matters that have deep effects on communities, their culture and the resources that they have access to, it is recommended that the consultation process be of the highest level.

90. In approaching a community, the policy or law maker should already have some knowledge of the community in order to listen and communicate more effectively, especially considering the differences in cultural values and frameworks. Moreover, a study of prior projects and legislation relating to the group or site is useful. In conducting such research, one may learn about why prior projects or legislation were successful or not, and thus avoid making the same mistakes.

91. However, the community itself must also be prepared for the consultation. Indeed, the consultation will only be meaningful if the community prepares itself in advance to tackle the issues at stake and to prepare its own response. Preparing a response may include gathering information and community meetings. As such, the community must receive appropriate notice of the consultation and the elements to be addressed. Inadequate allocation of time to prepare will entail a consultation that is much less useful to both sides. The notice is thus a critical component of the consultation process. The government should have completed some preliminary research by that time in order to provide a relevant and useful notice.

92. Furthermore, during the consultation process and at any time before or after, the community must be presented with all the relevant facts relating to the situation. All considerations must be disclosed in order to allow an informed decision-making process. Full disclosure also implies complete explanation of: terms that are complex or technical (especially legal terms stemming from Western legal traditions); the government process (including the identity of the actors that the community is or will be dealing with); and the potential outcomes of the sui generis system. Preferably, funds should be made available for the community to hire its own counsel, who would be independent from the government.

93. The government should also consider holding the consultation in the community and not in a remote location (e.g. government buildings in the capital). Not only will it allow greater participation of the community, but it will also enable community members, particularly Elders, to feel more comfortable with the process. Community members should also feel comfortable using their native language to express their views.

94. The consultation process does not have to be limited to one meeting. Indeed, it is preferable that it would not be so limited. The consultation process should be comprised of complementary meetings, negotiations, submissions and other exchanges between the community and the government. Depending on the size of the process, it would be beneficial to create a practical website to post minutes of proceedings, recent developments and news, as well as to encourage feedback and public awareness. Additionally, it is preferable that a report be provided to the community after each meeting, to avoid miscommunication. The importance of follow-up and constant dialogue needs to be emphasized.

95. Although consultation is most effective when first held in the early stages of the decision-making process, the dialogue should not be limited to the initial stages of elaboration of a sui generis system, as it is also necessary in the implementation of the system. Collaboration and consultation with the community

should be regular and conducted in good faith. Additionally, a community member should hold a position that would create a permanent link to government officials, thus facilitating dialogue.

96. Launching the sui generis system initially as a pilot project or a framework agreement could help further community interests if the community had the opportunity to be consulted about the project once it has been implemented. Indeed, a pilot project or a framework agreement, which is more experimental in nature, would provide the opportunity to observe the system as it would be working, but without it being fully implemented, and thus provide more complete feedback on whether it serves community interests or not and how it could be better adapted. Furthermore, a consultation prior to the implementation of the system would also allow to correct any divergence of understandings regarding certain concepts and applications.

97. As such, a meaningful consultation process would follow such an approximate timeline:

- Gathering of preliminary information by the government, to provide an adequate notice.
- Notification of the community.
- Sufficient time to allow the community to gather information and prepare a response. / Further research and information gathering by the government.
- First meeting, preferably in the community.
- Subsequent meetings, negotiations, website, further information gathering and elaboration of the sui generis system.
- Pilot project / framework agreement.
- Feedback and communication between government and community.
- Final meeting before implementation.
- Implementation.
- Further collaboration and liaison between the community and the government.

98. Although there are many steps to the process, it should be relatively expeditious and efficient. The steps should not be used as a means of ‘gaining time’. Momentum must be kept in order to preclude the process from falling into the category of ‘never-ending negotiations’, which not only keep both parties in an uncertain situation, but also preclude development. Negotiations and consultations and the subsequent implementation should not take more than a couple of years. For this to take place, it is suggested that a schedule be adopted for various steps of the process, with some degree of flexibility.

99. It should be in every government’s interest to uphold its honor in dealing with its ILCs. The process of elaborating and implementing a sui generis system should also be an opportunity to build a durable relationship between the community and the government.

Elaboration of the System – Substantive Elements to Consider

100. Although the needs, concerns and circumstances of a community may vary, there are some substantive elements that need to be given consideration. Those elements should be submitted and explained to the community.

- Protection against misappropriation or appropriation through unfair means of indigenous / traditional / local knowledge.

- Fair and equitable benefit sharing and recognition of the knowledge holders.
- Prior informed consent to any indigenous / traditional / local knowledge by knowledge holders.
- Continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders.
- Use of traditional medicine for household purposes, use in government hospitals, especially by traditional knowledge holders attached to such hospitals, or use for other public health purposes.
- Administration and enforcement of protection.

For further information on those elements and for drafting examples, please refer to document UNEP/CBD/COP/8/INF/41, elaborated by WIPO.

101. Those elements need to be discussed with the given communities in order to elaborate a system that is adapted to the needs, concerns and circumstances. Furthermore, it is essential to discuss those elements to insure that the community fully understands the implications and workings of the sui generis system of protection.

Approval of the Community

102. Preferably, the system would include a veto mechanism, whereby a community would not only have to be consulted in relation to project that would affect the biological resources it depends on, but would also provide a mechanism of approval or disapproval. The weight of the community should not be merely symbolic. In that sense, the community should always be involved in negotiations between the government and the project developers, not only in order to provide an opportunity to comment, but also to gain access to all the relevant facts and dealings. It is necessary to keep the community informed of anything that may happen relating to its territory and resources.

Parallel Concerns

103. The key concept to keep in mind is capacity building. It is not enough for the community to benefit from a sui generis protection system: it must also have the capacity to *fully* benefit from it. This capacity relates not only to the implementation and enforcement of the sui generis system, but also to the substance that the system is meant to protect, i.e. indigenous / traditional / local knowledge and the related culture and biodiversity.

104. It should be kept in mind that elaborating such sui generis protection may involve protection of the local language. Indeed, most indigenous / traditional / local knowledge is strongly related to the language spoken by the communities involved. As such, it might be necessary to implement, in parallel to the sui generis mechanism, measures to encourage learning and transmission of the local language. Similarly, it might be necessary to implement measures to promote traditional education, again in order to enable learning and transmission of the knowledge. Furthermore, it is advisable to provide a version of the sui generis system in the local language.

105. Establishing a sui generis system of protection might also entail the need to build capacity within the community to administer the system. The community might need expertise, for instance, to understand and make use of environmental impact assessments. The expertise should be local as much as possible. As such, the community should have access to means to develop its own capacity, but should also have access to government support in implementing and adopting the sui generis system.

On Community Protocols

106. Community protocols are an effective way to address the needs and concerns of a community with regards to biological resources, while taking into account its customary values. Indeed, protocols are rules of conduct that are flexible and may change over time and serve to create and guide relationships between the community and outsiders. Furthermore, as communities themselves elaborate them, they are an adequate way of responding to community needs within the social framework of the given community.

107. The advantage of a protocol is that the community itself, without input from the government, can draft it. As such, it can be the first step towards establishing how indigenous / traditional / local knowledge should be dealt with by insiders and outsiders. The protocol might also serve to guide the law and policy makers in elaborating their sui generis systems of protection. Furthermore, through the right procedures, a protocol may confer legal rights, enforceable in national courts.

108. Thus a protocol, although it does not have the force of a legislative scheme, can provide some guidance as matters dealing with indigenous / traditional / local knowledge and according to community needs and wishes. Needless to say, it also tends to be more cost effective than other instruments. As such, an ILC can take steps to protect its knowledge. Furthermore, the elaboration of such a document can also be a powerful signal to the policy- and law-makers that a process for the elaboration of a sui generis system should be undertaken.

IV. DRAFT RECOMMENDATIONS FOR FUTURE WORK REGARDING POSSIBLE PRIORITY ELEMENTS OF SUI GENERIS SYSTEMS

The Working Group on Article 8(j) and related provisions may wish to recommend that the Conference of the Parties:

1. *Recalling,* Decision VIII/E, paragraph 4, which requested the Working Group on Article 8(j) to identify priority elements of sui generis systems based on Annex to Decision VII, H, paragraph 6;

2. *Recommends* the following two elements as priority elements to be considered in the establishment of sui generis systems:

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

(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;

3. *Urges* Parties and Governments to develop national and local sui generis models for the protection of knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity, in partnership with indigenous and local communities, prioritising these two elements (a) and (e);

4. *Requests* the Executive Secretary to continue to gather and analyses information, in consultation with Parties, Governments, relevant international entities, non-governmental organisations and indigenous

and local communities, to further develop possible elements of sui generis systems prioritizing elements (a) and (e), and to provide advice regarding the development of guidelines for the establishment of sui generis systems for the consideration of to next meeting of the Working Group on Article 8(j);

5. *Considering* the draft definitions proposed in annex II, and *taking into account* ongoing work concerning the development of an international regime on access and benefit sharing of genetic resources, *invites* Parties and Governments, indigenous and local communities and non-governmental organizations to communicate to the Executive Secretary their views on the definitions (UNEP/CBD/WG8J/4/7, Annex II), and requests the Executive secretary to compile these views and to propose a glossary of terms for consideration at the next Working Group meeting.

Annex I

EXISTING SUI GENERIS PROTECTION SYSTEMS

Certain countries have already adopted some sui generis measures for the protection of traditional knowledge. They have been summarized in a document produced by WIPO, titled “Comparative Summary of Existing National Sui Generis Measures and Laws for the Protection of Traditional Knowledge”[27]. According to this document, most sui generis measures combine two legal concepts: intellectual property frameworks and access and benefit sharing arrangements. Conceptual and policy tools include the regulation of access to traditional knowledge, the grant of exclusive rights to traditional knowledge, concepts of repression of unfair competition and references to customary laws of indigenous and local communities. Finally, the sui generis systems delimit the scope of their application according to a combination of three criteria: sectorial distinction, tangible subject matter and holders of the traditional knowledge.

When this document was produced (2003), the countries that had enacted some sui generis measures were the African Union, Brazil, China, Costa Rica, India, Peru, the Philippines, Portugal, Thailand and the United States.

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27 WIPO/GRTKF/IC/5/INF/4

Annex II

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

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

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

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

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

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

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

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

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

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

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

[For further exploration of this definition of innovation, consider the African Model Law: "Any generation of a new, or an improvement of an existing, collective and /or cumulative knowledge or technology through alteration or modification, or the use of properties, values or processes of any biological material or any party thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing."28/

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

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

28/ 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.

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).

[The World Intellectual Property Organization also has a working definition of traditional knowledge: "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.30/]

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

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

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

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