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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 purpose of this paper is to examine the further development of and prioritize the twelve elements (as per decision VII/16 H, annex), building on document UNEP/CBD/WG8J/4/7. To assist discussions section I contains the further development of the elements for *sui generis* systems listed in the annex to decision VII/16 H; and section II, provides draft recommendations for the consideration of the Working Group on Article 8(j) regarding future and priority elements of *sui generis* systems. As requested in decision VIII/5 E, paragraph 8, the Executive Secretary has provided a compilation of views concerning a glossary of terms relevant to Article 8(j) is available in UNEP/CBD/WG8J/5/INF/15.

* UNEP/CBD/WG8J/5/1.

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3. Views regarding *sui generis* systems, as well as definitions, were received from Argentina, the European Union, the United Nations Permanent Forum on Indigenous Issues and members of the International Indigenous Forum on Biodiversity ^{1/} and those views have informed the further development of the elements contained herein and are made available in UNEP/CBD/WG8J/5/INF/15 together with the views concerning a glossary of terms.

I. 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

4. In paragraph 4 of decision VIII/5 E, the Conference of Parties requests the Working Group on Article 8(j) to identify priority elements of *sui generis* systems as listed in annex to decision VII/16 H, paragraph 6.

5. 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

6. The overall purpose of *sui generis* systems could be to put in place a set of measures that would respect, preserve and promote the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity including biological and related genetic resources ^{2/} (hereinafter referred to as “traditional knowledge”) and to ensure that they derive fair and equitable benefits from its utilization and that such utilization is based on their prior informed consent. This purpose would ensure the system to be established is within the mandate of the Convention.

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

- (a) Control access to, disclosure and use of traditional knowledge;
- (b) Exercise their prior informed consent for any access to or disclosure and use of traditional knowledge;
- (c) Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices;
- (d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon. ^{3/}

8. *Sui generis* systems are based on recognition that the knowledge and related resources are collective property and hence *sui generis* systems could provide safeguards against claims of third parties to intellectual property rights over traditional knowledge. Exceptions to this general protection would be clearly defined and any consent to use would follow principles of prior informed consent, benefit-sharing, mutually agreed terms and other principles of customary law of the affected communities. The safeguarding of knowledge from intellectual property claims from third parties could extend to protection against unauthorized disclosure, culturally offensive or unauthorized use of traditional knowledge.

^{1/} Input received from the IIFB include those from the Pacific Indigenous Caucus of the UNPFII, the Asia Caucus, Arctic Caucus, Asociacion Kunas Unidos Napguana Centro de Asistencia Legal Popular, Corporacion de Abogados Indigena, and Comision Juristas Indigenas de la Republica Argentina (CJIRA).

^{2/} Views received from Argentina.

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

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

10. Sustainable 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 sustainable development, if they so choose, *sui generis* systems would need to carefully balance the goal of protection of traditional knowledge as against the goal of promotion of use, particular as it related to conservation and sustainable use.

11. 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

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

13. *Sui generis* systems could:

- (a) Recognize and register, as appropriate, the ownership of traditional knowledge by the indigenous and local community that is the holder of said knowledge;
- (b) Control access to, disclosure and use of traditional knowledge;
- (c) Exercise the right to require free prior informed consent for any use of traditional knowledge;
- (d) Exclude improper use by third parties;
- (e) Ensure that they derive fair and equitable benefits from the wider application of their knowledge;
- (f) Generate protection mechanisms at the international and national government levels, and within relevant customary law.

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

3. Scope

15. The scope of *sui generis* systems should consider the collective nature of indigenous and local communities and their holistic approach to resource use and management, including its ideology and relationship to local environment. For *sui generis* systems to be effective there will likely be a need for measures at local, national and international levels. It is highly desirable that local measures be based closely on the relevant customary laws of the indigenous and local communities concerned and developed with their full and effective participation and their prior informed consent. In fact, traditionally, there may already be *sui generis* protection in place, through customary law and such measures require formal

recognition by the State and support to ensure their effectiveness and continuity. National and international measures should therefore be more general in nature and provide best-practice guidelines, or a framework that recognises and supports local measures. It is important to clarify that in practice no single overarching international, regional or national *sui generis* system, however broad in scope, is likely to embrace all the characteristics and the full context of traditional knowledge in its original cultural context and its related customary law and the cultural and legal diversity of the world's indigenous and local communities. It is therefore vital that *sui generis* protection be local in nature but supported by national and international frameworks and/or guidelines.

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

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

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

18. In developing *sui generis* systems, there is a need to clarify the ownership rights and interests of indigenous and local communities over their traditional knowledge. Beyond clarity over the rights and interests a community has over its knowledge, *sui generis* systems also need to provide greater clarity with regards to genetic resources associated with a community's traditional knowledge as well as the territories to which the traditional knowledge relates. The way in which a system defines the rights 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.

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

20. It is important for *sui generis* systems at the local level be based on the relevant customary laws of the communities concerned. The importance of customary law is particularly crucial for the attribution of rights and benefits within the community. Any measures concerning the protection and equitable sharing of benefits of traditional knowledge, both at the national and international levels, should respect the communities' customs and traditions involving permission for individuals to use elements of traditional knowledge, within or outside the community concerned, as well as issues concerning ownership, entitlement to benefits, etc.

21. 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.

C. *Set of relevant definitions*

22. 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 requested the Executive Secretary to compile these views for consideration at the fifth meeting of the Working Group on Article 8(j) and Related Provisions. To this end a compilation, has been prepared for the consideration of the Working Group and is available along with the definitions (annex I) in UNEP/CBD/WG8J/5/ INF/15.

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

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

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

25. At the national level the question of how to provide recognition to customary law or more accurately, recognition of the principles of customary laws relevant to the conservation and sustainable use of biological diversity, 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*

26. Intellectual property rights, as generally understood under international law, are often at odds with the understanding of rights in traditional knowledge as perceived by indigenous and local communities. Traditional knowledge at the community level works under customary rules and this context is lost when the knowledge escapes into foreign systems. While intellectual property rights aim at commodifying/commercializing certain pieces of knowledge, this is generally not part of the purpose behind customary rights in traditional knowledge. The idea of 'exclusivity' of rights may, for example, conflict with customary law concepts of how knowledge and resources should be treated.

27. For many indigenous and local communities, traditional knowledge is connected not only with rights but also with obligations. For example, intergenerational transfer of knowledge is an important obligation for older generations among most bodies of customary law. Similarly, there is also an obligation on youth to 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.

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

2. *Customary rights regarding biological resources*

29. Although there are individual rights and obligations under customary legal systems, generally rights and responsibilities are held collectively. The processes by which traditional knowledge is acquired, used and sustained are shaped by the unique cultural and spiritual values and beliefs of the relevant communities. Many traditional knowledge holders believe that all parts of the natural world are 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.

30. 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. ^{4/}

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

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

32. 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, respect and obligation as opposed to rights.

33. 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.

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

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

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

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

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

(c) 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.

36. 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.

37. 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 is respected as a teacher;

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

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

(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.

38. Furthermore, the list above should not be considered exhaustive and it should also be understood that customary laws may include other common principles, ^{5/} such as (but not limited to):

(a) *Mutual recognition*: use of the benefits of biological and genetic resources is conditional on recognition of (respect for) nature that is based on the notion that nature is made up of a group of living beings, of which indigenous peoples feel they are a part, which is why they act within nature, rather than separately from its elements.

(b) *Least damage*: one rule of conduct is to cause the least damage or suffering through use, which is based on the interdependence of the beings, who inhabit nature.

(c) *Vision of the future*: This vision is based on putting back for future intergenerational uses. It is based on a circular view of life, in which a plant is born, grows and dies, and has its cycle and function.

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

39. The programme of work on article 8(j) and related provisions adopted by the Conference of the Parties in the annex to decision V/16 states as a general principle that “access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or the prior informed approval from the holders of such knowledge, innovations and practices”. This suggests that, prior and informed consent could be considered a mandatory process, which should be guaranteed by the State regarding access to the knowledge innovations and practices of indigenous and local communities. A basic principle guiding the entire process should be “equal opportunity” which should be understood that all parties including indigenous and local communities should have equal access to financial, human and materials resources.

40. 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), which outlined the main elements of a common understanding of a process of prior and informed consent. ^{6/} As such these elements may help guide the development of processes of prior informed consent, which should be developed with the full and effective participation of the communities concerned. It should be for the communities concerned to inform interested parties about processes, timeframes and participants in such processes. It is also important to note that local norms and customs need to be considered in this entire process, in order to avoid a homogenous prior informed consent process, which entails many dangers.

2. Mutually agreed terms

41. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization set out the basic requirements for mutually agreed terms (MAT), potential contractual parameters for an agreements of MAT and offers a possible list of mutually agreed terms. *Sui generis* systems for the protection of traditional knowledge could borrow from the Bonn

^{5/} Input received from Argentina.

^{6/} 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).

Guidelines, while ensuring any guidelines properly reflect the relevant customary law and the concerns of the appropriate Indigenous and local communities.

3. *Equitable sharing of benefits*

42. Equitable benefit-sharing mechanisms and processes are fundamental to any *sui generis* system that hopes to successfully protect and promote the use of traditional knowledge. Benefits arising from commercial use of traditional knowledge should be shared in a fair and equitable way with the communities, whose knowledge is being used. The nature of the benefits that could be anticipated from accessing traditional knowledge fall into two general categories: monetary and non-monetary. Appendix II 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.

43. Given that direct payment of monetary benefits (such as shared profits, or royalties) to Indigenous and local communities may not be appropriate or sufficient in some instances, other forms of benefits should be considered. In fact, perhaps the most beneficial measures in access agreements may be non-monetary, such as capacity building, technology transfer, free licensing of developed products or processes, joint research, development of local industries and training. An important issue when considering what constitutes equitable benefit-sharing is the economic value of the traditional knowledge (and associated resource/s) at issue. The economic value of traditional knowledge can vary enormously depending on the needs of particular industries, availability of the knowledge and resource, whether there is a need for ongoing supply, and the usefulness of knowledge.

44. The value of traditional knowledge concerning conservation, sustainable use and maintaining ecosystems services and thus its contribution to the greater good and humanity in general should also be fully considered in benefit sharing arrangements. At the international level, the Bonn Guidelines provide an agreed basis for dealing with issues regarding the equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, innovations and practices. Thus, the Guidelines should be taken into account in the development of *sui generis* systems for the protection of traditional knowledge related to genetic resources.

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

1. *Rights of traditional knowledge holders*

45. 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*

46. Conditions for the granting of rights may include:

- (a) General requirements;
- (b) Categories of traditional knowledge that will be protected;
- (c) Conditions of confidentiality;
- (d) Clarity surrounding issues of novelty, originality, public domain and protection.

47. *Sui generis* systems could either recognize the inherent right to all traditional knowledge (perhaps within certain categories) or establish that the subject matter of protection needs to be documented and fixed, for example in inventories, collections, compilations, or databases. Based on the oral traditions of many indigenous and local communities, as well as the objective of recognizing customary law in *sui*

generis systems, as well as the difficulty of documenting all traditional knowledge, particularly in communities that are impoverished, lack capacity, have limited access to mainstream societies or do not want to document their knowledge, it seems that recognizing the inherent rights related to traditional knowledge may be a more equitable option. In this case, rights would arise simply out of the existence of the knowledge. ^{7/}

48. *Sui generis* systems will also need to address the status of traditional knowledge which has already entered the public domain (either under present definitions, or a new definition adapted to the issues and values of indigenous and local communities), noting that the “public domain” is not a universal concept in customary systems and may not be easily compatible with those systems.

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

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

(b) Elements that are susceptible to commercial use;

(c) Elements that are useful for academic use;

(d) Elements of traditional knowledge that remain “traditional,” in the sense that they remain intrinsically linked to the community that has originated them, compared to traditional knowledge which may have lost that link (this classification would have to be done by the community themselves); ^{8/}

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

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

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

52. 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.

53. 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

^{7/} Supported by Argentina.

^{8//} They can nevertheless be protected under other forms of intellectual property. Some forms of handicrafts, for example, have been subject to intensive industrialization and modernization, thereby losing their traditional characteristics and consequently ceasing to function as elements of cultural identification. Those handicrafts may be protected under the industrial design system, because they have become essentially consumption products.

the first commercial act involving the protected element of traditional knowledge, which could be renewable for a certain number of successive periods), then it is possible to have a predefined expiration, provided it would apply exclusively to those elements of traditional knowledge with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.

G. The rights conferred

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

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

55. 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.

56. 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.

57. 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.

58. If desired by the community, *sui generis* systems could also incorporate customary laws which limit the rights a holder has in their traditional knowledge, such as codes of ethics to ensure that knowledge is used properly, for the good of the community and according to traditional values. These may include rules for ensuring medicinal knowledge is transmitted only to people who are committed to its wise and proper use. The system could also incorporate indigenous and local communities rules and practices for conservation of biodiversity, such as sustainable harvesting, restrictions or bans on harvesting trees or vulnerable species, as well as sanctions often imposed on those that do not comply with conservation norms.

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

59. 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.

60. 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.

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

- (a) Maintenance and preservation of traditional knowledge by virtue of recording and documenting it;
- (b) Protection against the inappropriate granting of intellectual property rights by providing evidence of prior art;
- (c) Raise awareness of communities with respect to the values of traditional knowledge;
- (d) Encourage long term conservation and promotion of natural resources and their related traditional knowledge;
- (e) Provide information to interested parties who may be interested in obtaining information available in the registry, in exchange for a fee;
- (f) To be used as part of a legislative system for the assertion of intellectual property rights over traditional knowledge (e.g. a national *sui generis* system to protect Indigenous and local knowledge).

62. 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.

63. Registers or databases would facilitate the recognition of prior art in the processing of patent applications and thereby prevent its unauthorized appropriation. However, if the traditional knowledge is secret, its inclusion in a registry or database could facilitate its unauthorized appropriation if adequate

measures are not taken to protect it. In this respect, there will need to be more research on how to deal with confidentiality issues within registration system/s.

64. 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*

65. 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.

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

J. Provisions regarding enforcement and remedies

67. 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.

68. 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.

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

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

K. Relationship to other laws, including international law

1. National level

71. 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.

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

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

73. A possible approach discussed by WIPO ^{9/} to harmonizing *sui generis* systems with other national laws is to determine to what extent the law of intellectual property is relevant to meeting national objectives and addressing policy issues related to traditional knowledge. If there are points of relevance, then determine how existing IP laws can be used. Determine which non-IPR tools, programmes and measures can also be used to meet the objectives. Where gaps are identified, adapt IP laws and develop *sui generis* measures, laws and systems to complement existing IP and non-IP tools and to fill the gaps and respond to the particular characteristics of traditional cultural expressions. Take practical steps to make sure that existing and new measures and laws are easily accessible to and usable by intended beneficiaries (e.g. provision of legal advice, funding for court cases, appropriate institutions to help with rights management and enforcement).

74. 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.

^{9/} Refer WIPO document "Protection of Traditional Knowledge: overview of policy objectives and core principles", wipo/grtkf/ic/7/5.

2. *International level*

75. At the international level *sui generis* systems need to be in harmony with international obligations including environmental law, human rights law and relevant Intellectual Property Law (IP). So far, *sui generis* systems to protect traditional knowledge are being developed on a national or regional basis. Since traditional knowledge, like IP, is an intangible asset that is readily communicated and reproduced, it can cross national borders with no barriers other than legal protection. Concern generally arises when traditional knowledge is removed from its traditional context, and transmitted to or used in different jurisdictions altogether. In addition the development of national *sui generis* systems may not provide adequate protection for traditional knowledge in cases where the same knowledge is found in more than one country. Therefore there is a need to consider how to achieve international recognition of *sui generis* rights granted under national systems or through an international framework. Such a multilateral framework may therefore be necessary to ensure protection of all stakeholders involved. To address this issue an international *sui generis* framework could be considered to set minimum standards.

II. DRAFT RECOMMENDATIONS FOR FUTURE WORK REGARDING *SUI GENERIS* SYSTEMS

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

1. *Invites* Parties and Governments to consider that the development of effective *sui generis* systems for the purposes of the Convention, be local in nature and based on the relevant customary law of the appropriate indigenous and local communities concerned, and recognized and/or created with the prior informed consent and the full and effective participation of those communities for the purposes of respect, preservation, maintenance and promotion of the knowledge, innovations and practices of indigenous and local communities;
2. *Further invites* Parties and Governments to recognize, support and/or develop *sui generis* systems through national guidelines and *requests* the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, international entities and indigenous and local communities, to provide information regarding the development of guidelines for the consideration of the sixth meeting of the Working Group on Article 8(j) and related provisions;
3. *Requests* the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, international entities and indigenous and local communities, on the possible development of proposals for an international framework to set minimum standards and ensure protection of all stakeholders involved for the consideration of the sixth meeting of the Working Group on Article 8(j), fully taking into account and collaborating with, the work of other bodies concerning *sui generis* systems and customary law, and in particular the WIPO and the UNPFII.
4. *Takes note* of the draft glossary of terms relevant for Article 8(j) in annex I of UNEP/CBD/WG8J/5/INF/15, taking into account the views compiled on definitions provided and also considering the ongoing work concerning the development of an international regime on access and benefit sharing of genetic resources, and noting the need for harmony of terms throughout the Convention, and the international system.
