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ELEMENTS OF *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

Note by the Executive Secretary

INTRODUCTION

1. In paragraph 3 of decision IX/13 F, the Conference of the Parties invited Parties, Governments, indigenous and local communities and relevant organizations to share their experience in the development, adoption or recognition of *sui generis* systems, and to submit to the Executive Secretary concise case-studies and other experiences that underpin the elements of *sui generis* systems relevant to the conservation and sustainable use of biodiversity, contained in the note by the Executive Secretary on development of elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices (UNEP/CBD/WG8J/5/6), including means to ensure prior and informed consent.

2. In paragraphs 4 and 5 of the same decision, the Executive Secretary was requested to make case-studies and experiences received available and to update his note on the subject, in light of case-studies and experiences received, for consideration by the Working Group on Article 8(j) and Related Provisions at its sixth meeting. To this end, a compilation of submissions has been made available as an information document (UNEP/CBD/WG8J/6/INF/15). Based on information received and as requested by the Conference of the Parties, the present note provides an update of the previous submission on the development of elements of *sui generis* systems (UNEP/CBD/WG8J/5/6) and includes recommendations for the consideration of the Working Group.

3. Furthermore, Parties are reminded of paragraph 6 of decision IX/13 F, which notes the clear linkage in many countries between effective *sui generis* systems as may be developed, adopted or recognized and the implementation of access and benefit-sharing provisions and the need to prevent the misuse and misappropriation of traditional knowledge, innovations and practices of indigenous and local communities, as stated in decision VII/16 H. Given this, Parties may also wish to consider under agenda

* UNEP/CBD/WG8J/6/1.

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item 6 (International Regime on Access and Benefit-sharing), the possible contribution that *sui generis* systems could make to the protection of traditional knowledge under the future International Regime.

4. Hence, the purpose of this revised document is to examine the further development and prioritise the twelve elements (as per decision VII/16, H, annex), building on document UNEP/CBD/WG8J/5/6. To assist discussions, Section I contains some brief conclusions drawn from submissions received,; and Section II seeks to further develop and prioritise the elements for *sui generis* systems listed in the annex to decision VII/16 H,. Finally section III, provides draft recommendations for the consideration of the Working Group on Article 8(j) regarding *sui generis* systems.

5. Views regarding *sui generis* systems, were received from Australia, the European Union, and the International Centre for Trade and Sustainable Development (ICTSD). Conclusions from these submissions are available in section I. Those views have also informed the further development and prioritization of the elements contained herein.

I. CONCLUSIONS DRAWN FROM RECENT SUBMISSIONS

6. Views regarding *sui generis* systems, received from Australia, the European Union, and the International Centre for Trade and Sustainable Development (ICTSD), have provided a useful basis for further developing the dialogue on *sui generis* elements for the protection of traditional knowledge.

7. In particular, Australia has included many examples of how principles of effective participation and partnership can provide a basis for developing a menu of programmes and projects which focus on the promotion and use of traditional knowledge. Paramount to this, are programmes which assist the intergenerational transfer of knowledge, innovations and practices as well as to assist indigenous peoples to remain connected to "country".[1] The Australian submission also emphasizes the need for flexibility in national approaches concerning the implementation of *sui generis* systems and that such systems can be much broader than legal protection, fully reflecting the goals of Article 8(j) to respect, preserve and promote traditional knowledge.

8. Australia has a number of government programmes developed in partnership and with the approval and participation of indigenous Australians, which amongst other things, support the recording, storage and transfer of traditional ecological and cultural knowledge, in culturally sensitive ways. These programs include:

- Working on Country;
- The Indigenous Heritage Program;
- The Indigenous Protected Areas Program;
- The National Arts and Crafts Industry Support Program;
- The Indigenous Broadcasting Program;
- The Maintenance of Indigenous Languages and Records Program;
- The Indigenous Culture Support Program; and
- The Return of Indigenous Cultural Property Program.

Further information on these programme are available in the compilation of submissions received (UNEP/CBD/WG8J/6/INF/15).

9. The European Union submission discusses briefly the need for *sui generis* policy to be based on practical experience in the implementation of such systems. Hence the experiences noted in the Australian submission are particularly useful for the respect and promotion of traditional knowledge, whereas in analysing the development and implementation of various national systems, ICTSD notes that it is early days and much more monitoring of the implementation and outcomes of *sui generis* systems are needed, especially at the national level, to determine whether systems being put in place are working effectively.

[1] Aboriginal Australians refer to their traditional territories as their "country" and this is reflected in such national Australian programme as "Caring for Our Country".

10. The ICTSD submission takes a broad approach focussing on various *sui generis* forms of legal protection, including a plethora of measures that are being developed at national levels particularly in the Asian region. ICTSD also notes the need to critically evaluate national measures in order to report on the success of such measures so that models of good practices can be developed. The ICTSD submission covers many diverse *sui generis* arrangements, as well as those specifically designed for the protection of traditional knowledge. Also included in their submissions are consideration of and proposals covering *sui generis* systems for plant variety protection (PVP) both domestic, local and wild varieties and traditional knowledge; *sui generis* systems for regulating access to traditional knowledge and ensuring benefit sharing; additional *sui generis* systems for traditional knowledge protection and promotion; *sui generis* systems for the promotion of domestic and local plant innovations; *sui generis* systems for food sovereignty and rural poverty; *sui generis* elements for indigenous or community rights and customary protocols; and finally *sui generis* systems related to administration, dispute resolution and remedies.

11. In particular the sections on traditional knowledge protection and promotion emphasize that access to traditional knowledge should include:

(a) Prior informed consent and/or material transfer agreements

(b) Clear access point and designation of national authorities over the jurisdiction of access to biodiversity, including agricultural plant varieties, medicinal plant varieties, forests and protected areas, plant varieties in other public domain areas, and related traditional knowledge.

(c) A national focal point or licensing body could help facilitate access by providing a single access point, which could then coordinate with other designated authorities;

(d) The establishment of cultivation limits and protected areas for rare, threatened or overexploited varieties;

(e) Clear identification of the role of customs authorities in restricting unauthorized collection and international transfer of plant materials.

12. ICTSD also suggests that *sui generis* elements for benefit sharing could include:

(a) Establishment of gene funds for the distribution of funds, or expenditure on useful projects or incentives;

(b) Means for the collection of funding from numerous sources such as: royalty payments, plant variety registration fees, plant or gene (and associated traditional knowledge) accession fees, government contributions, and other sources;

(c) Ensuring fair participation of relevant stakeholders in benefit sharing fund committees or boards;

(d) Ensuring fair participation of all relevant parties, including traditional local communities and farmers, in the negotiation of ABS arrangements;

(e) Conditions for mutually agreed terms as specified in the Bonn Guidelines;

(f) Stipulation and examples of the kind of monetary and non-monetary benefits that may be allocated as appropriate and desired;

(g) Stipulation and examples of the timing of benefits, the distribution of benefits between parties, and mechanisms for benefit sharing.

13. ICTSD stressed in their submission that permission to access genetic resources does not necessarily confer access to knowledge associated with those resources and that national authorities need to clearly specify distinctions between access to genetic resources and access to traditional knowledge. This may result in two separate processes, although coordinated both may be coordinated through a national competent authority. ICTSD further elaborates that a PIC system established at the national level should include as a minimum:

(a) An access point acting as, or directing to, competent authorities that can grant PIC;

(b) Timing and deadlines such that consent is sought sufficiently in advance of access, and to ensure quick processing of applications;

(c) Specification of use requirements, such that authorities may consider the validity and necessity of access, and any problems or offence it might cause;

(d) Detailed procedures for PIC;

(e) Mechanisms to facilitate consultation with relevant stakeholders;

(f) Transparent processes, including documentation and permits, licences or similar.

(adapted from the Bonn Guidelines, 2002, section IV (decision VI/24, annex))

14. Finally, ICTSD suggests that additional *sui generis* elements for the protection and promotion of traditional knowledge could include:

(a) Formal recognition of the intellectual contributions of traditional local communities and farmers;

(b) Databases and registries, including stipulation of the information to be registered. Databases should be accessible to applicants and examiners of PVP registrations and patents. These could also be linked to disclosure requirements.

15. The ICTSD in its submission emphasizes that countries have considerable space for the development of unique national laws, subject to the obligations imposed by international agreements, but cautions that a one-size-fits-all law may be inoperable or dysfunctional by attempting to resolve too many concerns. Furthermore the development of both national and in particular, international *sui generis* systems may tend to homogenize diverse customary laws and at the same time risk being to broad to address the reality of the problem on the ground. Rather, countries may want to follow the national approaches of others such as India, Thailand and the Philippines, which have each developed a range of unique laws which deal with PVP concerns and the legal handling of traditional knowledge in different ways.

16. Countries also need to recognize that over-regulating agricultural genetic resources may have the negative consequence of discouraging innovation, and may be contrary to the historical interdependence between countries with regard to the sharing of germplasm. National authorities should balance these factors against the desire to ensure sovereign control of biological resources. Therefore, a selection of the only most pertinent *sui generis* components and elements would be prudent, to balance the promotion of agricultural innovations and the protection of broader public interests.

17. ICTSD urges national authorities, policy-makers and interested groups to continue to watch closely the regulatory developments of PVP and biodiversity laws, particularly in India and Thailand. Both these countries are on the verge of advancing the implementation of *sui generis* laws, which has been a considerable challenge to date. In particular, the Thai PVP law (favouring liability rather than exclusive property protections) presents a model that has fewer substantial administrative burdens, and would be suitable for most developing and least developed countries in Asia.

18. All submissions emphasized the need for diverse *sui generis* systems with different but complementary objectives and the need for policy to be based on experience in practical implementation of such systems or evidence-based policy development. The current focus of the work on *sui generis* systems is on priority elements for *sui generis* systems that are legal in nature and focused on protection of traditional knowledge. The Australian and the ICTSD submissions suggest that the Working Group on Article 8(j) could take a broader view of *sui generis* systems for various purposes including both the protection and promotion of traditional knowledge. The submissions also suggest that a one-size-fits-all approach to a *sui generis* system may be inoperable or dysfunctional by trying to resolve too many concerns. Such an attempt at a single international *sui generis* system may also have a tendency to

homogenize diverse customary legal traditions and in doing so become so over-arching that the details are missed and it will fail to achieve its objectives.

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

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

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

A. Statement of purpose, objectives and scope

Purpose

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

22. 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]

23. *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.

24. *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.

[2] Views received from Argentina.

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

25. Sustainable development and poverty alleviation are also both possible side-benefits of *sui generis* systems. In particular, a system could work to increase access to capital for indigenous and local communities, thus facilitating the establishment of commercial ventures within traditional communities. While promoting sustainable development, if they so choose, *sui generis* systems would need to carefully balance the goal of protection of traditional knowledge as against the goal of promotion of use, particular as it related to conservation and sustainable use.

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

Objectives

27. 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.

28. *Sui generis* systems could:

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

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

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

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

(e) Exclude improper use by third parties;

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

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

29. 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.

Scope

30. The scope of *sui generis* systems should consider the collective nature of indigenous and local communities and their holistic approach to resource use and management, including its ideology and relationship to local environment. For *sui generis* systems to be effective there will likely be a need for measures at local, national and international levels. It is highly desirable that local measures be based closely on the relevant customary laws of the indigenous and local communities concerned and developed with their full and effective participation and their prior informed consent. In fact, traditionally, there may already be *sui generis* protection in place, through customary law; however, such measures require formal recognition by the State and support to ensure their effectiveness and continuity. National and international measures should therefore be of a more general in nature and provide best-practice guidelines, or a framework that recognizes and supports local measures. It is important to clarify that in practice no single overarching international, regional or national *sui generis* system, however broad in scope, is likely to embrace all the characteristics and the full context of traditional knowledge in its original cultural context and its related customary law and the cultural and legal diversity of the world's

indigenous and local communities. It is therefore vital that *sui generis* protection be local in nature but supported by national and international frameworks and/or guidelines, which may establish minimal standards.

31. 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.

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

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

33. 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.

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

35. 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.

36. 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 according to their respective community protocols. Research and development of traditional knowledge could then be coordinated and profits should be shared equitably and according to the relevant customary laws.

C. Set of relevant definitions

37. The Working Group considered the revised definitions at its fifth meeting and took 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.

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

38. 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[4] 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.

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

40. 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.

Customary rights in indigenous/traditional/local knowledge

41. 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.

42. For many indigenous and local communities, traditional knowledge is connected not only with rights but also with obligations. For example, intergenerational transfer of knowledge is an important obligation for older generations among most bodies of customary law. Similarly, there is also an obligation on youth to be prepared to receive this knowledge. In many cases, youth must earn the right to receive the knowledge. Elders may in some cases be reluctant to fully share their knowledge with others, even within their own community, if they feel that the latter will not use the knowledge in the respectful way.

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

Customary rights regarding biological resources

44. 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

[4] Sustainable development is more often considered by indigenous and local communities as community wellness or well being

over biological resources. Thus the misappropriation that most offends communities may be cultural and spiritual, more than economic.

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

46. 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

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

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

49. 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.

50. 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.

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

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

(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;

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

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

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

52. 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.

53. 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. Although these principles are specific to customary practices of the Inuit, they can be considered representative of the *kinds* of principles that exist in other *sui generis* systems.

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

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

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

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

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

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

(g) Creativity and flexibility are highly valued, as is the ability to improvise with whatever is at hand to achieve a purpose or solve a problem;

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

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

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

(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.

54. Customary laws may include other common principles, [6] such as (but not limited to):

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

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

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

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

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

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

Prior informed consent

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

56. The elements of a prior informed consent mechanism were considered by an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, facilitated by the Permanent Forum on Indigenous Issues in January 2005 (see document E/C.19/2005/3), which outlined the main elements of a common understanding of a process of prior and informed consent.[7] 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 may entail many dangers.

Mutually agreed terms

57. 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),

[6] Input received from Argentina.

[7] 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).

potential contractual parameters for an agreements of MAT and offers a possible list of mutually agreed terms. S*ui generis* systems for the protection of traditional knowledge could build on the Bonn Guidelines, while ensuring that any guidelines properly reflect the relevant customary law and the concerns of the appropriate indigenous and local communities.

Equitable sharing of benefits

58. Equitable benefit-sharing mechanisms and processes are fundamental to any *sui generis* system that hopes to successfully protect and promote the use of traditional knowledge. Benefits arising from commercial use of traditional knowledge should be shared in a fair and equitable way with the communities, whose knowledge is being used. The nature of the benefits that could be anticipated from accessing traditional knowledge fall into two general categories: monetary and non-monetary. Appendix II to the Bonn Guidelines contains an indicative list of both. While not specifically tailored to the needs of indigenous and local communities as providers of biological resources and associated knowledge, many of the listed benefits will nevertheless be appropriate in many circumstances.

59. 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.

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

61. In order to suggest some prioritisation of the elements of *sui generis* systems based on the submissions received, prior and informed consent (PIC) and mutually agreed terms (MAT) could be the cornerstones on which *sui generis* systems are constructed. In particular, MAT could ensure that obligations arising from customary laws are taken into account without the need to reveal or codify customary legal systems.

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

Rights of traditional knowledge holders

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

Conditions for the granting of rights

63. 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.

64. 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.

65. *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.

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

67. 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.

68. 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.

69. *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.

70. 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.

71. There are two possible ways to deal with the issue of how rights are lost. One approach is to establish protection for an indefinite period. This approach speaks to the intergenerational and incremental nature of traditional knowledge and recognizes that its commercial application, once the protection is secured, may take an extremely long time. But if the protection of traditional knowledge is to be established upon an initial act of commercial use (for example, a period of fifty years counted from the first commercial act involving the protected element of traditional knowledge, which could be renewable for a certain number of successive periods), then it is possible to have a predefined expiration, provided it would apply exclusively to those elements of traditional knowledge with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.

G. The rights conferred

72. 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;

[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 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.

(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;

73. 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.

74. 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.

75. 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.

76. 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

77. 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.

78. 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.

79. 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).

80. 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.

81. 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.

82. 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.

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

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

84. 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.

85. 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

86. 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.

87. 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.

88. 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.

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

K. Relationship to other laws, including international law

National level

90. 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.

91. 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.

92. 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, programs 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).

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

International level

94. 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.

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

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

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

(a) *Notes* that the elements of *sui generis* systems provide are relevant to the protection of traditional knowledge, innovations and practices at local, national and international levels;

(b) *Also notes* that *sui generis* systems for the protection of traditional knowledge, innovations and practices, as appropriate, should be developed with the effective participation and prior informed consent of the knowledge holders;

(c) *Requests* the Executive Secretary to compile and make available through the clearing house mechanism information on measures taken by Parties for the development of *sui generis* systems for the protection of traditional knowledge, at various levels, including local, national, regional and international, and how these may complement each other with a view to achieving comprehensive protection of traditional knowledge, innovations and practices relevant to biological diversity;

(d) *Requests* Parties to submit to the Executive Secretary information regarding elements of *sui generis* systems relevant to traditional knowledge they have adopted whether they are local, subnational, national or regional in focus, including assessments of the effectiveness of such measures;

(e) *Invites* Parties and Governments with transboundary traditional knowledge relevant to biological diversity to report on regional measures taken including *sui generis* systems that are been developed or have been developed and/or implemented, including evidence regarding the effectiveness of such measures.
