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### AD HOC OPEN-ENDED INTERSESSIONAL WORKING GROUP ON ARTICLE 8(j) AND RELATED PROVISIONS OF THE CONVENTION ON BIOLOGICAL DIVERSITY

Seventh meeting

Montreal, 31 October – 4 November 2011

Item 6 (c) of the provisional agenda\*

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

*Note by the Executive Secretary*

#### **INTRODUCTION**

1. In paragraph 4 of decision X/41, the Conference of the Parties invited Parties and Governments to submit information regarding elements of *sui generis* systems relevant to the protection of traditional knowledge they have adopted, including assessments of the effectiveness of such measures, whether they are local, subnational, national or regional in focus, and to report on any regional measures that have been taken to protect traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity that is held across national boundaries, including *sui generis* systems that are being developed or have been developed and/or implemented, including evidence regarding the effectiveness of such measures. Paragraph 6 of the same decision requested the Executive Secretary to compile this information and make it available through the clearing-house mechanism.

2. Furthermore, paragraphs 7 of decision X/41 invited Parties, indigenous and local communities and other relevant organizations to provide views through case-studies on how statutory laws and customary laws interact with regard to the protection of traditional knowledge, innovations and practices and for the results to be made available through the traditional knowledge portal of the clearing-house mechanism of the Convention and to the Working Group on Article 8(j) and Related Provisions for consideration at its seventh meeting. Paragraph 8 of the same decision requested the Executive Secretary to update his note on the subject (UNEP/CBD/WG8J/6/5), in light of case-studies and experiences received, indicating what changes have been made in relation to case-studies submitted, for consideration by the Working Group. In accordance with this request, the present document has been prepared in track

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changes to highlight changes made from the previous iteration. The compilation of views received is also made available as an information document (UNEP/CBD/WG8J/7/INF/6).

3. Furthermore, Parties are reminded of paragraphs 9, 10 and 11 of decision X/41, which note respectively:

(a) The clear relationship between effective *sui generis* systems as may be developed, adopted or recognized at various levels, 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;

(b) The decision of the General Assembly of the World Intellectual Property Organization (WIPO) at its thirty-eighth session, to continue its work without prejudice to the work pursued in other forums, and “undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments), which will ensure the effective protection of genetic resources, traditional knowledge, and traditional cultural expressions”; and

(c) The work of the Convention on Biological Diversity, in relation to *sui generis* systems for the protection of the knowledge innovations and practices of indigenous and local communities and in relation to the early establishment of a legally binding Protocol on Access and Benefit-sharing.

Given this, when discussing *sui generis* systems (item 6 (c) of the provisional agenda), Parties may also wish to take into consideration agenda item 6 (a) (tasks 7, 10, 12 and 15 of the revised multi-year programme of work), in order to ensure coordination with the current work on *sui generis* systems for the protection of traditional knowledge and to ensure that these tasks remain complementary and avoid overlap or duplication.

4. Hence, the purpose of this revised document is to examine the further development and prioritize the twelve elements (as per decision VII/16, H, annex) based on input received, building on the note by the Executive Secretary on Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices (UNEP/CBD/WG8J/6/5). Section I contains some conclusions drawn from submissions received; Section II seeks to further develop and prioritize 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 regarding *sui generis* systems.

5. Views regarding *sui generis* systems were received from Australia and Natural Justice. A summary of these submissions is available in section I and has also informed the further development of the elements contained in section II. All views received on *sui generis* systems are compiled and made available as an information document (UNEP/CBD/WG8J/7/INF/1).

6. As no views were received regarding prioritization of the elements, the current order of elements remains unchanged.

## I. SUMMARY OF SUBMISSIONS RECEIVED

7. Views regarding *sui generis* systems, received from Australia, and Natural Justice have provided a useful basis for further developing the dialogue on *sui generis* elements for the protection of traditional knowledge.

8. 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 developed in partnership with indigenous Australians, 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”.<sup>1</sup> The Australian

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<sup>1</sup> Aboriginal Australians refer to their traditional territories as their “country” and this is reflected in the national Australian programme: “Caring for Our Country”.

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. The menu of programmes and projects provided in the Australian submission would suggest that the current focus on *sui generis* systems for the legal protection of traditional knowledge within the Convention could be expanded to include *sui generis* systems for the preservation, maintenance and promotion of traditional knowledge.

9. Australia has a number of government programmes developed in partnership with, 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 programmes include:

- Working on Country
- The Indigenous Heritage Program (IHP)
- The Indigenous Protected Areas (IPA) Program
- The National Arts and Crafts Industry Support (NACIS) Program
- The National Land and Sea Management Conference
- The Indigenous Broadcasting Program (IPB)
- The Maintenance of Indigenous Languages and Records Program (MILR)
- The Indigenous Culture Support (ICS) Program
- The Return of Indigenous Cultural Property (RICP) Program

10. Australia has also established an Indigenous Advisory Committee under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) to advise the Minister for the Department of Sustainability, Environment, Water, Population and Communities on the operation of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), taking into account the significance of indigenous people's knowledge of the management of land and the conservation and sustainable use of biodiversity; and Indigenous Protected Areas. It also provides advice to the department on indigenous issues as they relate to the role of the department, excluding where an existing statutory committee exists to provide such advice. Further information on these programmes is available in the compilation of submissions received (UNEP/CBD/WG8J/7/INF/1).

11. Australia's Biodiversity Conservation Strategy 2010-2030 calls for increased engagement of indigenous people recognizing the significant role they play in biodiversity conservation in Australia. Indigenous people hold title over a large and increasing proportion of Australia's lands and waters, and are also the guardians of traditional ecological and cultural knowledge of Australia's natural environments. The strategy considers that increasing indigenous engagement through employment, partnership and participation and promoting the two-way transfer of knowledge will lead to both increased opportunities for indigenous peoples and improved outcomes for biodiversity.

12. In accordance with paragraph 5 of decision X/41, Australia has also submitted information regarding regional measures that have been taken to protect traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity that are held across national boundaries, including *sui generis* systems that are being developed or have been developed and/or implemented, including evidence regarding the effectiveness of such measures. Specifically, the Desert Knowledge Cooperative Research Centre (DKCRC) was funded from 1 July 2003 to 30 June 2010. The work of the DKCRC continues under Ninti One Limited, which is a management company for the new Cooperative Research Centre for Remote Economic Participation (CRC-REP) and the Australian Feral Camel Management Project.

13. The DKCRC was a research and brokerage institution that linked researchers with 28 partners. Research efforts focused on creating useful outcomes with commercial application for desert people, communities and our partners. Partners and interested parties all benefitted from the commercialization of the research, accessing new intellectual property (IP) and the sharing of the extensive knowledge common to all desert regions. The DKCRC contributed to developing the following broad outcomes in the national interest:

- (a) Sustainable livelihoods for desert people based on new natural resource and service enterprise opportunities that are environmentally and socially appropriate;
- (b) Remote desert communities that are more sustainable to support the presence of desert people, as a result of facilitating access to more attractive services that are delivered more efficiently;
- (c) Thriving desert economies that are based on unique desert knowledge and which are more self-sufficient;
- (d) Increased social capital of desert people, their communities and service agencies.

Please see <http://www.desertknowledgecrc.com.au/home> for more information and CRC outputs.

14. As such the DKCRC represents an interesting *sui generis* project to bridge knowledge systems and deliver practical outcomes to indigenous peoples and is in line with a broad approach proposed by Australia regarding *sui generis* systems beyond protection.

15. Regarding paragraph 3 of decision X/40 B, on national laws, legislation, policies and programmes regarding the protection of traditional knowledge, Australia has provided information which is relevant to the *sui generis* discussion and diverse approaches taken by Governments to protect, preserve and promote traditional knowledge. The Nanga Mai Arung “Dream Shield” project: a Case Study of Traditional Knowledge Protection was launched by Intellectual Property Australia in late 2010. This electronic information kit advises traditional knowledge holders to consider issues such as prior informed consent and benefit-sharing when protecting aspects of their traditional knowledge with a patent or plant breeder’s rights. Dream Shield is a guide for Australian Aboriginal and Torres Strait islanders to protect designs, brands and inventions. The guide has case-studies, including a story where traditional knowledge was used to develop a patentable invention. The guide advises holders of traditional knowledge considering using the intellectual property system to consider the complex legal and cultural issues relevant to protecting traditional knowledge, including PIC, ABS and customary law. The example supplied by Australia demonstrates a preference for protecting traditional knowledge using current legal arrangements, or law reform rather than or before, *sui generis* systems for the protection of traditional knowledge should be considered.

16. **Natural Justice** (legal NGO, Africa), in their submission, reminds Parties that the recently adopted Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization requires that, in implementing their obligations under the Protocol, Governments take into consideration indigenous and local community laws, customary laws, community protocols and procedures, and that Parties shall endeavour to support the development by indigenous and local communities, including women, of community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from its use. As such, community protocols are promoted as *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities.

17. A community protocol can therefore be considered as a *sui generis* system for the protection of traditional knowledge and can provide benefits including: notification to others that a *sui generis* system is in place; enhance the interaction of customary and statutory laws to protect traditional knowledge; support the bottom-up implementation of the multi-year programme of work on Article 8(j) and related provisions; support community-led conservation and customary uses of natural resources under Article 10(c) of the Convention, and finally, enhance communities’ involvement in ecosystem management, ecosystem services and protected areas. Specifically, community protocols are a useful tool for communities in situations where there is a gap between the bio-cultural rights being recognized at the international level, and the local realities of their daily interactions with national implementing agencies and other stakeholders.

## 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

18. 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 the annex to decision VII/16 H.

19. 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*

20. 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<sup>2</sup> (hereinafter referred to as “traditional knowledge”) and to ensure that they derive fair and equitable benefits from its utilization and that such utilization is based on their prior informed consent. As such, *sui generis* systems and measures may be broad and may not focus solely on protection but could take on other focuses, including preservation and promotion. This purpose would ensure that the system to be established is within the mandate of the Convention.

21. 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;<sup>3</sup>
- (e) Assist in the inter-generational transmission of traditional knowledge and its application on traditional lands and waters;
- (f) To ensure obligations arising from customary law are transmitted to potential users of traditional knowledge (i.e., through community protocols and mutually agreed terms).

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

23. *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

<sup>2</sup> Views received from Argentina.

<sup>3</sup> UNEP/CBD/WG8J/3/7.

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.

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

25. 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*

26. 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.

27. *Sui generis* systems could:

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

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

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

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

(e) Exclude improper use by third parties;

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

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

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

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

#### *Scope*

29. 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. [Community protocols may offer a tool to translate customary law into understandable obligations for potential users of traditional knowledge and should be developed by the relevant indigenous and local communities, with a focus on women.](#) National and international measures should therefore be more general in nature and provide best-practice guidelines, or a framework that recognizes and supports local measures. It is important to clarify that in practice no single overarching international, regional or national *sui generis* system, however broad in scope, is likely to embrace all the characteristics and the full context of traditional knowledge in its original cultural context and its related customary law and the cultural and legal diversity of the world's indigenous and local communities. It is therefore vital that *sui generis* protection be local in nature but supported by national and international frameworks and/or guidelines, which may establish minimal standards.

30. 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.

31. 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**

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

33. 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.

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

35. In the case of the trans-boundary occurrence of some biological and genetic resources and associated traditional knowledge, as well as its occurrence among different indigenous and local communities within the same country, ownership of shared knowledge and resources should be seen as

joint ownership and consent should be required from all parties involved according to their respective community protocols. Research and development of traditional knowledge could then be coordinated and profits should be shared equitably and according to the relevant customary laws.

### **C. Set of relevant definitions**

36. 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 to document 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. [To assist the Working Group in taking forward the development of a glossary of terms, as requested in paragraph 4 of decision VII/16 H, and the set of definitions requested in the annex of the same decision, and in light of the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefit Arising from its Utilization and taking into account task 12<sup>4</sup> of the multi-year programme of work on Article 8\(j\), the draft glossary of terms is made available in the annex to this document.](#)

### **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**

37. 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<sup>5</sup> ethic that guides interaction with biological diversity. Given the significance of customary law to indigenous and local communities, it is important that these legal systems form the backbone to any *sui generis* systems for the protection of traditional knowledge. [Community protocols based on customary laws and developed by the indigenous and local communities themselves may provide a way of translating customary laws and obligations arising from customary laws for users of traditional knowledge and thus provide the community with an effective tool in managing access to traditional knowledge and in ensuring the equitable sharing of benefits.](#)

38. 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.

39. 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.

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<sup>4</sup> Task 12. [The Working Group to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8\(j\) and its related provisions \(which could include \*sui generis\* systems\), and definitions of relevant key terms and concepts in Article 8\(j\) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention.](#)

<sup>5</sup> Sustainable development is more often considered by indigenous and local communities as community wellness or well-being.

*Customary rights in indigenous/traditional/local knowledge*

40. 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.

41. 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.

42. 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*

43. 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.

44. 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).

45. 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.<sup>6</sup>

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<sup>6</sup> Refer IIED Information document UNEP/CBD/WG8J/4/INF/17

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

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

47. 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.

48. 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.

49. 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.

50. 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;

(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.

51. 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.

52. 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.

53. Customary laws may include other common principles,<sup>7</sup> 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.

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<sup>7</sup> Input received from Argentina.

***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*

54. 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.

55. 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.<sup>8</sup> 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*

56. 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 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*

57. 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.

58. 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

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<sup>8</sup> 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).

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.

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

60. In order to suggest some prioritization 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*

61. 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*

62. 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.

63. *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.

64. *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.

65. 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 “publicly 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.

66. 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);<sup>9</sup>
- (e) Elements that are useful for promoting environmentally sustainable practices, conservation, etc.

67. 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.

68. *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.

69. 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

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<sup>9</sup> 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.

any formality. However, that option may give rise to problems of practicality, such as evidentiary difficulties needed for enforcement.

70. 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**

71. 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;

72. 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.

73. 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.

74. 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.

75. 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***

76. 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.

77. 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.

78. 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).

79. 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.

80. 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.

81. Further information on registers is available in the composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities – the advantages and limitations of registers (UNEP/CBD/WG8J/4/INF/9). A summary of the report on registers is also available in a document from the Executive Secretary on the revised phase one, and phase two of the composite report on the status and trends regarding the knowledge, innovations and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity (UNEP/CBD/WG8J/4/4).

82. 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](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***

83. 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 subnational 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. [A local indigenous competent authority could also develop community protocols and other tools to assist in managing traditional knowledge and requests from potential users of traditional knowledge.](#)

84. 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.

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

#### ***J. Provisions regarding enforcement and remedies***

85. 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.

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

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

(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.

87. 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.

88. 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*

89. 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.

90. 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.

91. A possible approach discussed by WIPO<sup>10</sup> 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

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<sup>10</sup> See WIPO document "Protection of Traditional Knowledge: overview of policy objectives and core principles" (WIPO/GRTKF/IC/7/5).

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).

92. 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*

93. 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.

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

#### *The Conference of the Parties*

1. *Decides* to extend and broaden the dialogue regarding *sui generis* systems to include such systems that may have a broader focus or multiple foci, beyond protection of traditional knowledge, including preservation and promotion of traditional knowledge;

2. *Invites* Parties, Governments, international organizations, non-governmental organizations and indigenous and local communities to communicate their experiences and views regarding a broad range of *sui generis* systems, including community protocols and other forms of legal reform, which have contributed to the respect, preservation, protection and promotion of traditional knowledge, to the Secretariat and request the Executive Secretary to compile and analyse and to revise the current document for the consideration of the eighth meeting of the Working Group on Article 8(j) and Related Provisions.

3. *Invites* Parties and Governments, in light of the adoption of the Nagoya Protocol, to report on any regional measures that have been taken to protect traditional knowledge, innovations and practices of indigenous and local communities relevant to biological diversity that is held across national boundaries, including *sui generis* systems that are being developed or have been developed and/or implemented, including evidence regarding the effectiveness of such measures, and requests the Executive Secretariat to compile and analyse information received and to include in the revision of the current document a new section on regional measures, for the consideration of the eighth meeting of the Working Group on article 8(j) and Relate Provisions;

3. *Urges* Parties and Governments to support and encourage the development of local *sui generis* systems for the protection of traditional knowledge by indigenous and local communities, including through the development of community protocols, and to develop national frameworks, taking into account the elements of *sui generis* systems, as set out in section II of the note by the Executive

Secretary (UNEP/CBD/WG8J/7/3), in order to support these local initiatives, and to report on these initiatives through the national reporting process and through the traditional knowledge information portal and to the next meeting of the Working Group on Article 8(j) and Related Provisions.

4. Invites Parties to consider the terms and definitions developed in response to decision VII/16 H, paragraph 4, taking into account the adoption of the Nagoya Protocol on Access and Benefit-sharing and task 12<sup>11</sup> of the Article 8(j) multi-year programme of work, and to submit views, including additional terms and definitions for possible inclusion, to the Executive Secretary and requests the Executive Secretary to compile these views and based on information received, to revise the terms and definitions, include additional terms and definitions proposed and to propose a draft glossary of terms for the consideration of the eight meeting of the Working Group on Article 8(j) and Related Provisions.

5. *Requests* the Executive Secretary to continue to inform the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization on the work undertaken regarding *sui generis* systems and other matters of mutual interest and to continue to positively contribute to the work of the Intergovernmental Committee.

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[11 Task 12. The Working Group to develop guidelines that will assist Parties and Governments in the development of legislation or other mechanisms, as appropriate, to implement Article 8\(j\) and its related provisions \(which could include \*sui generis\* systems\), and definitions of relevant key terms and concepts in Article 8\(j\) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their traditional knowledge, innovations and practices, within the context of the Convention.](#)

## Annex

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

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

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

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

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

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

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

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

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

***Customary use of biological diversity:*** Use in relation to local traditions and customary laws, while allowing for innovation.

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

[For further exploration of this definition of innovation, consider the African Model Law: “Any generation of a new, or an improvement of an existing, collective and /or cumulative knowledge or technology through alteration or modification, or the use of properties, values or processes of any biological material or any party thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing.”<sup>12</sup>

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

**Prior informed consent:** the procedure through which national governments or the Indigenous or local communities, as the case may be, properly supplied with all the required information, allow or refuse access to their biological resources and traditional knowledge innovation and practices, under mutually agreed conditions of equality, respect and fair compensation.<sup>13</sup>

**Protected area:** A geographically defined area, which is designated or regulated and managed, to achieve specific conservation objectives.

**Research:** includes but is not limited to collecting and/or analysing information, data and/or statistics concerning knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.

**Sacred site:** A site, object, structure, area or natural feature or area, held by national Governments or indigenous and local communities to be of particular importance in accordance with the custom of an indigenous or local community because of its religious and/or spiritual significance.

**Sacred species:** A plant or animal held by indigenous and local communities to be of particular importance in accordance with the traditions and/or customs because of its religious or spiritual significance.

**Traditional knowledge:** the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

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

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

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

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<sup>12</sup> African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, Part II, Definitions and Scope, page 4.

<sup>13</sup> Refer to the Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples facilitated by the United Nations Permanent Forum on Indigenous Issues (E/C.19/2005/3).