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

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Item 7 of the provisional agenda*

DEVELOPMENT OF ELEMENTS OF A *SUI GENERIS* SYSTEM FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

Note by the Executive Secretary

I INTRODUCTION

1. In paragraph 34 of decision VI/10, the Conference of the Parties requested the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity to address the issue of *sui generis* systems for the protection of traditional knowledge, focusing in particular on the following issues:

- (a) Clarification of relevant terminology;
- (b) Compiling and assessing existing indigenous, local, national and regional *sui generis* systems;
- (c) Making available this compilation and assessment through the clearing-house mechanism of the Convention;
- (d) Studying existing systems for handling and managing innovations at the local level and their relation to existing national and international systems of intellectual property rights to ensure their complementarity;
- (e) Assessing the need for further work on such systems at the local, national, regional and international levels
- (f) Identifying the main elements to be taken into consideration in the development of *sui generis* systems;
- (g) The equitable sharing of benefits arising from the utilization of traditional knowledge, innovations and practices of indigenous and local communities, taking into account the work carried out by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional

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Knowledge and Folklore with a view to promote mutual supportiveness, and existing regional, sub-regional, national and local initiatives.

2. The Executive Secretary has prepared the present note to assist the Working Group in its work. The note addresses the issues identified in paragraph 34 of decision VI/10, taking into account the relevant work being carried out in other organizations including, in particular, the work by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the WIPO Intergovernmental Committee”). The note includes suggested elements to be taken into consideration in the development of *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity that the Working Group may wish to use as a basis for its work.

3. In examining the main elements to be taken into consideration in the development of *sui generis* systems for the protection of traditional knowledge, the Working Group may wish to consider how they relate to the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of Their Utilization adopted by the Conference of the Parties in paragraph 3 of decision VI/24 A, particularly in terms of how the elements might complement the Guidelines by focusing on the specific needs and interests of indigenous and local communities in the protection, utilization and equitable sharing of benefits when access to their traditional knowledge is sought.

4. The Working Group may also wish keep in mind the work still to be carried out in fulfilment of tasks 7 and 12 of the first phase of the programme of work on Article 8(j) and related provisions endorsed by the Conference of the Parties in paragraph 1 of decision V/16. Tasks 7 and 12 provide *inter alia* for the development of guidelines to ensure that indigenous and local communities obtain a fair share of the benefits arising from the use and application of their traditional knowledge, and to recognize their rights over such knowledge.

5. Sections II-VII of the note address the issues raised in paragraph 34 of decision VI/10. Section VIII contains suggested recommendations that the Working Group may wish to submit to the seventh meeting of the Conference of the Parties.

II. CLARIFICATION OF RELEVANT TERMINOLOGY

6. The need for a rigorous use of terminology in discussions on traditional knowledge has been widely recognised. Some Parties have argued that agreed definitions are essential before entering into further discussions on the protection of traditional knowledge in the context of the Convention on Biological Diversity.^{1/} The need for greater clarity in the use of terms has also been raised in the Working Group on Access and Benefit Sharing in connection with the Bonn Guidelines.

7. Discussions on terminology relevant to Article 8(j) and related provisions for the purposes of national legislation, policies and strategies to implement the Convention are fraught with difficulties. Internationally agreed generic definitions—“a one size fits all” approach, while desirable, may not be possible from a practical point of view. Governments typically adopt legislation taking into account national circumstances that depend on historical, social and cultural backgrounds and the ethnic diversity and composition of their national populations.

8. Another consideration is that discussions on terminology relating to traditional knowledge are of relevance not only to the Convention on Biological Diversity, but also to other processes such as the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) (Articles 16 (g) and 17.1 (c)), the International Treaty on Plant Genetic Resources for Food and Agriculture (Article 9.2 (a)) and the work of the WIPO Intergovernmental Committee on Intellectual Property Rights, Genetic Resources, Traditional Knowledge and Folklore.

^{1/} Thematic reports on access and benefit-sharing by Austria, Switzerland, and Norway, and also discussions on the Bonn Guidelines at sixth meeting of the Conference of the Parties.

9. In light of the difficulties inherent to the formulation of definitions or a glossary of terms, the Working Group may wish to consider carefully how best to carry out this task. One approach could be to reach agreement on a list of terms that need to be defined and invite Parties and other stakeholders to submit tentative definitions of these terms, along the lines of a similar approach adopted by the Working Group on Access and Benefit-sharing with respect to the use of terms in the Bonn Guidelines. The submissions could be compiled by the Secretariat and submitted to the Working Group or to a group of experts established for this purpose. Alternatively, the Secretariat could be requested to draft a tentative definition of each term based on submissions received. The Working Group could recommend to the seventh meeting of the Conference of the Parties the convening of a meeting of technical experts in order to agree on those definitions.

10. The terms listed in annex would seem to be the most relevant to discussions on *sui generis* systems for the protection of traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity. This non-exhaustive list is in addition to the terms listed under Article 2 of the Convention. It is assumed that, in the context of *sui generis* systems, the terms such as “prior informed consent”, “mutually agreed terms” and “equitable sharing of benefits” would be given the same meaning as in the Bonn Guidelines, given the high degree of complementarity between the two processes.

III. APPROACHES TO THE PROTECTION OF TRADITIONAL BIODIVERSITY-RELATED KNOWLEDGE

11. The analysis of existing *sui generis* systems for the protection of traditional biodiversity-related knowledge reveals that at least five approaches, which are not mutually exclusive, have been adopted or could be considered in the development of such systems:

(a) *Intellectual property rights laws incorporating sui generis elements for the protection of traditional biodiversity related knowledge (e.g. requiring the disclosure of the source of genetic resources and associated traditional knowledge and evidence of prior informed consent in applications for intellectual property rights).* Some countries believe that traditional knowledge can be adequately protected by existing intellectual property rights, perhaps supplemented by specific measures to address particular needs.^{2/} For, example, the Andean Community decision 486 on a common intellectual property regime, contains a number of provisions (Articles 3, 26(h) and (i), 75(g) and (h)) to safeguard against the unauthorized use of traditional knowledge;

(b) *Legislative measures developed to address the access and benefit-sharing provisions of the Convention on Biological Diversity, including the protection of traditional knowledge and measures developed to address specifically issues of ownership and access to traditional knowledge.* A number of legislative measures or models developed to address the access and benefit-sharing provisions of the Convention also include provisions for the protection of traditional knowledge. These include the Philippines Executive Order 247 of 1995; the Andean Pact decision 391 on the common regime on access to genetic resources (1996); Brazil’s Provisional Act No. 2,186-16 (2001) and the African Model Law (2000). In addition to the prior informed consent requirements at national level in response to Article 15 of the Convention, these regimes and models also require the prior informed consent of the concerned indigenous and local communities in cases where access to their traditional knowledge and associated genetic resources is being sought. In most cases there is recognition of the relevant elements of customary law and practice with respect to the giving of such consent. Peru was the first country to establish a legal system specifically for the protection of indigenous communities’ traditional knowledge associated with biodiversity in its Law No. 27811 (2002). WIPO prepared a comparative summary of existing national *sui generis* measures and laws for the protection of traditional knowledge, for the fifth session of the Intergovernmental Committee (WIPO/GRTKF/IC/5/INF/4);

^{2/} WIPO/GRTKF/IC/4/3, para. 9.

(c) *A comprehensive national legislative, administrative and policy framework for the conservation and sustainable use of biological resources, which incorporates provisions for the protection of traditional knowledge.* Some countries have adopted a comprehensive biodiversity legislation that includes provisions related to access and benefit-sharing and the protection of traditional knowledge, such as Costa Rica in its *Biodiversity Law No. 7788* of 1998. Others have adopted a combination of legislative measures, biological diversity strategies and action plans that incorporate measures for the protection of traditional knowledge, its wider application, equitable sharing of benefits arising from its utilization, and customary use of biological resources. A good example of this approach is provided by Australia. Agreements were reached between the Commonwealth and the States and Territories in the National Strategy for the Conservation of Australia's Biological Diversity (1997) and the Nationally Consistent Approach for Access to and the Utilization of Australia's Native Genetic and Biochemical Resources (2002), which have been signed by all governments. The Federal Parliament passed the Environment Protection and Biodiversity Conservation Act (No. 91 of 1999), which recognizes the role of indigenous people in the conservation and sustainable use of Australia's biodiversity and the promotion of the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge. (section 3 (1)(d), (f), (g)). The primary means by which traditional knowledge is to be protected is by contractual arrangements when traditional knowledge is part of a genetic resource access and benefit-sharing arrangement. Finally, in support of a "National Consistent Approach for Access to and the Utilization of Australia's Native Genetic and Biochemical Resource", Commonwealth, State and Territory governments endorsed General Principles Underpinning Development or Review of Legislative, Administrative or Policy Frameworks in Australian Jurisdictions for Access to, and Utilization of Australia's Native Genetic and Biochemical Resources. Principle 7 states that the governments "recognize the need to ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms";

(d) *A comprehensive indigenous/local community rights law which deals with issues such as land rights and community governance, and also incorporates provisions for the protection of traditional biodiversity-related knowledge and access to genetic resources.* While many countries have a law, or body of laws, with respect to indigenous and local communities within their jurisdictions, these laws generally, however, do not deal specifically with the protection of traditional biodiversity-related knowledge. Some may provide mechanisms that can be used indirectly by such communities to protect their knowledge by, for example, empowering them to control access to their lands, resources and communities. However, such mechanisms may not necessarily protect traditional knowledge which has been documented and published through, for example, the academic research process, thereby making it available to others for whom it could provide leads for the development of commercially viable products. One example of this approach is provided by the Philippines *Indigenous Peoples Rights Act* of 1997. Within this comprehensive law providing for the rights of indigenous cultural communities/indigenous peoples (ICCs/IPs), provisions relating to the intellectual property rights of the ICCs/IPs are contained in Chapter VI: Cultural Integrity and the Rules framed under Sections 34 and 35 are directly relevant to the obligations contained in Article 8(j). Section 34 concerns the right of ICCs/IPs to their indigenous knowledge systems and practices and to develop their own sciences and technologies, in which rights to full ownership, control and protection of the cultural and intellectual property rights by ICCs/IPs are recognized. Section 35 is concerned with access to biological and genetic resources within the ancestral domains of indigenous people. Sections 34 and 35 do not contain any provisions regarding the equitable sharing of benefits, however, this issue is addressed in the rules (annex III) which lay down some guidelines regarding the safeguarding of the rights of indigenous peoples and indigenous knowledge systems. These include: (i) the right to regulate entry of researchers and research institutions; (ii) written agreement concerning the purpose, design and expected output of the research; (iii) the need to recognize the source of the material taken in case the information regarding the material is published; (iv) the supply

of copies of research output to the communities concerned, and most importantly; and (v) sharing of the income derived from the research output with the community;^{3/}

(e) *A comprehensive sui generis cultural heritage protection law based on a holistic approach to the protection of traditional cultural expressions/expressions of folklore/traditional knowledge which incorporates, or can be extended to incorporate, provisions for the protection of traditional biodiversity-related knowledge, innovations and practices.* Many indigenous and local community representatives have argued that traditional knowledge is more than the sum of its parts, forming instead a complex, integrated and coherent system - an indivisible body of knowledge and lore that can only be adequately protected through a holistic, rather than piecemeal approach. The most effective approach in protecting such a body of knowledge and practice, it is argued, is through the medium of customary law, but the State would have to recognize it in such a way as to enforce it.

12. To date, within the holistic approach, two possibilities have been explored:

(a) *A system intended for the protection of cultural heritage/cultural expressions/folklore which could be extended to include traditional biodiversity related knowledge.* Two models have been developed which primarily focus on the protection of traditional cultural expressions and/or folklore. These are the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other prejudicial actions (1982) and the South Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002) which is to protect the rights of “traditional owners” in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including their commercialization, subject to prior informed consent and benefit-sharing. Panama has also adopted a *sui generis* law, Law No.20 of 26 June 2000, to protect the cultural and intellectual heritage of the country’s indigenous peoples which is entitled “Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and other Provisions”. The objective of this legislation is to protect the collective intellectual rights and traditional knowledge of indigenous peoples’ creations;

(b) *A comprehensive system which expressly includes traditional biodiversity-related knowledge.* Many indigenous people/s, communities and organizations have argued for comprehensive, holistic protection for their cultural heritage, using as their starting point the draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, ^{4/} developed under the auspices of the UN Commission on Human Rights, based on a definition of cultural heritage which includes traditional environmental knowledge. Such an approach was argued by indigenous people in Australia. ^{5/} However, to date no laws have been implemented based on such a holistic approach to the protection of cultural heritage in all of its manifestations.

13. Some countries have used a combination of these approaches to provide protection to traditional biodiversity related knowledge. For example, the Andean Community in Decisions 486 and 391 have used the first two approaches to protect the rights of indigenous and local communities with regard to their traditional knowledge. In another example, the Philippines has used the second and fourth approaches through the implementation of Executive Order No 247 in 1995, and the Indigenous Peoples Rights Act 1997, respectively. Given the mix of tools employed by Governments, it would seem that a single approach may not be adequate to address the issue of protection of traditional knowledge.

^{3/} Kuttly PV, WIPO/GRTKF/STUDY/1, 25 November 2002, p. 29-30.

^{4/} Document E/CN.4/SUB.2/2000/26 OF 19 June 2000. annex I.

^{5/} Janke T 1998. *Our Culture : Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*. Michael Frankel and Company, ATSIC and AIATSIS, Canberra, Australia.

IV. EXISTING SYSTEMS FOR HANDLING AND MANAGING INNOVATIONS AT THE LOCAL LEVEL AND THEIR RELATION TO EXISTING NATIONAL AND INTERNATIONAL SYSTEMS OF INTELLECTUAL PROPERTY RIGHTS

14. Indigenous and local communities have adopted a number of systems and strategies for handling and managing their innovations. These include using existing intellectual property laws, particularly those regarding trademarks and geographical indications.^{6/} Many indigenous and local communities, or organizations which represent them, have also established community-based registers of traditional knowledge, innovations and practices. Other strategies include the development of community-generated codes of ethics and protocols to govern any research undertaken by outsiders, such codes/protocols usually also contain provisions to protect confidentiality of information, conditions for publication of information, and sharing of benefits. Contractual agreements with researchers and bioprospectors have also been used as a means of protecting local innovations, and generally including clauses governing confidentiality and benefit-sharing. The following paragraphs examine more specifically registers/databases of traditional knowledge and their relation to intellectual property rights.

Registers/databases of traditional knowledge, innovations and practices and their relation to intellectual property rights

15. The main tools used to manage and handle innovations at the local level appear to be registers or databases of traditional knowledge.

16. Traditional knowledge registries or databases have been developed through various initiatives in India, Peru, the Philippines, Australia, New Zealand, the South Pacific and by the Inuit of Nunavik and the Dene in Canada. They are generally compiled by communities or community groups for their own benefit. They have been found useful for organizing knowledge to enable better protection and improved management of the community resources.^{7/} These registers may serve a number of purposes, depending on the needs of the community, including:

(a) Maintenance and preservation of traditional knowledge by virtue of recording and documenting it;^{8/}

(b) Protection against the inappropriate granting of intellectual property rights (sometimes referred to as “biopiracy”) by providing evidence of prior art;^{9/}

(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).

^{6/} Studies from Australia and Canada provide examples of not only how various forms of intellectual property have been used to protect traditional knowledge from abuse, but how indigenous people have successfully applied for certain forms of intellectual property, such as trademarks and geographic origins, in order to protect and promote their commercial interests. The approach in these two countries is to encourage indigenous communities to use the intellectual property system, and both have mounted education and public awareness programmes to encourage such use. For further information see: Janke, 2002. *Minding Culture* WIPO/GTRKF/STUDY/2, December 2, 2002; Cassidy M and Langford J (eds) 1999. *Intellectual Property and Aboriginal People: A Working Paper*. Ministry of Indian Affairs and Northern Development, Ottawa, Canada.

^{7/} Downes and Laird 1999. *Community Registries of Biodiversity-Related Knowledge: The role of intellectual property in managing access and benefit*. Prepared for the UNCTAD Biotrade Initiative p. 4..

^{8/} Some countries have noted the fact that because traditional knowledge has not been documented, this has contributed to the erosion of traditional knowledge systems (eg, in Namibia).

^{9/} The Panel of Experts on access and benefit-sharing, during the second meeting, acknowledged that traditional knowledge registers could provide protection which could be used to avoid the inappropriate granting of intellectual property rights (UNEP/CBD/WG-ABS/1/2, para. 77(c)).

17. WIPO reports that there is a growing number of initiatives seeking to use databases and registries to conserve and protect traditional knowledge and genetic resources. It notes that they 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. These initiatives have precipitated considerable concern about their intellectual property implications. ^{10/}

18. These initiatives generally aim at promoting the interests of traditional knowledge holders and local and indigenous communities. But in some cases, there is apprehension among indigenous and local communities that recording traditional knowledge may actually undermine the potential intellectual property rights of traditional knowledge holders, or override customary law restrictions associated with the knowledge. These concerns raise practical questions on how to give effect to these policy objectives. In order to address some of the concerns raised, a better understanding of the needs, objectives and priorities of the different stakeholders is essential. ^{11/}

19. With respect to traditional knowledge that is already in the public domain, registers or databases of this knowledge will facilitate its recognition as prior art in the processing of patent applications and thereby prevent its misappropriation. However, if the traditional knowledge is secret, its inclusion in a registry or database could facilitate its misappropriation if adequate measures are not taken to protect it. In this respect, certain government representatives, as well as indigenous and local communities, have expressed serious concerns about the confidentiality of information on traditional knowledge contained in both existing and proposed registries. ^{12/} The draft WIPO toolkit for managing intellectual property when documenting traditional knowledge and genetic resources has been developed to provide practical assistance to traditional knowledge holders and custodians of genetic resources in this process. ^{13/}

20. In order to address this concern, some Parties and Governments, as well as indigenous and local communities, may feel that there is a need to differentiate the role of registers at different levels of operation. For example, at the local level, community-based registers may be used to store all kinds of cultural information, possibly including associated ritual or ceremonial information (for example, that associated with healing rituals), which may be of a secret/sacred nature. In addition to written records, such information may be in the form of audio- and videotapes, photographs, CD-ROMS, etc. At the national level, national registers could contain only the technical components of this information, thus preserving the secrecy of the other components of the information, and leaving it directly under community control. The information contained in national registers, for example, could be protected by *sui generis* legislation (which also extends to any databases associated with the register), such that information entered in a register automatically becomes protected information. Community-based innovations could also be recorded in the register, thus rendering them unavailable for commercial exploitation, or to prevent intellectual property claims over them.

21. In summary, issues of access and confidentiality might be more easily addressed if an essentially two-tiered system of traditional knowledge registers is adopted. Community-based registers, commensurate with their role of promoting the preservation and maintenance of many forms of cultural knowledge and expression may contain much information about traditional knowledge beyond its strictly technical components, and therefore there will be a need to ensure that the appropriate safeguards are in place to protect confidentiality and restrict access. National registers may be restricted to only holding information regarding the more technical components of traditional knowledge necessary for intellectual property purposes, for example to provide evidence of prior art with respect to a patent application. An additional point here is that this kind of information might be made more readily accessible at both regional and international levels, without infringing the rights of the traditional owners of such information, and without threat to those components of the information to which its traditional owners may want to restrict access.

^{10/} WIPO/GRTKF/IC/Q.4, para.1

^{11/} Ibid, para. 2.

^{12/} OAU Permanent Observer to IGC, 3rd Session June 13-21, 2002, Intervention, para 5.

^{13/} For further discussion see WIPO/GRTKF/IC/5/5.

Example of two tiered approach

22. An example of the management of traditional knowledge at the local community level is provided by the Tulalip Tribes of Washington State in the United States with regard to the Tulalip Cultural Stories Project (TCSP), initiated in 1996. Emphasizing a community-based knowledge management solution, the TCSP is able to 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 detailed knowledge about the uses of culturally important plants and animals and traditional land management practices. The TCSP consists in a set of tribally-developed methodologies for collecting and organizing biodiversity-related traditional knowledge, mostly from interviews with tribal elders, for archival, cultural revitalization and natural resource management issues. The information has been collected and archived under tribal procedures for obtaining prior informed consent. The information collected in the project has been assembled using a software system called ICONS that manages the information at multiple levels of access. Moreover, ICONS provides links to Western scientific models used by the Tribes for watershed management as well as GIS technology for resource mapping and spatial analysis. While most of the data are secured for internal tribal use, some is general and non-proprietary, and the system has been designed to allow this information to be shared in open networks using widely adhered to formats. The model can be used to implement other networks where there needs to be a mix of public information sharing and community-based information control. ^{14/}

National sui generis systems that include registers

23. A number of countries have reported that the establishment of registers are part of their proposals for a legislation to protect traditional knowledge. For example, India has established a national system, which includes the National Innovation Foundation established to build a national register of innovations and network of community-based registries. Namibia has included a mechanism of a community register in its draft *sui generis* legislation (article 29(vi)). ^{15/} Costa Rica's *Biodiversity Law* contains, in article 84, provisions for determination and registration of *sui generis* community intellectual rights. The Government of Venezuela has established BIOZULUA, a database that compiles, orderly biodiversity-related traditional knowledge with the aim of protecting (keeping it secret, for the time being) and commercializing it. Brazil created a national catalogue system where members of indigenous and local communities, or any other person, could deposit documents relating to traditional knowledge.

V. ASSESSMENT OF THE NEED FOR FURTHER WORK ON *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

24. Although there is remarkable progress in the development of *sui generis* systems for the protection of traditional knowledge at the national and regional levels, there are a number of important issues that may require further work. These include the clarification of basic concepts within the context of the Convention, in particular the concept of traditional knowledge; the international dimension of the protection of traditional knowledge; and the use of registries or databases as a tool for protection.

The concept of traditional knowledge

25. Significant discussion has taken place within the WIPO Intergovernmental Committee on the definition of traditional knowledge for the purposes of intellectual property protection. ^{16/} These discussions have led to the conclusion that intellectual property protection of traditional knowledge may be applied to three general forms of subject matter: (i) protection extended to the content, substance or idea of knowledge and culture; (ii) protection extended to the form, expression or representation of traditional cultures; and (iii) protection extended to the reputation and distinctive character of signs,

^{14/} UNEP/CBD/AHTEG/TK-CHM/1/3, *Report of the Ad Hoc Technical Expert Group on Traditional Knowledge and the Clearing-House Mechanism*. para 18.

^{15/} Thematic report on access and benefit-sharing, Namibia.

^{16/} WIPO/GRTKF/IC/5/12

symbols, indications, patterns and styles associated with traditional cultures. ^{17/} Such a comprehensive conceptualization of traditional knowledge may well be beyond the requirements of Article 8(j) and related provisions of the Convention. Indeed, Article 8(j) in referring to “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity” already circumscribes the scope of the concept for the purposes of the Convention. However, even within this limited and distinct scope there exists significant variation in emerging national *sui generis* systems for the protection of traditional biodiversity-related knowledge. For example, the scope of the concept would appear to be much broader in the *sui generis* statute of Panama than is the case in both the Brazilian and Peruvian laws.

26. The clarification is particularly important for determining the type of protection to be established. The scope of the concept will determine whether protection is “positive” or “defensive” or a combination of the two. Positive protection refers to protection that “seeks to establish proprietary or other intellectual property rights in claimed subject-matter”. ^{18/} In contrast, “defensive protection” does not seek to assert proprietary rights, “but merely aims at preventing third parties from claiming rights in misappropriated subject-matter.”

The international dimension of traditional knowledge protection

27. The relationship between national systems for the protection of traditional knowledge amongst different jurisdictions is an issue that may require further work. How international recognition of *sui generis* rights granted in one jurisdiction is achieved is a key practical and legal issue. Wide variations in national protection systems may compromise the overall objective since, on the one hand, there may not be comparable protection in other jurisdictions and, on the other, there may be no international system for enforcing compliance. It may therefore be necessary not only to strive towards the harmonization of standards of protection at the international level but also to establish some formal rules regarding reciprocal recognition. It would seem, therefore, that there is need for the elaboration of an international framework that defines the basic elements and principles of a *sui generis* system for the protection of traditional knowledge.

The role of registries and databases of traditional knowledge

28. As discussed above, there is an increasing use of registers and databases at national and local levels as a means to protect traditional knowledge. Such inventories of information could, for example, help patent examiners become aware of traditional knowledge that constitutes prior art. There is, however, also growing concern that such initiatives may actually undermine the potential intellectual property rights of traditional knowledge holders, or override customary law restrictions associated with the knowledge. Significant issues have been raised that would require further work. For example, how to ensure that traditional knowledge is collected, represented and accessed consistent with cultural imperatives and customary laws; how to ensure full community participation and involvement in the establishment of registries and databases; how registers and databases could govern access to traditional knowledge on the basis of prior informed consent of the holders of such knowledge, including confidentiality requirements; and how to address the issue of the legal status of information stored in such registries or databases. In addition, the relationship between national and sub-national databases and registries and the rights and obligations associated thereto may need to be further addressed.

VI. IDENTIFICATION OF THE MAIN ELEMENTS IN THE DEVELOPMENT OF *SUI GENERIS* SYSTEMS

29. As noted above, many Parties have adopted, or are in the process of considering, a number of approaches to the protection of traditional knowledge, including the adoption of *sui generis* systems. The elements suggested below could be considered as components of a system that can be adapted, as

^{17/} See WIPO/GRTKF/IC/5/8, para. 41.

^{18/} Ibid., para. 73.

appropriate, to national needs and circumstances, or, alternatively, provide certain elements which might complement, or be incorporated within existing systems.

30. In examining this issue, the Working Group may also wish to consider the relationship between the suggested elements and the Bonn Guidelines, particularly in terms of how the elements might complement the Guidelines by addressing the specific needs and interests of indigenous and local communities in the protection, utilization and equitable sharing of benefits when access to their traditional knowledge is sought.

31. The elements suggested below take into account elements found or proposed in a number of relevant national laws, the African Model Law, the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1982) and the model developed by The Crucible II Group. ^{19/} The work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in addressing the many issues associated with these elements has also been taken into account.

A. Statement of purpose, objectives and scope

32. The purpose of *sui generis* systems could be, *inter alia*, to provide the legal means for indigenous and local communities to:

- (a) Control access to, disclosure and use of traditional knowledge, innovations and practices;
- (b) Exercise the right to require prior and informed consent for any access to or disclosure and use of traditional knowledge; ^{20/}
- (c) Enable them to equitably benefit from the wider application of their traditional knowledge, innovations and practices;
- (d) Ensure normal and continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon.

B. Clarity with regard to ownership of traditional knowledge and traditionally-used biological resources

33. In any *sui generis* system, there will be a need to clarify the respective rights and interests of indigenous and local communities over genetic resources and their rights and interests over knowledge associated with such resources.

34. Ownership can be vested in the State, a local body, the community itself, through any other authority found suitable or through some other functional arrangement. Depending on the arrangement, ownership may take into account ownership under customary law. The Philippines Indigenous Peoples Rights Act 1997, for example, recognizes full ownership, control and protection of their cultural and intellectual rights by indigenous peoples/indigenous cultural communities, while Indonesia vests ownership of traditional knowledge in the State.

35. Other factors that may need to be taken into account concern the possibility that misappropriation or abuse may be committed by individual members of an indigenous/local community, by a community claiming exclusive ownership shared with another community (or communities) of the same country, or by indigenous and local communities from other countries and regions. Similarly, traditional knowledge, innovations and practices can be held, practiced and conserved by persons who may not necessarily think of themselves as “indigenous” or “traditional”. ^{21/} A further consideration is that traditional knowledge of, for instance, a particular species and its uses, may be shared by a number of indigenous/local

^{19/} The Crucible II Group 2001. *Seeding Solutions* (Vol. 2). International Development Research Centre, Ottawa, Canada. pp.59-124.

^{20/} See also Ibid, paras. 39 and 41.

^{21/} WIPO/GRTKF/IC/4/3, para. 103.

communities, in which case issues of authority to determine access, use and benefit-sharing may prove difficult to resolve. This situation can arise within a country and across national border.

C. Set of relevant definitions

36. *Sui generis* systems for the protection of traditional biodiversity-related knowledge could incorporate, as appropriate, the terms discussed in the annex to the present note.

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

37. Divergences between intellectual property law and customary laws and protocols have been one of the motivations behind the development of *sui generis* systems for the protection of traditional knowledge. ^{22/} However, whether to provide recognition to customary law is very much a matter 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 (such as ILO Convention 169). In many countries, the issue of recognition of customary law is not relevant.

38. It should be noted that there is no generic form of collective/community custom-based proprietary system for the ownership and control of traditional knowledge, and that there is in fact great diversity among traditional proprietary systems, many of which are highly complex. It may, therefore, be necessary to clarify the nature of customary rights regarding traditional biodiversity related and the customary law restrictions regarding access thereto.

E. A process and set of requirements governing prior informed consent, mutually agreed terms and equitable sharing of benefits with respect to traditional knowledge and associated genetic resources

39. *Sui generis* systems for the protection of traditional knowledge may consider, as part of the requirements for prior informed consent, the consent of indigenous and local communities, as appropriate.

40. The Bonn Guidelines address the steps in the access and benefit-sharing process. They set out the basic principles and elements of a prior informed consent system and provide guidance with regard to the responsibilities of a competent authority for granting such consent, timing and deadlines, specification of use and procedures for obtaining prior informed consent. They also address basic requirements for mutually agreed terms, including benefit-sharing. The components of the Bonn Guidelines could be complemented in order to cover elements of *sui generis* systems for the protection of traditional knowledge.

F. Conditions for the grant of rights

41. Conditions for the grant of rights may need to be clarified and may include some general requirements, the categories of traditional knowledge that will be protected, conditions of confidentiality, and issues of novelty, originality and protection for customary products.

42. A *sui generis* system may establish that the subject matter of protection is contained in inventories, collections, compilations, or databases, e.g. that in order to be protected, traditional knowledge be documented and fixed.

G. The rights conferred

43. A *sui generis* system could specify the rights to be conferred with regard to who is entitled to the rights; what are the rights; how they are acquired; whether there are any exemptions; and the duration of such rights. These could also comprise the right to assign, transfer and license those contents of

^{22/} WIPO/GRTKF/IC/4/3, para. 66.

traditional-knowledge databases with a commercial/industrial nature. As WIPO cautions, if the possibility of transferring rights or licensing is not included in the system, any attempt to address the issue of benefit-sharing under the Convention on Biological Diversity would necessarily fail. ^{23/} Provisions should also be included to ensure that the collective nature of the rights does not impair any private rights. ^{24/}

44. An important consideration is how the rights are lost or how they expire. Two approaches to this issue are possible. One approach, which is generally preferred by the national laws 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. However, if the protection is to be established upon an initial act of commercial exploitation (for example, a period of 50 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 might be preferable to establish 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. ^{25/}

H. A system for the registration of indigenous/local knowledge

45. *Sui generis* systems are predicated upon the establishment of registers of traditional knowledge operating at two levels. Registers established at the community level may be used to hold a range of information, including both technical and culturally sensitive information. Registers established at the national level could be used to record technical knowledge, and could be accessed, for example, by national intellectual property offices. In principle, registers at both levels could be protected under a single *sui generis* system. Alternatively, legislative protection may be given to information recorded in the national register, while at the local level, indigenous/local communities could establish their own protection regimes or rely on conventional measures for protection (for example, laws governing confidential information, etc). *Sui generis* systems could specify, particularly with regard to national-level registers, conditions for making entries and removals from the register, as well as setting conditions with regard to accessing the register and using information placed therein.

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

46. A competent authority established to manage access and benefit sharing arrangements on behalf of its constituent indigenous/local communities could have the following functions:

- (a) Processing requests for access to traditional biodiversity related knowledge;
- (b) Facilitating the prior informed consent of indigenous and local communities regarding access
- (c) Establishment and maintenance of registers;
- (d) 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;
- (f) Liaison with any national competent authority established as part of a national regime governing access to genetic resources and benefit-sharing;

^{23/} Ibid. para. 47.

^{24/} Ibid. para. 48

^{25/} Ibid., para. 57.

- (g) Liaison with relevant intellectual property offices.

J. Provisions regarding enforcement and remedies

47. As is pointed out in paragraph 34 of the document on elements of a *sui generis* system for the protection of traditional knowledge prepared by the WIPO secretariat for the third session of the Intergovernmental Committee (WIPO/GRTKF/IC/3/8), intellectual property rights are useless if they cannot be enforced. Protection for traditional knowledge, innovations and practices would not be effective without the availability of effective and expeditious remedies against their unauthorized use. There may be practical difficulties for holders of traditional knowledge to enforce their rights, which raises the possibility of administration of rights through a distinct mechanism, possibly a collective system of administration, or a specific role for government agencies in monitoring infringements of rights.

48. *Sui generis* systems could also include appropriate institutional mechanisms for effective implementation and enforcement. Such institutional mechanisms could include establishment of administrative and judicial review processes regarding the granting of access to traditional knowledge on the basis of possible environmental, cultural or social impacts.

K. Relationship to other laws

49. *Sui generis* systems need to be accommodated within the existing legal framework of the State, subject to necessary adjustments. This will involve:

- (a) National intellectual property laws;
- (b) Any laws specifically related to the administration of the affairs of indigenous and local communities;
- (c) Laws for the management of biological diversity and the environment;
- (d) Laws addressing access to genetic resources and benefit-sharing.

L. Extra-territorial protections

50. One of the problems with *sui generis* systems is that protection afforded to traditional knowledge in one country, may not be afforded to it in another. To address this issue bilateral and multilateral agreements could be considered to set minimum standards. Switzerland has suggested that 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, that is, in situations where some components are regionally based. A *sui generis* system could then be circumvented by using the same knowledge from another country with no protection. A multilateral framework may therefore be necessary to ensure protection of all stakeholders involved.^{26/} It remains open to States in their establishment of national laws for the protection of traditional knowledge to provide for the protection of foreign expressions on the basis of national treatment or reciprocity. In this way, networks of national laws, each providing for reciprocal protection of foreign expressions of traditional knowledge could eventually lead to sub-regional, regional and even interregional systems of protection.^{27/}

51. Impediments to establishing extra-territorial protections include situations in countries which have no indigenous and local communities within the meaning of Article 8(j), and those countries that do not recognize rights of indigenous and local communities within their jurisdiction that are recognized in other countries.

^{26/} UNEP/CBD/TKBD/1/2 1997

^{27/} WIPO/GRTKF/IC/4/3, para. 109

VII. EQUITABLE SHARING OF BENEFITS ARISING FROM THE UTILIZATION OF TRADITIONAL KNOWLEDGE, INNOVATIONS AND PRACTICES

52. Benefit-sharing has been an important issue in discussions regarding the protection of traditional biodiversity related knowledge. A number of national *sui generis* systems address this issue in countries such as Brazil, Costa Rica, India and the Philippines. For example, Brazil, in its Provisional Measure N.2186-16 of 23 August 2001 provides in its article 24 that the benefits arising from economic exploitation of a product or process developed from samples of genetic heritage components and associated knowledge, shall be shared in a fair and equitable way between the Contracting Parties. According to article 25, benefit-sharing may include: sharing of profits, payment of royalties, access and transfer of technologies, licensing, without cost, of products and processes; and capacity-building of human resources. In addition, article 21 provides that the institution receiving associated traditional knowledge shall facilitate transfer of technology for the preservation and use of that traditional knowledge for the national institution responsible for access and dispatch of the traditional knowledge.

53. Another example of legislation including benefit-sharing provisions related to traditional knowledge is the Indian Biological Diversity Act 2002. It provides in article 2 (a) that benefit claimers include holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application. Article 21(1) also provides that the National Biodiversity Authority “shall ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practise associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.” Benefit-sharing mechanisms are also included in article 21(2).

54. 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.

55. A number of additional considerations, which may also need to be taken into account in the further development of the benefit-sharing components of *sui generis* systems, are examined below.

56. In considering the issues surrounding access to biological resources and benefit-sharing, it is helpful to distinguish between the physical biological resource itself and the associated traditional knowledge. It may also generally be the case that the associated knowledge may be more valuable than the resource itself.

57. With regard to biological resources, while the preamble to the Convention reaffirms the sovereign rights of Parties over their biological resources, national circumstances dictate the status that indigenous and local communities may have with regard to those resources. This status may vary in accordance with, for example, constitutional, domestic treaty, national and sub-national laws. In some countries, the nature of indigenous and local community rights remains unresolved. In cases where such rights have been determined by the courts or by law, they may not be consistently applied among the indigenous and local community population. While some indigenous/local communities may have ownership rights to land and the biological resources found on it, neighbouring communities that share essentially the same resources may have usufructuary rights only, or not have their rights recognized at all. Yet they may share the knowledge and customary rights associated with those resources.

58. In many indigenous and local communities, while ownership may be communal, the nature of that ownership may be expressed more in terms of personal responsibility, as custodians, stewards, etc., and particularly with regard to who has the right to give permission to access it. 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.

59. The economic value of genetic resources and associated traditional knowledge can vary enormously depending on the needs of particular industries, availability of the genetic resource, whether there is a need for ongoing supply, and the usefulness of knowledge. For example, the main value of genetic resources to the pharmaceutical industry is less in the genetic resource itself than in the intellectual property that can be generated from that resource through research and development. Even within the pharmaceutical industry there are widely varying estimates of the economic value of raw genetic material.

60. There will be a need for an accurate appraisal of the potential economic benefits to indigenous and local communities arising from the biotechnology industry as a whole, taking into account its different sectors (i.e., pharmaceuticals, natural therapies, agriculture, personal care products, food and beverages, etc.). For example, whereas bioprospectors working for pharmaceutical companies may require only a one-off collection of a small amount of a particular biological resource, the food industry may require a regular supply of a particular plant as a special food ingredient, which may ultimately give rise to the need for the commercial production of that species. Such a situation may give rise to the establishment of a community-based industry with considerable value-adding potential.

61. Another factor having a major bearing on benefit-sharing arrangements will be the geographic range of the biological resource for which access is being sought. In the case of a species with a wide geographic range and which is found on the lands of a number of different indigenous and local communities, this can be very complex. This also raises issues of prior informed consent: while one community may grant such consent, another may withhold it. The nature of traditional rights may also vary from one community to another in accordance with the customary laws of each community. A particular species may have a different significance in the cultural, economic, and religious life of different communities. The number of indigenous and local community stakeholders, and the nature of their interests in a particular wide-ranging species may therefore vary considerably. Establishing beneficiaries is therefore likely to be difficult, and could be facilitated by establishing and maintaining a register of holders of traditional knowledge related to identified components of biological diversity.

62. In the case of a species with a narrow range, and in comparatively rare circumstances some species will be endemic to the territory of a particular indigenous/local community, then it might be considered that that community would be entitled to exclusive rights and benefits arising from access to their traditional knowledge associated with such a genetic resource.

63. Some policy analysts have noted the need to distinguish between the need to access biological resources for the purposes of “pure research” (or “academic research”) as distinct from research that has a commercial purpose in mind. This distinction is made, for example, in the access application process under the Philippines Executive Order No. 247. In reality, however, the boundaries between the two are often blurred.

The value of traditional knowledge to research and development

64. In order to determine appropriate levels of benefits in an access and benefit-sharing arrangement, some consideration could be given to the roles of both biological resources and associated traditional knowledge in the research and development process, as it is first of all necessary to assess the value of both the biological resource and any associated traditional knowledge in an access and benefit sharing arrangement. The value of the knowledge associated to a particular resource varies depending on the sector: traditional knowledge is extremely valuable in conservation, in identifying the medicinal properties of certain plants, and in agriculture, but not much used in the biotechnology sector, which is characterized by mass sampling and mass screening for bioactive molecules.

Determining the nature of the benefits

65. The nature of the benefits that could be anticipated from accessing biological resources and associated traditional knowledge are broadly of two kinds: monetary and non-monetary. Appendix II of

the Bonn Guidelines contains an indicative list of both. While not specifically tailored to the needs of indigenous and local community providers of biological resources and associated knowledge, many of the listed benefits could nevertheless be negotiated with such communities. Because direct payment of monetary benefits to indigenous/local communities (or particular individuals or groups) may not be practical or appropriate in some instances, other forms of benefits could be considered.

66. Institutional collectors/researchers may be better positioned to provide capacity-building benefits (e.g., technology transfer, training, repatriation of information concerning traditional knowledge of species held in institutional collections and recorded long ago - and as referred to in Article 17, paragraph 2 of the Convention). In an analysis of a number of access agreements negotiated under selected access regimes in overseas countries, carried out by Columbia University for the Biodiversity Action Network, it was concluded that:

“The main benefits to be obtained from access agreements will most likely be non-monetary, i.e., capacity building, technology transfer, joint research, and training (...) Many of the access agreements reviewed (...) strongly emphasize the training and capacity-building responsibilities of the foreign parties. Therefore training and capacity-building, as emphasized by these agreements, are likely to be much more important than monetary benefits in the short and long term. They may also address conservation goals in a shorter term.”^{28/}

67. It was therefore recommended that, when establishing agreements, all parties should acknowledge that benefits obtained from access will for the most part be non-monetary, and that monetary benefits may be elusive. Education of resource owners should emphasize that long-term royalty benefits are unlikely. ^{29/}

68. Monetary benefits, particularly in the form of royalties, may prove illusive and therefore access and benefit-sharing arrangements should also take into account non-monetary benefits. These benefits make take the form of capacity-building, including information, technology and training to foster new, local industries that in turn provide sustainable economic growth.

69. Capacity-building could also include the training of local people in taxonomy. Some countries are taking a less traditional approach using minimally trained local parataxonomists, which also allows for ready access to knowledge of indigenous people. This approach involves collaboration between professionally trained taxonomists and parataxonomists to the mutual benefit of both parties enabling an important contribution to be made to, for example, the Global Taxonomy Initiative and the International Initiative for the Conservation and Sustainable Use of Pollinators. Researchers are able to draw upon the expertise of local people and local people are able to learn valuable skills. Adoption of such an approach would also contribute to the increased involvement of indigenous and local communities, and widen the range of benefits those communities might derive from the access system adopted.

70. Bioprospecting activities may also provide information that can be shared with indigenous and local communities for conservation and management purposes. For example, the discovery of populations of threatened species (which, in the case of plant species, can provide the genetic material that can be used to propagate the species), identification of rarity, the conservation status of a population of a particular species, threats to a species because of alien species encroachment, or identification of alien species infestations.

VIII. RECOMMENDATIONS

71. The Ad Hoc Working Group on Article 8(j) and Related Provisions may wish to recommend that the Conference of the Parties at its seventh meeting:

^{28/} Columbia University School of International and Public Affairs 1999. *Access to Genetic resources: An Evaluation of the Development and Implementation of Research Regulation and Access Agreements*. Report prepared for the Biodiversity Action Network by the Environmental Policy Studies Workshop 1999. Columbia University, New York, USA. pp. 86-87

^{29/} Ibid.

- (a) *Invite* Parties, Governments, relevant organizations and other stakeholders to identify terms that may require definition and to provide tentative definitions of such terms;
- (b) *Request* the Executive Secretary on the basis of submissions by Parties, Governments and relevant organizations, to prepare a compilation of terms and tentative definitions and to submit a report thereon to the Working Group on Article 8(j) and Related Provisions at its next meeting;
- (c) *Invite* Parties, governments and relevant organizations to communicate to the Secretariat any relevant information on existing indigenous, local, national and regional *sui generis* systems for the protection of traditional knowledge relevant for the conservation and sustainable use of biological diversity;
- (d) *Request* the Executive Secretary to compile this information and make it available through the clearing-house mechanism;
- (e) *Take note* of the elements for *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity and request the Working Group on Article 8(j), with the collaboration of relevant international organizations such as WIPO, to further develop these elements;
- (f) *Invite* Parties and Governments to consider appropriate measures, with the involvement of indigenous and local communities, to implement at the national level elements of *sui generis* systems that may be relevant to their specific circumstances, with a view to ensuring the protection of traditional knowledge;
- (g) *Invite* WIPO to continue to cooperate with the Convention relating to the protection of traditional biodiversity related knowledge to ensure complementarity and mutual supportiveness between the work of the Convention and that of WIPO in this field.

*Annex***TERMINOLOGY**

1. The present annex sets forth several key terms that may be most relevant in discussions on *sui generis* systems for the protection of traditional knowledge and provides a short commentary for each.

A. *Indigenous and local communities*

2. While the term “indigenous and local communities embodying traditional lifestyles” is used in the Convention, many countries and indigenous and local communities use different terms. This reflects not only the diversity of situations between countries, but also within countries. However, “indigenous” and “local” are generally not seen as synonymous and there would appear to be a preference to use one or the other in national legislation. With regard to “indigenous community” other terms are often used in national legislation, such as “indigenous people/s”, “indigenous populations”, “Indians”, “native communities”, “A/aboriginal people/s”, “tribal people/s”, and “First Nations”.^{30/} Work has been undertaken on definitions of “indigenous”, or who constitutes an indigenous person/people, in the Working Group on Indigenous Populations of the Commission on Human Rights, and the International Labour Organization in relation to Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. It should also be noted that the Convention to Combat Desertification uses the terms “local populations” and “local communities”, but does not define them.

3. Another term/concept has also emerged, namely, “cultural community”, which, depending on national circumstances, may be used to encompass both indigenous and local communities. This term is used in the UNESCO first preliminary draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage but not defined.^{31/} The Indigenous Peoples Rights Act 1997 of the Philippines, in addition to “indigenous peoples”, also employs a variation of this term, namely, “indigenous cultural communities”.

4. Local communities in many countries are comprised of people who are indigenous to the country. However, definitions of “indigenous people/s” which largely refer to such people/s as “colonized people/s”, as in the case of definitions based on the work of the Working Group on Indigenous Populations of the Commission on Human Rights, in many cases are considered inappropriate. For example, it has been said that in Africa “a definition of indigenous people in terms of colonized people and colonizers, or generations of settlers, is out of date with both past experience and recent reality”.^{32/} This situation notwithstanding, the African Model Law for The Protection of The Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (the African Model Law), for example, only employs the term “local community”, even though members of such communities, in most cases, are also indigenous. Article 1 of the African Model Law defines local community as “a human population in a distinct geographical area, with ownership over its biological resources, innovations, practices, knowledge, and technologies governed partially or completely by its own customs, traditions or laws”.

5. In decision 391 of the Andean Community, on a common regime on access to genetic resources, a single definition is used to embrace communities of three distinct ethnicities. In article 1, a native, Afro-American or local community is defined as “a human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, that is governed totally or partially by its own customs or traditions or by special legislation and that, irrespective of its legal status, conserves its own social, economic, cultural and political institutions or a part of them”.

^{30/} See also WIPO/GRTKF/IC/1/3, Annex 3, p. 2.

^{31/} CLT-2002/CONF.203/3, Paris 26 July 2002

^{32/} Ambassador Sophie Asimenye Kalinde, OAU Permanent Observer to IGC, 3rd Session June 13-21, 2002, Intervention, para 13.

6. Practice to date suggests, therefore, that no single definition of “indigenous and local community” would find acceptance worldwide and that governments prefer to adopt definitions which not only reflect the spirit and requirements of Article 8(j), but also their national circumstances.

B. Traditional lifestyle (embodying a traditional lifestyle)

7. All communities are, to some degrees, subject to the outside influences of the modern world and thus their cultures and lifestyles are experiencing change. For many indigenous and local communities, many aspects of their traditional ways of life have undergone considerable change with the introduction and access to new technologies, while core values relating to their traditional view of the world have remained comparatively constant. In today’s world, it is therefore exceedingly difficult to determine what is or is not, or who is practising, a “traditional lifestyle”, and particularly for definitional purposes when constructing a law.

8. In some cases “traditional lifestyle” is bound to ethnic identity, and the national constitutions and laws often define or accommodate the ethnic diversity of their populations with due regard to their country’s historical and social evolution. In some cases, members are accorded “status” in accordance with domestic laws, taking into account increasing relationships between different segments or ethnic groups that comprise the population. This “status” is usually accorded/defined on the basis of kinship and descent, and may or may not take into account traditional customs governing such matters.

C. Knowledge, innovations and practices

9. While the phrase “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles” is used in the Convention on Biological Diversity, how these terms are defined and used in national legislative contexts may vary from one country to another. For example, a definition which limits knowledge, innovations and practices to that relevant to the conservation and sustainable use of biodiversity (as in the Andean Community decision 391, article 1) as opposed to a comprehensive, holistic definition which includes traditional knowledge as part of a broader definition which encompasses cultural expressions, folklore, etc, in which traditional knowledge could be referred to as a sub-class of either (as is the case in the Philippines Indigenous Peoples Rights Act 1997).

10. In the first approach, efforts to protect traditional knowledge, particularly from an intellectual property perspective, may tend to focus on its more technical aspects, such as plant breeding, animal husbandry, conservation and sustainable use technologies, and medicinal remedies. Age-old bodies of traditional knowledge also have implications with respect to the public domain. The term “innovations”, which can also imply inventions and improvements, also has intellectual property implications, particularly in the domain of patents, plant breeders rights and industrial property generally. Ownership of, and rights to innovations both within a community (including individual rights within a community) as well as those outside a community who innovate and invent using a component of traditional knowledge, pose challenging issues in creating workable *sui generis* systems to protect traditional knowledge, innovations and practices.

11. The term traditional knowledge attracts a number of variants, such as traditional ecological/environmental knowledge, indigenous knowledge, community knowledge, local and traditional knowledge. Of particular note, however, is the use of the phrase “traditional and local technology, know-how and practices” used in Article 17.1 (c), 18.2 (a) and (b) of the Convention to Combat Desertification, which may be seen as synonymous with the “knowledge, innovations and practices” of Article 8(j) of the Convention on Biological Diversity. For the purposes of the Convention to Combat Desertification, “traditional knowledge” was defined by a group of experts to mean: subject matter which “consists of practical (instrumental) and normative (enabling) knowledge about the ecological, socio-economic and cultural environment. Traditional knowledge is people-centred (generated and transmitted by people as knowledgeable, competent and entitled actors), systemic (inter-sectoral and holistic), experimental

(empirical and practical), transmitted from one generation to the next and culturally valorized. This type of knowledge promotes diversity; it valorizes and reproduces the local (internal) resources”. ^{33/}

12. In the Andean Community decision 391, traditional knowledge is subsumed under the umbrella of the “intangible component” associated with genetic resources. “Intangible component” is defined as “all know-how, innovation or individual or collective practice, with a real or potential value, that is associated with the genetic resource, its by-products or the biological resource that contains them, whether or not protected by intellectual property regimes.” (article 1). The African Model Law, in article 1, community knowledge or indigenous knowledge “is the accumulated knowledge that is vital for conservation and sustainable use of biological resources and/or which is of socio-economic value, and which has been developed over the years in indigenous/local communities”.

13. Given the vast array of subject matter that could be potentially encompassed by the term “traditional knowledge”, “folklore” and “cultural expressions”, the WIPO Intergovernmental Committee, in order to better delineate the scope of the subject matter in respect of the application of intellectual property protection, ^{34/} has suggested that the term “traditional knowledge” be used more to refer to technical knowledge, and that this term be more closely allied to the kinds of traditional knowledge, innovations and practices referred to in the Convention on Biological Diversity. From an intellectual property perspective and for the purposes of framing *sui generis* legislation, traditional knowledge as technical knowledge places it more within the domain of patent and industrial property law, as distinct from folklore and cultural expressions, which raise issues more closely associated with laws relating to copyright and related rights. ^{35/}

14. Based on an approach whereby traditional knowledge is to be equated with technical knowledge, a working definition of traditional knowledge, is a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. Bodies of traditional knowledge generally exhibit the following features:

- (a) Information about the various physical, biological, spiritual and social components of a particular landscape;
- (b) Rules for using them without damaging them irreparably;
- (c) Relationships among their users;
- (d) Technologies for using them to meet the subsistence, health, trade and ritual needs of local people; and
- (e) A view of the world that incorporates and makes sense of all the above in the context of a long-term and holistic perspective in decision-making. ^{36/}

15. Many commentators have emphasized that, in the context of traditional knowledge systems, innovation is a feature of such systems whereby tradition acts as a filter through which innovation occurs, that is, innovation and creation occur within a framework of tradition. ^{37/} In this context, it is traditional methods of observation, research and application and not always particular pieces of knowledge that persist.

16. Unlike the term “traditional knowledge”, few definitions of “innovation” in the context of Article 8(j) have been put forward. Under article 1 of the African Model Law, innovation is defined as “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

^{33/} ICCD/COP(4)/CST/2, PARAGRAPH 30.

^{34/} WIPO/GRTKF/IC/1/3, Annex 4, and paragraphs 78-80.

^{35/} WIPO/GRTKF/IC/1/3, Annex 3, p. 2.

^{36/} UNEP/CBD/COP/3/19.

^{37/} WIPO/GRTKF/IC/4/3, para. 30.

biological material or any part thereof, whether documented, recorded, oral, written or in whatever manner otherwise existing”. In another model law, the Community Intellectual Rights Act, innovation:

“[S]hall include any collective and cumulative knowledge or technology of the use, properties, values and processes of any biological material or any part thereof rendered of any, or enhanced, use or values as a result of the said cumulative knowledge or technology whether documented, recorded, oral, written or howsoever otherwise existing including any alteration, modification, improvement thereof and shall include derivatives which utilize the knowledge of local communities in the commercialization of any product as well as to a more sophisticated process of extracting, isolating, or synthesizing the active chemicals in the composition of biological extracts used by the local communities. The knowledge is recognized complete with its rituals and sacredness as practised by the community.” ^{38/}

17. The term “innovation” can also be considered synonymous with the terms “invention” and “improvement” and can have clear implications with regard to intellectual property law, particularly patent law. Some argue that innovations based on traditional knowledge, and particularly where these are carried out by members of the local community, should be protected under a *sui generis* law/system – a solution offered under the Community Intellectual Rights Act and the South Pacific Model Law—while others argue that the protection of such innovations can be sought under the existing regime of intellectual property rights. The term “innovation” also has important implications in terms of *positive* and *defensive* measures in designing *sui generis* systems. The inclusion of *positive* measures should enable community members to have their innovations/inventions acknowledged, protected and rewarded without necessarily having to resort to standard forms of intellectual property protection. The latter option, however, should remain available.

D. Customary law

18. Customary law has been defined as “enforceable rules and norms of conduct existing within and applying to a tribal group or other community living within a socio-cultural system distinct from the dominant system of the state within whose territory the community resides”. ^{39/} In section 3 (f) of the Philippines Indigenous Peoples Rights Act 1997, customary laws refer to “a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective indigenous cultural communities/indigenous peoples”.

19. Many countries recognize customary-law systems within the legal framework of the State: for example, Malaysia, Indonesia and the Philippines. However, such recognition tends to be confined to customary laws regarding social customs, ownership and inheritance of land, and property, but does not extend to recognizing intellectual property rights in traditional knowledge. ^{40/}

20. If the recognition of customary law—or those elements relevant to the conservation and sustainable use of biological diversity—is to be part of *sui generis* systems for the protection of traditional knowledge, it may be necessary to incorporate a definition of such, or at least identify the salient elements in the system.

^{38/} In Mugabe J, Barber CV, Henne G, Glowka L and La Vina A (eds) 1997 *Access to Genetic Resources: Strategies for Sharing Benefits*. African Centre for Technology Studies, Nairobi, Kenya. p. 353

^{39/} Laird S (ed) 2002. *Traditional Knowledge and Biological Diversity*. Earthscan Publications, London, UK. p. 456.

^{40/} See Kutty PV, WIPO/GRTKF/STUDY/1, November 25, 2002, pp. 35-36.

21. Alternatively, it may be possible to codify relevant aspects of customary law. In countries, such as Malaysia, and in some parts of Africa, that maintain systems of legal pluralism, codification is practised. However, codification of customary law may run counter to the spirit of such law, particularly in non-literate communities. It may be possible in these situations to develop protocols or guidelines regarding relevant customary practices.

E. Customary use of biological diversity

22. It may be necessary to define, in general terms, what constitutes customary uses of biological diversity as this can raise certain legal and policy issues, particularly as many indigenous and local communities may no longer use traditional technologies for hunting, gathering, growing and preparing particular biological resources for food and other customary purposes, although the original (traditional) purpose or reason for using the biological resource remains. From this perspective, “customary use” may need to be defined *vis-à-vis* laws regarding the “taking of wildlife” emphasizing the overall purpose of taking the biological resource rather than the manner.

23. The customary use of biological diversity may also be considered an “access issue” within the context of policies for access to genetic resources and benefit-sharing. Access by outsiders to biological resources on lands and waters traditionally used or occupied by indigenous and local communities may threaten the sustainability of customary uses of biological resources, a matter addressed in the Bonn Guidelines (paras. 16 (a) (iii) and 16 (b) (ii)). Customary practices, including uses of biological resources, may be protected by being excluded from the purview of laws governing access to genetic resources, as is the case in Brazil law (see Article 8), the African Model Law and Andean Community decision 391 (see article 4(b)).
