

# Sui Generis Systems for the Protection of Traditional Knowledge

## *Information for the Secretariat of the Convention on Biological Diversity*

### *Submitted by:*

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This Information is submitted in response to the Notification on Decision VII/16 calling for cooperation with the preparatory work for the next meeting of the Working Group on Article 8(j) (Ref: SCBD/SEL/OJ/RR/43945). It focuses on the development of sui generis systems for protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity; existing sui generis systems and innovative measures supportive of customary laws; and the nature of customary laws relating to customary uses.

The information has been compiled by IIED and research and indigenous organisations working on the project "Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices". It is based on the emerging findings from the project, which began in January 2005. The project entails participatory research with indigenous and local communities to examine customary laws and practices for protecting traditional knowledge, and inform the development of appropriate sui generis systems. The management and protection of traditional rice, potato and maize varieties, and biodiversity-based medicines, is being explored with the following indigenous and local communities:

- Andean Quechua communities in the Potato Park, Cusco, Peru
- Kuna, Embera and Wounaan communities in Panama
- Maasai pastoralists in the Rift Valley and Mijikenda coastal forest communities, Kenya
- Yanadi tribals of Chittor District, Andhra Pradesh, India
- Lepchas and mixed communities in West Bengal and Sikkim, Eastern Himalayas, India.
- Indigenous farmers in the Bastar region of Chattisgarh, India.
- Traditional farming communities in Guangxi, Southwest China.<sup>1</sup>

Section I of this report explores the holistic nature of traditional knowledge and the development of sui generis systems to protect knowledge systems as a whole, including their biological, cultural and landscape components. Section II reviews existing sui generis systems and examples of innovative mechanisms based on customary law. Section III examines the nature of customary laws relating to customary use of biodiversity and traditional knowledge and the implications for sui generis systems. Section IV further develops the Elements to be considered in the development of sui generis systems, contained in the Annex to CBD COP Decision VII/16.

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Or visit IIED's website: [http://www.iied.org/NR/agbioliv/bio\\_liv\\_projects/protecting.html](http://www.iied.org/NR/agbioliv/bio_liv_projects/protecting.html)

## I. General Issues relating to sui generis systems for protection of traditional knowledge

Through their reliance on biodiversity and natural resources, indigenous and local communities have acquired an immense knowledge of these resources. Yet their accumulated knowledge is rapidly disappearing as the world becomes more culturally and biologically uniform. It is estimated that between 50% and 90% of the world's languages will have disappeared within 100 years<sup>2</sup>. Loss of languages is an indicator of loss of cultural diversity. According to the IUCN Task Force on Indigenous Peoples, the main threats to cultural diversity include extension of government control, unjust land policies, cultural modification policies and inappropriate conservation management<sup>3</sup>. Lack of recognition of traditional territories, resources and authorities, together with growing market and other external pressures, have steadily driven cultural and biological erosion. With globalisation these pressures are stronger than ever. It is therefore imperative to ensure that systems to protect traditional knowledge help to maintain and strengthen traditional knowledge systems, as well as protecting the rights of indigenous and local communities to control the use of their knowledge.

### *(i) Recognising the holistic character of traditional knowledge and innovation systems*

While there is a diversity of cultures and local knowledge systems, certain characteristics are common to many knowledge systems. In particular, the way in which traditional knowledge, biodiversity, landscapes, cultural and spiritual values and customary laws, are inextricably linked and together maintain the integrity of knowledge systems. Many indigenous and local communities have strong spiritual beliefs associated with biodiversity, including agricultural resources, medicinal plants, forests, mountains and rivers and the cosmos, which are perceived as sacred and as an interconnected whole. This holistic worldview is engrained with a conservation ethic which underpins the sustainable use and conservation of biodiversity and the maintenance of related traditional knowledge.

Developing effective sui generis systems for the protection of traditional knowledge, that conform with the obligation to respect, preserve and maintain knowledge, innovations and practices, requires a recognition of the holistic character of traditional knowledge systems and the holistic worldview of indigenous and local communities. Taking each element in turn:

- *Biological resources and biodiversity* cannot be separated from traditional knowledge for a number of reasons. Firstly, thousands of traditional crop varieties and livestock breeds are themselves the product or embodiment of knowledge of past and current generations of farmers which have developed, conserved and improved them. Secondly, according to the worldview of many indigenous peoples, knowledge and resources, ie. the intangible and tangible components, cannot be separated. They are used and transmitted together. Knowledge comes from spirits associated with biodiversity across the whole spectrum from varieties, to species and ecosystems (eg. sacred plants, forests and mountains).
- *Landscapes* provide the physical space for customary use of biodiversity and for sharing knowledge and resources between individuals and communities, which is vital for sustaining biodiversity and knowledge systems. Traditional knowledge and customary laws are often acquired and transmitted at particular sites in the landscape of spiritual significance such as sacred lakes, rivers, forests or mountains. Furthermore, traditional governance and belief

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<sup>2</sup> UNEP. (2000) Cultural and Spiritual Values of Biodiversity: A Complementary Assessment to the Global Biodiversity Assessment.

<sup>3</sup> Inter-Commission Task Force on Indigenous Peoples (1997). 'Indigenous Peoples and Sustainability: Cases and Actions', Utrecht: IUCN and International Books.

systems often operate at landscape scales, through customary institutions for management of common property resources. Sustainable use of biodiversity and related knowledge form a subset of sustainable land use systems. Where communities have lost their traditional territories or no longer have access to sacred wilderness areas, the use and transmission of knowledge is likely to be severely weakened, putting traditional knowledge into a process of decline.

- *Cultural and spiritual values* shape the social processes by which traditional knowledge is acquired, used and transmitted. 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 beliefs are closely interlinked with, and expressed in, *customary laws* which govern the way knowledge is acquired and shared and the rights and responsibilities attached to possessing knowledge. Customary laws and institutions ensure the conservation and sustainable use of biodiversity and the maintenance and proper use of related traditional knowledge.

#### *The Holistic Character of Traditional Knowledge - Examples from the Case Studies*

For Quechua communities in Peru, traditional knowledge comes from gods that reside in particular mountains, through rituals performed by shamans. The mountain gods are the teachers of knowledge and customary laws. Each mountain in the landscape has a particular god with a particular role (for agricultural productivity, social relations etc.) People are sent to a particular mountain for infringement of customary law.

The Himalayan Lepchas believe that the original seeds of their crops came from the mountain gods, which reside near the Kanchenjunga peak. In Sikkim and Kalimpong areas, there is a direct link between the prevalence of customary and spiritual values and the cultivation of traditional varieties of crops. For indigenous communities in Bastar, Chattisgarh, all deities are related to Mother Earth. Rice is considered as "Lakshmi", the goddess of prosperity, daughter of 'Brahmman' the God who is Creator of the Universe. It occupies prime place in all rituals and offerings, and is part and parcel of the folklore and mythology of the indigenous people.

Similarly, the Kuna, Embera and Wounaan communities of Panama believe that medicinal plants and knowledge are creations of God. According to their world-view, traditional medicine is an integral science with physical-biological, socio-cultural and environmental-spiritual elements interacting. The Yanadi tribals (India) traditionally make ceremonial visits to the forest to show respect to worship health goddesses and give reverence to the plants that keep them healthy. In the past, entire families used to go to the forest for NTFP collection and the head used to educate his family members about medicinal plants. The Maasai youth undergo a two-week initiation ceremony in the forested hills which serves as a formal induction in medicinal plants and their uses.

Some of the studies have found a significant decline in TK and genetic diversity in the last few decades. In the Eastern Himalayan communities, a key reason for this is reduction of farmers' landholdings due to land fragmentation. In Guangxi, China, key reasons are the introduction of modern varieties, limited cultivated land and unclear land rights. Among the Yanadi tribals in Andhra Pradesh, traditional knowledge is rapidly declining due to the relocation of communities from forests to villages, and policies which restrict access to forests. Alienation from the resource base and lack of involvement in forest management is making the Yanadi lose their knowledge about biodiversity, and traditional way of life and customs. Innovation processes have completely stopped. While tribals are fined for collecting medicinal plants, eucalyptus plantations are let in.

However, where communities have legal land title, such as the Potato Park in Peru, the Kuna in Panama, and indigenous farmers in Chattisgarh, traditional knowledge and belief systems have largely been maintained. This shows the critical importance of secure rights to land and natural resources in

order to preserve and maintain TK and biodiversity. But even where communities have legal title, their territories and sustainable land use systems are not necessarily secure. For example, governments sometimes encourage exploitation of natural forests on indigenous territories which are perceived to be unused, but which hold important spiritual value and sacred sites and are protected due to indigenous knowledge and cosmovision.

*(ii) 'Collective Bio-Cultural Heritage' as the basis for sui generis systems*

Thus, traditional knowledge does not exist in isolation but is intimately connected with biodiversity, landscapes, cultural and spiritual values, and customary laws. Its preservation and maintenance depends on these components of knowledge systems and their ongoing interaction. This means that sui generis systems should go beyond a narrow focus on protecting rights over knowledge, to include protection of rights to traditional resources and territories; protection and strengthening of cultural and spiritual values; and recognition of customary laws. Otherwise they risk doing little to preserve and maintain traditional knowledge and could accelerate its already rapid loss.

In order to reflect the holistic character of traditional knowledge and worldview of indigenous and local communities, sui generis systems should be based on the more holistic concept of 'Collective Bio-Cultural Heritage'. This concept emphasises collective rather than individual rights; addresses biodiversity and culture together, rather than separating them; and recognises traditional knowledge as 'heritage' rather than 'property' to reflect its custodianship and intergenerational character.

'Collective Bio-Cultural Heritage' can be defined as: "*Knowledge, innovations, practices of indigenous and local communities which are often collectively held and inextricably linked to traditional resources and territories; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.*" These components of knowledge systems are often linked to knowledge of cosmic forces, as part of indigenous 'cosmovision' or holistic worldview.

Key terms in the above definition can be further defined as follows:

- *Indigenous Peoples*: In accordance with ILO Convention 169, 'indigenous and tribal peoples' can be defined as:
  - tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
  - peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
- *Local Communities*: The human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihoods and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others.
- *Traditional Resources*: Tangible or intangible assets of biological, spiritual, aesthetic, cultural and economic value.
- *Traditional Territories*: Lands, forests and waters traditionally occupied, used or conserved by indigenous peoples and local communities.

Based on the concept of 'Collective Bio-Cultural Heritage', *Traditional Knowledge Protection* can be defined as: "Full recognition and protection of the rights of indigenous peoples and local communities to own, control, use and conserve their Collective Bio-Cultural Heritage, for livelihood security, and to restitution of heritage taken from them."

This holistic understanding of traditional knowledge is nothing new. A number of existing agreements, standards and concepts recognize the need for holistic rights-based approaches to effectively protect traditional knowledge. For example, the Statement of Principles and Guidelines for the Protection of Heritage of Indigenous Peoples of the UN Working Group on Indigenous Populations<sup>4</sup> emphasizes that the discovery, use and teaching of indigenous peoples' knowledge, arts and culture is inextricably connected with the traditional lands and territories of each people; and that control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and to its full protection.

The NGO resolution on farmers' rights at the FAO Conference in Leipzig 1996 emphasised the importance of recognizing that collective knowledge is intimately linked to cultural diversity, land and biodiversity and cannot be dissociated from either of these three aspects. Similarly, the concept of Traditional Resource Rights recognizes that protection of traditional knowledge will only be adequate if it is conserved, maintained and enhanced in-situ, as part of the lands, territories and cultures of indigenous and local communities<sup>5</sup>. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993), agreed by over 150 indigenous leaders, underlines that indigenous flora and fauna is inextricably bound to the territories of indigenous communities, and that land and natural resource claims must be settled in order to promote traditional production systems.

A number of international agreements on indigenous and human rights also recognize rights to land and traditional territories, natural resources and self-determination, as vital for the survival of indigenous peoples and cultures (eg. the Draft Declaration on the Rights of Indigenous Peoples, ILO 169 on Indigenous and Tribal Peoples, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights). The CBD Decision VII/16 recognises that the preservation and maintenance of TK are linked to continued stewardship by indigenous and local communities of biological resources on lands and waters traditionally occupied or used by them. This implies that the maintenance of TK is also linked to their continued stewardship of traditional lands and waters.

However, many international and national processes dealing with protection of traditional knowledge are taking a narrow focus on the intellectual aspect of knowledge systems, rather than being guided by the worldview and needs of traditional knowledge holders. This risks alienating the people without whose support they are unlikely to be effective. Recognition of indigenous peoples' right to control traditional knowledge forms part of their demand for the right to self-determination and to land and natural resources. As recently stated by the UN Permanent Forum on Indigenous Issues "international response to indigenous peoples' aspiration on traditional knowledge is very crucial to remedy historical injustice of indigenous peoples..."<sup>6</sup>.

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<sup>4</sup> E/CN.4/sub.2/1995/26, 1995. Proposal of Mrs Erica Daes.

<sup>5</sup> Posey D. (1996). *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*. IUCN

<sup>6</sup> UN Permanent Forum on Indigenous Issues. Background Note for the International Workshop on Traditional Knowledge, Panama City, 21-23 September 2005. PFII/2005/WS.TK

### ***(iii) Ensuring Full Community Participation and Leadership***

The right to self-determination of all peoples is recognised in international law on human rights, and should guide any efforts to protect traditional knowledge. It is enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Draft Declaration on the Rights of Indigenous Peoples. ILO Convention 169 on Indigenous and Tribal Peoples states that “the people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being” (Article 7).

Traditional knowledge, innovations and practices owe their existence to indigenous and local communities, and to no-one else. Respecting TK implies respecting their right to decide whether and how it may be used and on what terms. Traditional knowledge has intrinsic cultural, spiritual and social value for indigenous and local communities, as well as being essential for their livelihoods and survival. For indigenous peoples, it is the very essence of identity as a culturally distinct people.

Sui generis systems should therefore be developed and implemented with the full and active participation of indigenous and local communities, including in defining the subject matter of protection. Their opinions should carry far more weight than those of other actors in all matters relating to their cultural and intellectual heritage.

#### **Supporting Community Leadership through Action-Research**

IIED and its partners are taking a highly participatory approach to research on community knowledge systems, in order to ensure community leadership of the process and resulting sui generis systems. In Peru, for example, Quechua community members or ‘technicians’ take the lead in designing and conducting the research through local community learning groups, with ANDES providing back-up support. The methods for research build on Quechua traditional knowledge and research and analysis methods, combined with contemporary approaches for participatory research. Through this ‘emancipatory’ approach, which integrates research, capacity building and strengthening self-governance, the communities are taking leadership in the management of the Potato Park as a sui generis system, including in revitalising customary laws and institutions for natural resource management and developing local tools for protecting knowledge rights, biodiversity and livelihoods.

### ***(iv) Focusing on landscape and resource management as well legal & policy frameworks***

The effective protection of traditional knowledge or ‘Bio-Cultural Heritage’ requires local sui generis systems based on collective land tenure and traditional resource management, as well as legal and policy frameworks at national and international levels. Thus, sui generis systems should include the following key elements:

- 1) Legal protection of rights over Bio-Cultural Heritage: to protect rights to traditional knowledge, resources and territories, and cultural and spiritual values, and ensure the recognition of customary laws and institutions for biodiversity and traditional knowledge.
- 2) Community sui generis systems: to protect Bio-Cultural Heritage in situ and ensure community control over it, by strengthening traditional landscape and resource management systems, and developing local tools to protect traditional knowledge (community registers, protocols etc), based on customary laws and institutions.
- 3) Legal and policy coherence, to remove the negative impacts of natural resource, development and conservation policies and programmes on the maintenance of traditional knowledge and biodiversity by indigenous and local communities.

A focus on securing land tenure and strengthening landscape and natural resource management systems, based on customary laws and institutions, provides a means to:

- protect Bio-Cultural Heritage as a whole, including its landscapes and spiritual components, in order to maintain traditional knowledge and biodiversity;
- strengthen local institutions (ie. social structures and norms) which govern sustainable land-use and the management and maintenance of biodiversity and related knowledge; and
- strengthen the capacity of communities to assert their rights over their traditional resources and control their external use.

***(v) Taking a flexible and bottom-up approach***

Community sui generis systems should be based on existing customary laws and practices for conservation, sustainable use and access to and benefit-sharing of biodiversity and related knowledge in their particular ecological and socio-cultural contexts. National, sub-national and international sui generis mechanisms should provide legal and policy protection to support local sui generis systems of indigenous and local communities. They should provide the flexibility to enable a diversity of community-based sui generis systems to be supported. In large countries with significant cultural and ecological diversity (eg. India), it may be best at national level to just have common elements for developing and supporting sui generis systems, rather than a common sui generis mechanism. Even at community level, sui generis systems need to maintain flexibility. For example, protection needs can differ from crop to crop depending on whether they are subsistence or commercial crops.

While specific customary laws vary considerably between cultures and ecological contexts, and sometimes from community to community, there are considerable similarities in the underlying customary law principles or values of different cultures. National and international sui generis systems should seek to identify common customary principles or values, allowing flexibility for more specific community norms to also be recognised.

***vi) Developing Legal Frameworks for protection of Bio-Cultural Heritage***

Legal frameworks should recognise the rights of indigenous and local communities to their Collective Bio-Cultural Heritage including each of its components, and help to strengthen them in situ. The right to collective as well as individual property is already recognised in the Universal Declaration of Human Rights and the Draft Declaration on the Rights of Indigenous Peoples. Taking each component in turn, the following elements should be considered:

**Traditional knowledge, innovations and practices:** Recognition of the rights of indigenous and local communities to decide fully over the use of traditional knowledge, innovations and practices based on their free prior and informed consent. The rights arise out of the existence of knowledge, and are inalienable and transmitted between generations. The rights should include all traditional knowledge currently held and used by communities, and knowledge recognised by communities as their cultural heritage, including that which has already been disclosed to third parties or is available to the general public. These elements are consistent with (inter alia):

- the CBD Article 8(j) requirement to promote the wider application of traditional knowledge with the approval of indigenous and local communities;
- the Universal Declaration of Human Rights, which acknowledges the right to protection of moral and material interests arising from any scientific, literary or artistic production;
- the Draft Declaration on the Rights of Indigenous Peoples, which recognises the right to PIC and full ownership, control and protection of cultural and intellectual property.

- The UN-WGIPs Draft Principles and Guidelines on the Heritage of Indigenous Peoples, which recognises that indigenous peoples have the right to own, control and manage their cultural heritage, and to determine its access, transmission and use by others subject to their free, prior and informed consent. The principle of PIC also applies to cultural heritage that is already available to the general public.

**Traditional resources and biodiversity:** Recognition of rights of indigenous and local communities over genetic and biological resources which have been developed or improved by them, are customarily used or conserved by them, or are found on their traditional territories; including the right to decide over the use of such resources based on PIC. This means that the sovereign rights of states over natural resources, and their authority to decide over the use of genetic resources, is conditioned by the customary rights of indigenous and local communities over such resources, which must also be recognised. In other words, consistency should be not only with regimes that regulate access to and benefit-sharing from genetic resources but also with other instruments that address the right to determine access to genetic resources, notably existing indigenous and human rights frameworks.

These elements are consistent with:

- CBD Article 8(j) focus on ‘innovations’ as well as knowledge and practices; and 10(c), which requires states to protect and encourage customary use of biological resources.
- The FAO Treaty on Plant Genetic Resources, which requires governments to protect farmers’ rights and to promote their right to participate in decision-making relating to conservation and sustainable use of genetic resources.
- ILO Convention 169, which recognises the rights of indigenous and tribal peoples to the natural resources pertaining to their lands, including the right to participate in the use, management and conservation of these resources.
- ICESCR and ICCPR, which recognise the right of all peoples to freely dispose of their natural wealth and resources;
- the Draft Declaration on the Rights of Indigenous Peoples, which recognises rights to full ownership, control and protection of cultural and intellectual property, including genetic resources and seeds, and to own and control flora and fauna and other resources which they have traditionally owned or used.
- The UN-WGIPs Draft Principles and Guidelines on the Heritage of Indigenous Peoples, which recognises natural resources, including genetic resources such as seeds, medicines and plants, as part of ‘Cultural Heritage’, whose access requires the PIC of indigenous peoples.

**Traditional territories:** Recognition of the rights of indigenous and local communities to own, access and use the lands, forests and waters traditionally occupied, used or conserved by them. ILO 169 recognises the rights of ownership and possession of indigenous and tribal peoples over lands which they traditionally occupy; and the need to respect the special importance for the cultures and spiritual values of the people concerned of their relationship with the lands and territories which they occupy or otherwise use, and in particular the collective aspects of this relationship. Similarly, the Draft Declaration on the Rights of Indigenous Peoples recognizes rights to own, develop, control and use the lands and territories which they have traditionally owned or otherwise occupied or used.

The UN-WGIPs Draft Principles and Guidelines on the Heritage of Indigenous Peoples identifies “traditional lands, waters – including historical, sacred and spiritual sites” as cultural heritage, which indigenous people have the right to own, control and manage. Article 4 states that “Since indigenous peoples’ cultural heritage is intrinsically connected to their traditional



lands and waters, protection for indigenous cultural heritage shall also include measures to preserve and safeguard the environment that indigenous peoples traditionally inhabit” and “shall recognise that indigenous traditional lands and waters can only be adequately preserved if managed by the indigenous peoples themselves”. The UNESCO World Heritage Convention recognizes ‘cultural landscapes’ in the definition of cultural heritage, which often reflect specific techniques of sustainable land-use and a specific spiritual relation to nature, and whose protection is therefore helpful for the maintenance of biodiversity.

**Cultural and spiritual values:** Recognition of rights over cultural expressions, rituals and ceremonies, including rights to determine their use by others and prevent derogatory or unauthorised use; rights to freely practice and express cultural and spiritual values and beliefs; rights to ownership and control of sacred sites, areas and objects of spiritual and cultural significance; freedom from all forms of discrimination; and respect for cultural and spiritual beliefs in external policies, plans, programmes and projects which affect indigenous and local communities embodying traditional lifestyles. These elements are consistent with (inter alia):

- CBD Article 10 (c ), which requires states to protect and encourage customary use in accordance with traditional cultural practices.
- The Universal Declaration of Human Rights, which recognises the right to manifest religion or belief in teaching practice, worship or observance.
- ILO Convention 169, which requires states to develop systematic actions, including for “promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions”.
- The Draft Declaration on the Rights of Indigenous Peoples, which recognises indigenous peoples’ rights to control and protection of cultural property.
- The UN-WGIPs Draft Principles and Guidelines on the Heritage of Indigenous Peoples, which requires PIC for access to and use of indigenous cultural heritage.

**Customary laws:** Recognition of the rights of indigenous and local communities to manage their internal affairs and natural resources in accordance with their customary laws and institutions; and requirement for government institutions and other actors to recognise and respect the customary laws and institutions of such communities within the jurisdiction of their traditional territories. Customary law should also be recognised for matters relating to access or use of traditional knowledge outside traditional territories, by formal legal systems (including statutes and the courts) and by third parties. Where there is a conflict between customary law and formal law, the supremacy of customary law should be recognised both within and beyond traditional territories for matters relating to traditional knowledge and associated biological resources.

These elements conform with the right to self-determination of all peoples. ILO Convention 169 requires that “in applying national laws and regulations to the people concerned, due regard shall be had to their customs or customary laws” (Article 8). The Draft Declaration on the Rights of Indigenous Peoples requires full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources. The African Union Model Law on the Rights of Local Communities, Farmers, Breeders and Access to Biological Resources requires the recognition of customary law whether such laws are written or not. Recognition of customary law is also enshrined in the national Constitutions of a number of countries.

**Restitution of Traditional Resource Rights:** The Biodiversity Convention (Article 17.2) provides for repatriation or return of information of importance to indigenous and local

communities and relevant for conservation of biodiversity. The right to restitution of traditional lands, territories and resources, and cultural, intellectual and spiritual property taken without proper authorization is recognized by the UN Draft Declaration on the Rights of Indigenous Peoples, and the UN-WGIP Principles and Guidelines for the Protection of Heritage of Indigenous Peoples. In this context, the following elements should be considered:

- 1) Settlement of land claims on traditional territories by indigenous and local communities, and granting access to traditional territories and sacred sites for customary use.
- 2) Providing access for indigenous and local communities to genetic resources and lost varieties collected from their territories and held in ex-situ collections, through repatriation or return of resources.
- 3) Restitution of rights over traditional knowledge and resources on which patents have been obtained without their consent and approval.

#### ***vii) Developing Community-level sui generis systems***

Community-managed sui generis systems to protect Bio-Cultural Heritage should seek to strengthen traditional resource management systems, traditional knowledge and biodiversity conservation; protect traditional resource rights; and strengthen cultural and spiritual values and customary laws, as part of traditional livelihood systems, in the face of multiple external threats and opportunities. They should aim to protect the biological/material, intellectual/spiritual and landscape components of traditional knowledge systems at local level.

Elements for their development should include:

- *Secure legal tenure* to traditional resources and territories, including secure access to sacred wilderness areas, and restitution of rights to traditional resources and territories; and granting special status to such territories, for example as "Bio-Cultural Heritage Areas";
- Community-driven initiatives to *strengthen traditional NRM systems*, based on customary laws and institutions, and to improve livelihood opportunities associated with traditional production systems.
- Community-driven initiatives to *develop sui generis tools* for protection of rights over traditional knowledge and genetic resources, based on customary laws and practices, such as protocols for researchers and access and benefit-sharing, and community registers of biodiversity and traditional knowledge.
- Community-driven *action-research to identify relevant customary laws and institutions* or derivatives for a new situation (ie. external use) as the basis for all the above activities.
- *Supportive legal and policy frameworks* at sub-national, national and international levels.

#### ***viii) Improving Coherence across Policy, Laws and Programmes***

Policies, laws and programmes in different sectors have tended to ignore the value of traditional knowledge, the role of indigenous and local communities in biodiversity conservation and their close dependence on natural ecosystems, and to promote 'modern' forms of development. These need to be reviewed to prevent continued undermining of, and integrate support for, traditional knowledge, cultural and biological diversity and the rights of indigenous and local communities – objectives which are already recognised in national Constitutions and statutes in many countries.

Elements to consider include the following:

- *Conservation and protected area policies*: In many cases National Parks have been designed without the participation of indigenous and local communities and completely neglecting traditional knowledge in maintaining biodiversity. They have been designated on ancestral territories, restricting access by communities, and in some cases displacing

communities. There is an urgent need for legal recognition of, and investment in, Community Conserved Areas where biodiversity is conserved and managed by indigenous and local communities, as recognised by the CBD COP7 Programme on Protected Areas. In particular, support for CCAs such as 'Bio-Cultural Heritage Areas' which include a specific focus on protecting cultural diversity and associated landscapes. This may also require the return of some protected areas to customary use by communities.

- *Natural Resource policies* (eg. forest and agriculture), must ensure that exploitation of resources on traditional territories and waters is subject to the PIC of local and indigenous communities. Agriculture policies which promote intensive production and agri-business priorities over those of indigenous and local communities need to be reviewed with the full participation of indigenous and local communities to address threats (eg. of GM crops) to traditional knowledge, livelihoods and biodiversity, and recognise the contribution and rights of traditional farmers to genetic resources. Associated IPR policies eg. for protection of plant breeders rights and extension of IPRs to seeds pose a growing threat to indigenous communities and farmers in many countries, for whom it may be a matter of survival.
- *Development policies* also need to be reviewed, for example to ensure: education programmes integrate traditional languages, biodiversity and traditional knowledge; health policies recognise the role of traditional healers; racial discrimination is addressed; religious organisations respect the right to traditional beliefs and practices; and trade policies respect the rights of indigenous and local communities over their traditional resources.
- *Government and decentralisation policies* should allow traditional institutions to retain responsibility for community decision-making according to customary laws, including for natural resources, rather than taking away authority from them.

## **II. Existing sui generis systems & innovative mechanisms supportive of customary law**

Some existing sui generis IP rights resemble conventional IP systems and seek largely to protect the interests commercial actors, while others which are distinct from current intellectual property systems are more responsive to the needs and worldviews of indigenous and local communities.

Plant breeders rights contained in the UPOV Convention mainly aim to protect the commercial interests of plant breeders, rather than the rights of farmers. While the WTO TRIPs agreement allows countries to provide plant variety protection by an effective sui generis system, developing country sui generis laws for plant variety protection have largely adopted the UPOV model rather than a distinct model which responds to the unique needs of their country's indigenous and local communities. India's Protection for Plant Varieties and Farmers Rights Act, for example, aims to protect both plant breeders and farmers rights, but its provisions are weighted in favour of plant breeders and risk undermining farmers' customary use and knowledge systems which depend heavily on the use of farm saved seeds. Similarly, India's National Biodiversity Act has offered few possibilities for indigenous and local communities to participate in decisions concerning access to genetic resources and traditional knowledge.

Other sui generis laws, such as the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, which recognise the need to support the customary laws of communities, provide more appropriate frameworks for protecting traditional knowledge in accordance with Article 8(j).

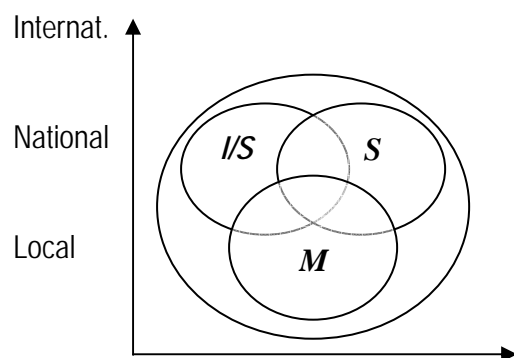
While existing IP systems are not appropriate models for developing sui generis systems for traditional knowledge protection, they can be useful to provide additional defensive protection

to complement positive sui generis protection. In particular, 'soft' IPRs such as collective trademarks, copyrights and geographical indications.

The **Potato Park in the Peruvian Andes** is a sui generis system which is being developed by six Quechua communities, with support from the NGO ANDES and the IIED-ANDES project on "Sustaining Local Food Systems, Agricultural Biodiversity and Livelihoods" (see [www.diversefoodsystems.org](http://www.diversefoodsystems.org)). It is a sui generis model because it provides protection based on models and elements which are different to those of current intellectual property systems, which protect individual rights and whose objectives are exclusively commercial. This responds to the fact that not even by incorporating new elements to existing IP systems can the continuation, dynamic and adequate protection of traditional knowledge be guaranteed, since structurally many traditional societies do not respond to the western system, but have their own methods of economic, political, social and cultural articulation.

Based on the model of an Indigenous Bio-Cultural Heritage Area, the Potato Park provides protection for three key components of knowledge systems: i) *Intellectual* and *Spiritual*; ii) *Material* (ie. biodiversity); and iii) *Spatial* (ecosystems and landscapes), at local, national and international levels. It is a positive mechanism for protection of collective rights over biodiversity and traditional knowledge, which seeks to maintain the agricultural character of the landscape, reduce poverty and sustain livelihoods, and ensure the historical continuation of culture, knowledge and collective indigenous rights to natural resources.

*The Potato Park sui generis system for TK protection*



The Potato Park uses collective land tenure and landscape management based on customary laws and institutions as the basis for positive protection, as well as 'soft' IPR tools to provide added defensive protection (eg. the Potato Park collective trademark). It aims to strengthen cultural and spiritual values and customary laws, in order to maintain the integrity of Quechua TK systems, to protect Collective Bio-Cultural Heritage in order to strengthen local livelihoods, and to promote the role of communities in biodiversity conservation. It comprises a number of community-led activities to strengthen traditional knowledge systems and enhance community control and rights over TK:

- identifying customary laws and institutions for the management of biodiversity, natural resources and traditional knowledge, and for access to genetic resources and benefit-sharing;
- strengthening traditional resource management systems, establishing a Community Conserved Area managed by Quechua communities, and developing a Park management plan;
- developing a database register of traditional knowledge relating to medicinal plants and native potato varieties, managed by the communities;

- packaging facilities for sale of medicinal plants for local needs, with part of the profits fed back to a communal Potato Park fund;
- developing community protocols for researchers and for ABS based on customary laws;
- establishing an agreement with the International Potato Centre (CIP) for repatriation of native potato varieties and an Inter-Community Agreement for Benefit-Sharing;
- establishing a local gastronomy group to promote traditional recipes based on native varieties; and
- engaging with local and national government and international processes to promote a more supportive legal and policy environment.

Customary laws and values are being used to shape all these activities. Plans are underway to develop low-impact eco-tourism in the park and market organic potatoes as 'nutraceuticals'. The identification of customary laws will enable the park communities to take advantage of these and other development opportunities whilst maintaining their traditional cultural values.

The **Agreement on the Repatriation, Restoration and Monitoring of Agrobiodiversity of Native Potatoes and Associated Community Knowledge Systems**, between the Association of Potato Park Communities and CIP, signed in December 2004, was also developed with support from ANDES (in collaboration with IIED). It is the first ever agreement between a scientific institution and local communities for the repatriation of genetic resources. It is a sui generis legal mechanism as it is not based on existing IP-rights, but on the customary laws of communities. It aims to promote the cultivation and maintenance of maximum diversity of traditional agricultural resources; ensure that genetic resources and knowledge remain under the custody of the communities and do not become subject to intellectual property rights in any form; promote the role of in situ and ex situ strategies in the conservation of agricultural biodiversity; and to implement the agreement with regard to traditional principles and common practices and the promotion of the rights and traditions of the indigenous communities.

Andean customary principles will be used to elaborate an Inter-Community Agreement for Equitable Benefit-Sharing, which will form an Annex to the agreement for the Repatriation of traditional potato varieties between CIP and the Potato Park communities. The main objectives of the Inter-Community Agreement are:

- to regulate the equitable sharing, between members of the six Potato Park communities, of the benefits generated by the CIP agreement;
- to maintain the free flow of resources between members of the Potato park communities and between the communities.

The benefits covered by the agreement include not only the return of potato seeds, but also financial benefits from the past and future use of potatoes collected from the park. Andes and the Potato Park communities are exploring Quechua norms for the distribution of wealth in order to identify principles for benefit-sharing based on customary law (see Section III).

### **III. The nature of customary laws and traditional protocols relating to customary uses**

The following working definition of customary law has emerged from the project: "Locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and are applied by community institutions to internally govern or guide all aspects of life". Andean principles, for example, have legal character because they provide the basis for the patterns of conduct to which Andean peoples adhere. They therefore give rise to locally recognised norms and the duty to respect these, their infringement always being sanctioned.

Customary law systems are flexible and evolving, in response to the needs of communities. Certain customary laws may be codified, or incorporated in community bye-laws or in national indigenous laws which include a mix of formal and customary law. However, it is important to note that in a traditional context customary laws are those which are orally held and currently recognized by community institutions.

Customary law principles have a strong spiritual character and are closely interlinked with belief systems associated with natural resources and landscapes. They are often based on fundamental values of respect for nature or Mother Earth, social equity and harmony, and serving the common good. For example, key customary principles of Quechua peoples are the following:

- *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 Pachamama (Mother Earth);
- *Duality*: means that everything has an opposite which complements it; behaviour cannot be individualistic, for example, in the union between man and woman; and that other systems or paradigms can be accepted.
- *Equilibrium*: refers to balance and harmony, in both nature and society - eg. respect for the 'Pachamama' and mountain gods; resolving conflicts to restore social harmony; and complementarity (eg. between ecological niches). Equilibrium needs to be observed in applying customary laws, all of which are essentially derived from this principle.

These customary law principles are very similar for indigenous communities in the other countries – in Panama, Kenya, India and China – even though they may be termed differently (eg. 'harmony' instead of 'equilibrium'). Customary norms have been weakened by colonial legal systems and the extension of government institutions. However, they are still evident in many traditional farming and indigenous communities and their practices. In Quechua communities for example, customary laws are dynamic and continue to be used for managing biological resources.

#### ***Customary Use and Protection of Traditional Knowledge – Examples from the Case Studies***

In the Eastern Himalayas, rice is exchanged for new seeds in equal proportion, based on the principle of reciprocity. The principle of duality is also manifested in the belief that mountain gods help with harvest and must therefore be offered part thereof, and that spoiling soils by introducing new inputs or chemicals will attract the wrath of Mother Earth. Traditional rice varieties and other seeds are shared freely within and between communities, including in neighbouring countries. Once seeds become unproductive, new varieties are obtained from within the village, or a neighbouring village (not from the market). In some cases, seeds are brought from neighbouring villages with brides, along with associated cultural and cultivation practices. Cultivation is a community affair, undertaken by members of different families which pool labour to work on each others' fields during field preparation, sowing and harvesting seasons. In addition, all members of the family from children to elders engage in cultivation activities together in the sowing season, a customary practice known as 'dastur'.

In Chattisgarh, indigenous communities also exchange seeds in equal measure of another variety, or seeds are borrowed for the season and returned after harvest with a 20-25% increased measure. Customary institutions have been eroded to large extent due to colonial rule and the introduction of state institutions and regulations, which rarely recognise customary principles. Thus, the underlying customary values are reflected only in the customs, activities and festivals of indigenous communities. The obligation to share resources is particularly relevant to seeds. This has been internalised through festivals and rituals which relate to cropping systems, seasons and natural cycles. Within a village, sharing and exchange of seeds is the only way of managing genetic resources. The Farming season

starts with a festival of seeds called the 'Akti' in Chattisgarh and 'Matti thyohar' in Bastar region among most indigenous people. All families bring their seeds of paddy in small amounts to a place of worship under the trees and perform a ritual sowing ceremony. Then the seeds are mixed together and taken back as equal portions to ones own fields. The customary practice of seed sharing does not exclude anybody from having access. Between communities seeds are also shared freely through kinship and marital relations.

Amongst the Yanadi, some medicinal knowledge is openly shared, notably common knowledge for everyday healthcare. But specialised knowledge of healers is kept secret and only shared with kith and kin. The names of the plants used for cure are not uttered loudly as people believe that this would make them loose their efficacy. In this way, the knowledge is protected from use by others. Even the plants and animals used in their preparation are kept secret and the resource base is passionately guarded.

The worldview of Kuna communities is based on solid principles of brotherhood, unity, reciprocity and solidarity, among other values, which are largely ignored in modern worldviews. The Kuna and Embera have customary norms to restrict transmission of medicinal knowledge to particular people who are considered worthy of apprenticeship – based on fundamental requirements such as mature age, positive attitude, moral image and vocation to learn traditional medicine. They must be people 'who act with love and wisdom', who will ensure the proper use of knowledge and safeguard the interests of the community. For the Kunas, each plant, illness and bit of TK has a different name in a scientific cultural language that stops the non-trained from accessing the knowledge. Nevertheless, medicinal plants are considered to be an essential part of nature and creations of God, along with related knowledge. They are believed to belong to God, and are therefore the collective heritage of indigenous peoples. No one can claim individual rights to them.

While specific norms vary considerably between different ethnic groups, ecological contexts and sometimes between neighbouring communities, a number of common features and principles relating to the customary use of biological diversity are evident across the different indigenous and local communities involved in the study. These and other findings relevant for the development of sui generis systems can be summarised as follows:

1. *Safeguarding the Free Exchange of Resources:* The free exchange of biodiversity and traditional knowledge between individuals, families, and neighbouring communities, including in neighbouring countries, is critical for the livelihoods and survival of indigenous and local communities embodying traditional lifestyles, the conservation and sustainable use of biodiversity and the maintenance of traditional knowledge. The obligation to share is particularly strong in relation to seeds, ensuring access to new seeds and knowledge, essential for sustaining subsistence economies that rely largely on biodiversity as opposed to markets. This means that sui generis systems must allow and promote the continued free sharing and exchange of genetic resources and knowledge within and between communities, by recognising collective heritage rights as opposed to protecting individual rights for commercial objectives through existing IP rights which restrict access to and sharing of resources for customary use.

2. *Recognising Collective Custodianship:* Medicinal plants and associated traditional knowledge are also freely shared, although in some communities the sharing of certain specialist knowledge may be restricted to elders, or family and kin, in accordance with specific norms. However, even where sharing is restricted, or where individual innovators play an important role, the belief that all knowledge and resources come from God implies a collective custodianship and a responsibility to use TK to serve the common good. Where customary institutions and values are eroding, as in many cases, it seems that the collective sharing, conservation and common good ethics are giving way to more individualistic values.

3. *Promoting Equal Exchange*: Seeds and crops are exchanged for an equal measure of new seeds of different varieties. This means that sharing of seeds increases the resource base of those that participate and results in the maintenance of biodiversity. Some communities pool their seeds and then share them out in equal portions during each sowing season. Similarly new seeds that enter the community are often shared out equally. Many indigenous and local communities are calling for ABS frameworks to facilitate access by communities to ex-situ resources, as well as facilitating access by external actors to community resources.

4. *Addressing both subsistence and commercial needs*: While the primary purpose of sui generis systems should be to protect TK for customary use for subsistence, they may need to include different systems to address protection of subsistence and commercial crops. For example, where communities have developed new varieties with valuable traits which are widely sought-after and wish to protect them as a commercial investment or prevent others from unfairly profiting. However, recognising collective custodianship may still be important if a crop with commercial value is the product of a tribe or community as a whole, and to safeguard the free exchange and sharing of resources amongst communities.

5. *Ensuring responsible use of traditional medicines*: Customary norms often include codes of ethics to ensure that medicinal 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.

6. *Conservation and sustainable use of biodiversity*: Indigenous and local communities very often have strict rules and practices for conservation of biodiversity, such as sustainable harvesting, restrictions or bans on harvesting trees or vulnerable species. These are often engrained in traditional beliefs and the need to respect mother earth in order to gain her fruits. Sanctions are often imposed on those that do not comply with conservation norms.

7. *Recognising customary authorities*: Customary laws are orally held and applied by customary institutions according to cultural values. A key factor driving the loss of cultural values and beliefs is the extension of government control and transfer of responsibilities from customary authorities to local government. This is reducing respect for elders and customary values, adding to the pressures on youth to leave their culture and traditions behind.

8. *Common property management systems*: Customary laws relating to customary use and biodiversity conservation and sustainable use have traditionally been associated with the management of common property resources. In many traditional systems, even individual or family held land and natural resources are under temporary user rights, rather than being individually owned, and cannot be sold.

9. *PIC and equitable benefit-sharing*: In accordance with the collective custodianship and resource management practices of communities, PIC and benefit-sharing processes should operate at ethnic group, or supra-community level, as well as attributing benefits and rights to particular communities and/or individuals in some cases. Engaging only with a single community or individual could undermine the collective values and practices which are so important for sustaining traditional knowledge systems, biodiversity and livelihoods. The research in the eastern Himalayas shows that genetic resources may be shared freely between communities in neighbouring countries (in this case India, Nepal, Bhutan and China). Collective custodianship of communities in different countries should also be recognised by sui generis systems, including in PIC and benefit-sharing processes.



The Kuna peoples have developed a Fundamental Law of Kuna Yala, based on customary laws and protocols. It requires any external researcher to present a proposal to the Kuna General Congress which submits it to a technical committee for initial evaluation and discusses it with the authorities of its 49 communities. If accepted, the researcher then also has to obtain permission from the specific community, which can be accepted or denied. If approved, the researcher can approach a knowledge holder who can also agree or deny access to knowledge. However, since the government does not recognise this regulation, in many cases external users have not approached the maximum Kuna authority but gone directly to individual knowledge holders, who due to economic need, have given up their knowledge for a small sum of money.

*10. Supporting subsistence economies:* Sui generis systems should primarily seek to address the subsistence and cultural needs of communities, rather than commercial objectives. For communities living traditional styles, monetary benefits may not be the priority. More important concerns may be to ensure control over, and access to, natural resources and territories customarily used or occupied by them, for ecological subsistence and cultural needs; access to ex situ collections of genetic resources taken from them, to increase their livelihood security and resilience (eg. to climate change); and preventing use which is unfair or offensive to cultural values and beliefs.

*11. Customary laws for benefit-sharing:* Participatory research on Quechua norms for distribution and redistribution of wealth has focused on how the Andean principles of Reciprocity, Equilibrium and Duality apply to equitable benefit-sharing. This has yielded a series of sub-principles, which will enable the identification of customary norms for distribution and redistribution of wealth. Particularly notable is their emphasis on equity, fairness, helping those in need and conservation values. (See Box for further details).

#### **Quechua Norms for the Distribution of Wealth or 'Benefit-Sharing'**

The principle of Reciprocity was identified by the communities as "Ayninkuy", understood as mutual and reciprocal support between community members through labour, services, goods and/or resources, with the commitment for its return in equal quantity, quality and opportunities in which it was received. This is an essential mechanism for the survival of Quechua communities outside the monetary economy. It is intensively practiced and has a clear orientating role for participation in biodiversity conservation and management as it permits exchange and hence redistribution of seeds of different species thus widening the resource base of those that participate. The communities also identified "Mink'anakuy", which is also widely practiced in the Andean world, and which is a mechanism for distribution of wealth to those in need of support (eg. orphans, widows, disabled or newly weds), without an obligation to return the support in equal measure.

The principle of Equilibrium yielded the following associated principles and concepts:

- "Rakinakuy" which denotes the equitable and proportional sharing of a benefit, good or service between participants, according to needs, capacities, responsibilities and contributions and/or efforts, and is also used for guiding impartial decision-making.
- Proportionality ("Chaninchay"), 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.
- Equal sharing ("Phasminakuy") whereby a good or service is shared equally between people, families or institutions – with an emphasis on sharing in half or equal portions.
- "Tupachiy" which seeks harmony between nature and man, 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.

The principle of Duality, known as “Yanantin” has a simple meaning but spiritual character, based on the understanding of the world, its parts and concepts, as comprising two components which are diametrically opposed but also complementary and vital. In this context, 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 agrobiodiversity 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 participating.

#### **IV. Elements to be considered in the development of sui generis systems for the protection of traditional knowledge**

This section further elaborates the potential elements to be considered in the development of sui generis systems identified in the Annex to CBD COP Decision VII/16.

##### **1. Purpose**

The purpose of a sui generis system should be to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities, and to recognise their right to control the use of their knowledge, based on their own vision, needs, customary laws and practices, and for their primary benefit.

Sui generis systems should take a holistic and rights-based approach to the protection of traditional knowledge in order to maintain the integrity of knowledge systems, and support the holistic worldview and fundamental needs of indigenous and local communities.

##### **Objectives**

The objectives and vision of sui generis systems should be as identified by indigenous and local communities, reflecting a country's cultural and ecological diversity. Rather than focusing only on protecting rights over knowledge, sui generis systems should protect traditional knowledge systems or 'Bio-Cultural Heritage' as a whole, by also protecting rights over biodiversity, landscapes, cultural and spiritual values and customary laws and institutions.

Key objectives should include:

*(i) Traditional Knowledge:* To recognise that traditional knowledge, innovations and practices are the collective heritage of indigenous and local communities; and that their use is subject to PIC of indigenous and local communities; including knowledge which is already available to third parties or the public.

*(ii) Biodiversity:* To recognise that biological and genetic resources which embody or are associated with traditional knowledge or are customarily or conserved used by communities, are the heritage of indigenous and local communities heritage, and that their use is subject to PIC of indigenous and local communities.

*(iii) Landscapes:* To ensure the continued stewardship and customary use by communities of their traditional lands, territories, waters and sacred sites. To protect and restitute ancestral rights to traditional resources and territories.

*(iv) Cultural and Spiritual Values:* To respect and strengthen cultural and spiritual values, and customary laws and institutions.

*(v) Customary Use:* To promote the customary use of traditional knowledge and biological, genetic and other natural resources by indigenous and local communities.

## Scope

The development of effective sui generis systems for protection of traditional knowledge requires systems at different levels, designed to support the existing sui generis systems of indigenous and local communities:

1. *Land tenure and resource management*: to protect 'Bio-Cultural Heritage' in situ and enhance community control over it, by recognising rights to traditional territories, strengthening traditional resource management systems, and developing tools to protect traditional knowledge (registers, protocols etc), based on customary laws and institutions.
2. *Legal mechanisms*: to protect the rights of indigenous and local communities over their Collective Bio-Cultural Heritage, including rights to traditional knowledge, resources and territories, rights to spiritual beliefs, and recognition of customary law; based on the PIC of indigenous and local communities.
3. *Policy coherence*: to remove the negative impacts of natural resource, development and conservation policies and programmes on the maintenance of traditional knowledge and biodiversity by indigenous and local communities and the protection of their customary rights over these resources.

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

Recognising traditional knowledge and associated biological and genetic resources as the Collective Heritage of indigenous and local communities which have developed, inherited and customarily used them, including:

- genetic resources such as traditional crop varieties and livestock breeds that have been developed by indigenous and local communities and therefore are the product or embodiment of traditional knowledge.
- genetic and biological resources with which traditional knowledge is associated and which are customarily used by communities or found on their lands, territories and waters.
- traditional knowledge and resources which have been collected and are available publicly.

Collective heritage rights may be accorded at ethnic group, tribe or community level, according to community understanding. Recognition of collective rights does not imply that individual rights cannot also be recognised. Rights are intergenerational and inalienable, as recognised by communities.

## 3. Set of relevant definitions.

***Collective Bio-Cultural Heritage***: Knowledge, innovations, practices and cultural expressions of indigenous peoples and local communities which are often held collectively and inextricably linked to traditional resources and territories; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.

***Indigenous Peoples***: In accordance with ILO Convention 169, Indigenous and Tribal Peoples may be defined as:

- a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

**Local Communities:** The human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihoods and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others.

**Traditional Resources:** Tangible or intangible assets of biological, spiritual, aesthetic, cultural and economic value.

**Traditional Territories:** Lands, forests and waters traditionally occupied, used or conserved by indigenous peoples and local communities.

**Heritage:** Is transmitted between generations and pertains to a particular people or its territory. It belongs to past, current and future generations, but is not the same as "property".

**Customary Law:** Locally recognized principles, and more specific norms or rules, which are orally held and transmitted and applied by community institutions to internally govern or guide all aspects of life

**Collective:** Held by a community or peoples, as well as by individuals within them, for the common good of the community or peoples. Innovations take place collectively and cumulatively. Recognition of collective rights does not imply loss of individual rights.

**Traditional Knowledge Protection:** Full recognition and protection of rights of indigenous peoples and local communities to own and control their bio-cultural heritage, including to conserve it for livelihood security, and to restitution of heritage taken from them.

**Farmer's Rights:** Inalienable rights to:

- Communal ownership of plant genetic diversity and domestic animal breeds, whose rich diversity embodies the knowledge and innovation of farming communities in its conservation, evolution and multiplication.
- Participate fully in any benefits derived from the improved use of these genetic resources
- Control access to land, water and genetic resources needed to sustain their livelihoods and provide for universal food security
- Reject any form of patents on, or genetically engineered forms of, plant and animal breeds, as this violates ethical values and cultural traditions.

4. 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 and genetic resources;
- (iii) customary rights to use and control traditional territories and sacred sites;
- (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.
- (iv) customary laws to regulate access to traditional knowledge and genetic resources and equitable benefit-sharing

5. 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.

- Requirement to obtain PIC from customary representative authorities of indigenous and local communities in accordance with their customary laws and practices.
- Requirement to gain the PIC of all neighbouring communities which share the same knowledge, as well as that of direct community and individual providers/holders.
- Requirement to share benefits collectively amongst ethnic groups and communities, according to heritage rights recognised by communities

- Recognition of the full authority of indigenous and local communities to set the conditions for access and use and benefits-sharing, including to their right to deny access and use.
  - Requirement to provide capacity building and information to communities to enable fully informed decisions and negotiations between users and communities to take place on an equal footing
6. Rights of traditional knowledge holders and conditions for the grant of rights.
- Rights arise out of the existence of knowledge (de facto rights)
    - Rights are inalienable and in perpetuity as long as the knowledge exists
    - Rights include rights over knowledge in the public domain
    - Rights are inter-generational ie. passed on to future generations
    - No registration of knowledge is required for rights to be legally recognised
7. The rights conferred.
- Rights over all components of Bio-Cultural Heritage – including rights over TK, biodiversity, traditional territories, customary laws, cultural and spiritual values.
  - Restitution of rights over Bio-Cultural Heritage, including traditional resources and territories.
8. A system for the registration of indigenous/local knowledge/Systems for the protection and preservation of indigenous/local knowledge.
- use of customary law principles for register design, management and decision-making
  - voluntary national registers, managed by indigenous and local community representatives
  - community controlled registers at local level
9. The competent authority to manage relevant procedural/administrative matters with regard to the protection of traditional knowledge and benefit-sharing arrangements.
- Establishing a competent authority which ensures that indigenous and local communities *take the lead in all decisions* regarding protection and maintenance of their knowledge and associated biological and genetic resources.
  - Ensuring balanced representation of indigenous cultural diversity and local community TK holders/resource user groups in the Competent Authority.
10. Provisions regarding enforcement and remedies.
- Enforcement and remedies according to customary law principles, institutions and processes, with formal legal backing.
11. Relationship to other laws, including international law.
- Consistency with international indigenous rights and human rights law, including the right to self-determination, to own and freely dispose of natural resources on traditional territories, to own and access traditional territories and waters, and to own and control access to and use of cultural and intellectual heritage.
  - Recognition of customary rights of indigenous and local communities over biodiversity, genetic resources and traditional knowledge, as well as national sovereignty over natural resources.
12. Extra-territorial protections.
- Recognition of rights of neighbouring indigenous and local communities beyond national jurisdictions as custodians of shared Bio-Cultural Heritage, and requirement to also obtain their PIC and include them in benefit-sharing processes.