

**Intergovernmental Committee on Intellectual Property and
Genetic Resources, Traditional Knowledge and Folklore**

Fifteenth Session
Geneva, December 7 to 11, 2009

REPORT

Document prepared by the Secretariat

INTRODUCTION

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) held its fifteenth session in Geneva, from December 7 to 11, 2009.
2. The following States were represented: Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, China, Colombia, Congo, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala, Guinea, Haiti, Holy See, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Kyrgyzstan, Lao People’s Democratic Republic, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Monaco, Morocco, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Rwanda, Samoa, Serbia, Singapore, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen, Zambia and Zimbabwe (101). The European Community was also represented as a member of the Committee.
3. The following intergovernmental organizations (“IGOs”) took part as observers: African, Caribbean and Pacific Group of States (ACP Group), African Regional Intellectual Property Organization (ARIPO), African Union (AU), Benelux Organization for Intellectual Property (BOIP), European Union (EU); Food and Agriculture Organization of the United Nations (FAO), Eurasian Patent Organization (EAPO), International Union for the Protection of New Varieties of Plants (UPOV), Islamic Educational, Scientific and Cultural Organization (ISESCO), Office of the High Commissioner for Human Rights, Organisation internationale de la Francophonie (OIF), South Centre, United Nations Children’s Fund (UNICEF), World Health Organization (WHO), and the World Trade Organization (WTO) (15).
4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: African Indigenous Women Organization; American Intellectual Property Law Association (AIPLA); Arts Law Centre of Australia; Center for Peace Building and Poverty Reduction among Indigenous African Peoples (CEPPER); Centre for International Intellectual Property Studies (CEIPI); Civil Society Coalition (CSC); Coordination of African Human Rights NGOs (CONGAF); CropLife International; *El Molo* Eco-Tourism Rights and Development Forum; Ethio-Africa Diaspora Union Millennium Council; Foundation for Research and Support of Indigenous Peoples of Crimea (FRSIPC); Global Education and Environment Development Foundation (GEED-Foundation); Ibero-Latin-American Federation of Performers (FILAIIE); Indian Movement “*Tupaj Amaru*”; Indian Council of South America (CISA); Indigenous Peoples (Bethchilokono) of Saint Lucia Governing Council (BCG); Indigenous Peoples Council on Biocolonialism (IPCB); *Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi)*; International Association for the Protection of Intellectual Property (AIPPI);

International Chamber of Commerce (ICC); International Council of Museums (ICOM); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Federation of Reproduction Rights Organizations (IFRRO); International Literary and Artistic Association (ALAI); International Publishers Association (IPA); International Seed Federation (ISF); International Society for Ethnology and Folklore (SIEF); International Trademark Association (INTA); International Union for Conservation of Nature (IUCN); IQ Sensato; Knowledge Ecology International (KEI); L'auravetl'an Information and Education Network of Indigenous Peoples (LIENIP); Maasai Aid Association (MAA); Max Planck Institute for Intellectual Property, Competition and Tax Law (MPI); Maya To'Onik Association; Mbororo Social Cultural Development Association (MBOSCUDA); Music In Common; Natural Justice; Nigeria Natural Medicine Development Agency (NNMDA); Organization for Social Action and Development (OSAD); Queen Mary Intellectual Property Research Institute (QMIPRI); Research Group on Cultural Property (RGCP); Rromani Baxt; Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Secretariat of the Convention on Biological Diversity (SCBD); The Assembly of Armenians of Western Armenia; The Federalist Society for Law and Public Policy Studies (the Federalist Society); The Sudanese Association for Archiving Knowledge (SUDAAK); Traditions for Tomorrow; Tulalip Tribes of Washington Governmental Affairs Department; West Africa Coalition for Indigenous Peoples' Rights (WACIPR); World Self-Medication Industry (WSMI) (52).

5. A list of participants is annexed to this report.
6. Document WIPO/GRTKF/IC/15/INF/2 provided an overview of the working documents distributed for the fifteenth session.
7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.
8. Mr. Wend Wendland of WIPO was Secretary to the fifteenth session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

9. The session was opened by Mr. Francis Gurry, the Director General of WIPO. The Director General recalled that the mandate of the Committee had been renewed at the recent meeting of the WIPO General Assembly. This was the Committee's strongest mandate yet and the Committee should rejoice that it had been adopted by consensus. This first meeting since the new mandate was established was very important in that it would give expression to the new mandate and demonstrate how it would work. The mandate had two main branches, the first establishing that the Committee would undertake text-based negotiations for an international legal instrument or instruments that will ensure effective legal protection for TK, GRs and TCEs. The Director General was hopeful that the Committee would now start the task of establishing a rhythm that was customary in all international instances when text-based negotiations were being undertaken, namely, that it examined a text and that Member States made amendments, comments and suggestions and that, thereafter, a new version of the text was prepared based on the amendments that had been submitted, if necessary with square brackets, and so on. The Director

General hoped that the Committee would get into such a rhythm of examination of texts which would lead to a consensus agreement on refined texts. The second important element of the mandate concerned the work program for the Committee for the coming biennium and the methodology that would be used by the Committee and by its intersessional working groups. This had already been the subject of some consultations amongst the membership but it would need to be further explored in the course of the week. It was extremely important that the Committee establish a very clear understanding of what the work program would be for the coming biennium. The Director General thanked Ambassador Alberto Dumont, the President of the General Assembly of WIPO, for the consultations that he had undertaken in the past weeks with regard to these two particular issues. The Director General also introduced Mr. Christian Wichard who was, as from December 1, 2009, Deputy Director General for Global Issues. "Global Issues" referred to any issue that did not fit exclusively into patents, trademarks, industrial designs, copyright, but was really of a cross cutting nature and foremost amongst these issues were the issues with which this Committee was concerned. Mr. Wichard would have overall responsibility for this Committee.

AGENDA ITEM 2: ELECTION OF THE CHAIR

Decision on Agenda Item 2

- 10. Upon the proposal of the Delegation of Yemen, on behalf of the Asian Group, seconded by the Delegation of Switzerland, on behalf of the B Group, the Committee elected as its Chair His Excellency Juan José Ignacio Gómez Camacho, Ambassador of Mexico, unanimously and by acclaim, for the remainder of the 2008-2009 biennium, the Committee's Vice Chairs, Mr. Abdellah Ouadrhiri of Morocco and Mr. Lu Guoliang of China, already having been previously elected for the same period.*
11. On assuming the Chairmanship, the Chair thanked the Committee for giving him the honor and great responsibility of chairing this session. There were perhaps two or three essential principles which should guide this session and the Chair's work. There was a great challenge facing the Committee as well as a great opportunity. This was a subject that was tremendously complex from a technical point of view. It was politically controversial, it was also very emotional. The election of the Chair was a vote of trust and the Chair assured that everything he did would be directed towards the success of the session. This session required leadership and guidance, which he was prepared to give. From time to time, the Chair would have to adopt decisions and shoulder responsibility for them and he requested the Committee's support and vote of confidence. As the Director General had said quite rightly, with the new mandate the Committee had a great opportunity. The Chair didn't see the success of the meeting as being anything other than discussing the substance. There had to be progress on the substance. This was the objective of the meeting. And as the Director General had said, this would set

the pace of the negotiations. The Chair welcomed the indigenous communities and hope that they would participate actively. The Chair only believed in diplomacy that created value for everyone, that did not impose solutions but that involved dialogue, transparency and a constructive approach.

AGENDA ITEM 3: ADOPTION OF THE AGENDA

12. The Delegation of Senegal, on behalf of the African Group, proposed that the Agenda be revised so that Agenda Item 10 ("Arrangements for the Intersessional Working Group Sessions") be discussed before discussion on substantive Agenda Items 7, 8 and 9.
13. The Chair stated that he respected the proposal of the Delegation of Senegal. The Chair also proposed that, as there had been a change in the mandate, this offered a great opportunity to commence work on substance. Second, the draft program for the session proposed an equal allotment of time to the Agenda items and he would ensure that there was adequate time to discuss Agenda Item 10 irrespective of which day it fell on. It was necessary to make progress on substance to have a more clear idea about the mandate and what type of sessions the intersessional meetings should be.
14. The Delegation of Yemen, on behalf of the Asian Group, stated that the Asian Group had not discussed the possibility of changing the Agenda and preferred that the Agenda remained as it was. The Asian Group did not wish to enter into a discussion on procedural measures at the expense of the texts that the Committee was supposed to be discussing and studying.
15. The Delegation of Switzerland, on behalf of Group B, stated that it attached great importance to the commencement of the substantive work of the Committee on the three items on the Agenda. Without diminishing the importance of the discussions and decisions needed on the intersessional working groups, the Delegation wished to keep the Agenda as it was. A substantive discussion would help to identify which questions ought to be dealt with in the intersessional process. Informal consultations on the intersessional process should continue, but it was preferable to begin substantive discussions in the plenary.
16. The Delegation of Ecuador, on behalf of GRULAC, believed that Agenda Item 10 was in the right place on the Agenda. This would make it possible during the days preceding the discussion on the Item to provide more input on the Item through informal discussions and conversations.
17. The Chair asked the Delegation of Senegal whether it would accept leaving Agenda Item 10 where it was on the Agenda and to begin informal consultations on that Item as soon as possible.
18. The Delegation of Senegal, on behalf of the African Group, stated that it was difficult to understand why it made more sense to discuss substance ahead of procedure. This was not the practice in United Nations meetings. The Delegation wished to consult with the African Group.
19. The Delegation of Yemen, on behalf of the Asian Group, stated that it supported the African Group's proposal.

20. The Delegation of Angola expressed surprise that a request by a Delegation and Group to alter the Agenda posed a problem.
21. The Delegation of Morocco proposed that, in the interim, discussions begin on Agenda Items 4, 5 and 6.

Decision on Agenda Item 3

22. *The Chair submitted the revised draft agenda circulated as WIPO/GRTKF/IC/15/1 Prov. 2 for adoption and it was adopted.*

AGENDA ITEM 4 ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4

23. *The Committee unanimously approved accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/15/2 as ad hoc observers, namely: Association of Nepal Kirat Kulung Language and Cultural Development (ANKKLACD), Engabu Za Tooro (Tooro Youth Platform for Action), Fundación Ngäbe-Buglé (FUNGOBE-B), Cercle d'initiative commune pour la recherche, l'environnement et la qualité (CICREQ), Rift Valley Voluntary Counsellors, and the Southeast Indigenous Peoples' Center.*

AGENDA ITEM 5: OPENING STATEMENTS

24. The Delegation of Spain referred to Circular 7767 prepared by the Secretariat, concerning the translation of Member States' contributions into different languages. It added that this was contrary, *ipso jure*, to the standards and practices of the United Nations. It stated that it was not able to consent to any potentially-binding document which had not been translated into Spanish and distributed with sufficient time for its analysis.
25. The Director General asked the Delegation of Spain which documents were the ones that were not available in Spanish. He said that he would be very pleased to rectify these omissions expeditiously.
26. The Delegation of Spain clarified that it was not referring to a document in particular but rather to Secretariat Circular 7767, dated October 28, 2009, the last three lines of which read as follows: "Documents received after that date [November 20] will be made available by the Secretariat in the form and in the

language(s) received, but translations will not necessarily be available in all languages for the meeting”.

27. The Director General clarified that the Circular referred to submissions by Member States and that the Secretariat had invited Member States to table their documents, submissions and proposals by a certain date in order to ensure that the Secretariat would then be able to provide them in all of the official working languages [of the Committee]. He added that it was intended that the Secretariat would do its best to make them available in the official working languages, but with no guarantee, would those documents, submissions and proposals be tabled after a certain date. He stated that it was an invitation on the part of Secretariat to try to ensure that it was in a position to do exactly what the Member States would like, namely to provide them with the documents in all of the official working languages.
28. The Delegation of Portugal, reminding that the languages and cultural diversity were very important values in the United Nations system, endorsed the statement made by the Delegation of Spain. It also thanked the Director General for his clarification, although it was of the view that the last three lines that were read by the Delegation of Spain did not mean necessarily that all the documents would always be available in all official working languages.
29. The Delegation of Algeria supported the statements made by the Delegation of Spain and thanked the Director General for his clarifications. It also believed that the working documents of the Committee should be available in the six working languages of WIPO.
30. The Delegation of Yemen, speaking on behalf of the Asian Group, thanked the Chair of the General Assembly for the informal consultations he organized before the present session of the Committee. It hoped that the new mandate of the Committee would help Member States to achieve a legal instrument to ensure effective protection of TK, GRs and TCEs. It stated that the focus of the Committee's work in the 2010-2011 biennium should build on the existing work carried out by the Committee and use all WIPO working documents including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKPIC/11/8(a), which were to constitute the basis of the Committee's work on text-based negotiations. It was of the view that the IWGs should be designed in a manner that expedited the realization of the mandate in submitting the text (texts) of an international legal instrument (instruments) which would ensure the effective protection of GRs, TK and TCEs, to the 2011 General Assembly, which should decide on convening a diplomatic conference. It stated that the Asian Group would remain very constructive and active during the discussions.
31. The Delegation of Senegal, on behalf of the African Group, stated that it had no intention of making an opening statement in the customary sense of the term as the Group had prepared a statement focusing on what it believed to be the most salient point, namely Agenda Item 10, which was scheduled for the end of the meeting. Wishing to explain the lack of a general statement, the Delegation of Senegal declared that Agenda Item 7 immediately placed the Committee at the negotiation stage, which exempted it from such statements. It also said that it was concerned with the time at which informal meetings had been scheduled, which it would have preferred to be held at 6 p.m. rather than in the morning.

32. The Delegation of Switzerland, speaking on behalf of Group B, said that delegations from Group B had come to this session with a constructive and result-oriented spirit for advancing the work of the Committee in accordance with the renewed mandate. It stressed the fact that it was nowadays clear to all stakeholders that GRs had assumed a great economic, scientific and commercial value with the emergence of modern biotechnologies, while TK and TCEs had gained new economic and cultural significance within a globalized information society. It was therefore crucial that WIPO, and more concretely the Committee, played a leading role in addressing the IP aspects of protecting, promoting and preserving TK, TCEs and GRs. The Committee had to do it not only in view of achieving the concrete mandate it received from the General Assembly last October, but also for the useful and timely contribution that it could deliver to the work undertaken in other international fora. It was for all these reasons that the Delegations pertaining to Group B recognized the need to strengthen the mandate of the Committee and played an active role during the negotiations that took place in order to give a real impetus to the substantive work of this Committee, while providing the flexibilities needed at this stage concerning the form of any legal international instrument(s) the Committee had to develop. In line with the renewed mandate of the Committee, the Delegation of Switzerland, on behalf of Group B, was of the view that TK, TCEs and GRs should be addressed on an equal footing, and that sufficient time had to be allocated to these issues also during the present session. The issues of terminology and policy objectives should be prioritized in the first phase of the text-based work in the Committee. Besides the importance to start without delay the work on the three substantive issues, it did not forget the necessity to take procedural decisions later during this session concerning the work to be undertaken in the IWGs. In order to facilitate these decisions, it was of the view that it might be useful to launch a process of informal consultations as soon as possible, in order to identify the different ideas and options and work towards a consensus by the end of this session. It thanked the Chair for the consultations he had undertaken over lunch time. It was fully confident that the Chair on the way you will ensure a proper time management for the work of the plenary, in order to ensure that all issues will be fully addressed during this week. It thanked the representatives of indigenous and local communities for having invited Group coordinators as well as representatives of Member States to their Consultative Forum that took place on December 6, 2009 and greatly appreciated the opportunity to have a direct and frank interaction and discussion with the representatives of indigenous and local communities. It was supportive of increasing such interactions and exchanges of views in the future. Group B remained committed to ensuring the participation of the representatives of indigenous and local communities in the work of the Committee and the IWGs, and the interaction between Delegations of Member States and representatives of indigenous and local communities. It reaffirmed its strong commitment to the work of this Committee under its renewed mandate and was confident that the fruitful exchange of views that took place during the Assemblies for the renewal of the mandate would continue to animate the Committee's work and debates, and enable the Committee to progress into substantive discussions and tangible results.
33. The Delegation of Ecuador, on behalf of GRULAC, expressed its gratitude for the efforts and commitments of the Director General and of the Secretariat as regards the work of the Committee. It reiterated its wish that all working documents be made available in a timely manner and in Spanish. It highlighted the importance that WIPO's member States attached to the Committee, as well as the important

decision to pursue text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which would ensure the effective protection of TK, TCEs and GRs. It recalled that in the negotiations during the 2009 Assemblies, GRULAC had maintained a flexible and constructive position, as it had been primarily interested in strengthening the work of the Committee within a new robust mandate, with a view to granting international, prompt and effective protection to TK, TCEs and GRs, taking into consideration, among other aspects, the ancient wealth of its region in TK, TCEs and its biodiversity. It stated that it was vital to extend the benefits of intellectual property to developing countries, as set out in WIPO's Development Agenda, and that in turn, it would benefit all parties involved, based on the mandate given to the Committee, for which reason past impasses should be avoided. The work on the Agenda was vast, and one of its main items was the one that referred to the arrangements for the Intersessional Working Group meetings. That working group should be composed of members who focused their work on the most-developed issues, as regards aspects of protection for TK and TCEs. That task of the Working Group should be carried out concurrently with discussions on the protection of GRs, whose development in other international fora should be carefully observed, particularly the ongoing negotiations in the context of the Convention on Biological Diversity (CBD) on access and benefit-sharing (ABS). It stressed the importance of the voluntary contribution fund for indigenous and local communities, and encouraged Member States to strengthen their contributions, as the valuable participation of indigenous representatives in the Committee and in the Intersessional Working Group should continue. It reiterated its support for multilateralism and its approval of starting discussions within the new mandate given to the Committee. It welcomed all efforts undertaken to strengthen the work of the Committee, such as the initiative carried out by the Government of Indonesia two weeks previously, with the participation of international organizations, including WIPO. It believed that the process initiated in Bali should be inclusive and stated that as a Regional Group it was ready to join their ranks.

34. The Delegation of China said that for many years the Committee had spared no effort in protecting TK, TCEs and GRs and expressed its satisfaction that the last General Assembly renewed the Committee's mandate and set priorities for the next biennium. It hoped that this renewed mandate and working mechanisms would result in better methods of discussing more efficient protection of TCEs, GRs and TK within the Committee framework. The Delegation of China ensured that it would participate in the Committee session in an open and constructive fashion.
35. The Delegation of Kyrgyzstan, speaking on behalf of the Regional Group of Central Asian, Caucasus and Eastern European Countries, paid tribute to the contributors to the WIPO Voluntary Fund. It expressed the hope that the experience of indigenous and local communities would enrich the Committee's work. It endorsed the new mandate of the IGC and invited all Member States to mobilize their efforts in order to implement this mandate and compile a legal instrument on TK, GRs and TCEs. It reminded that the Government of Kyrgyzstan had promulgated a law to protect TK and other legal instruments in relation to the registration, through a database system, of the TK of the indigenous peoples of Kyrgyzstan. It informed the Committee that the first request for registration had already been deposited. It wished the Committee and the Intersessional Working Groups every success in their work.

36. The Delegation of Sweden, speaking on behalf of the European Union and its Member States, looked forward to a constructive, efficient and fruitful meeting. It said that it remained committed to making progress in the important issues under the Committee's agenda and attached great importance to its work. It acknowledged that the Committee had a leading role in addressing the IP aspects of protecting, promoting and preserving TK, TCEs and GRs, and strongly welcomed the decision of the General Assembly to renew its mandate. It hoped that the renewed mandate would imply an accelerated and more constructive work within the Committee. It recalled that the discussions had for some time focused on the issue whether the outcome of the Committee's work should be legally binding or not and stated that the renewed mandate allowed for both options. It added that the Committee's work needed to get some positive momentum by constructive discussions on basic substantive issues. It said that once a broad agreement in substance would be reached, the Committee could come back to the issue of the legal character of the legal instrument or instruments that the Committee was requested to submit to the 2011 General Assembly. In view of the differences in law potentially applicable to TK, TCEs and GRs, and the specific differences in the discussions relating to these three subjects, it believed that more timely progress could be made in the new biennium if they were treated separately. It suggested that one each of the three proposed intersessional meetings be reserved entirely for one of the three subjects on the agenda. It argued that this distribution of work would allow more time for the discussions and would prove more productive. It stated that the IWGs should be as intensive and productive as possible and report back to the Committee. It believed that the Committee should focus its initial work under the new biennium on areas where it is more likely to have progress in the short term. In its view, it would be proper to initially focus on TK so that the first intersessional meeting would be given a precise mandate on TK. It stressed the fact that this was an area where previous discussions had indicated that a common understanding could be within reach and it was also an issue of great importance for many Member States as well as for indigenous and local communities. Progress on TK would also help the Committee to advance the discussions on GRs that were conducted in the Committee as well as in other fora. It highlighted that one outstanding issue related to GRs was the protection of TK associated with GRs and concluded that there was a need to deepen the discussions on TK and agree on a definition. It was of the view that this work should be conducted in this Committee. It also considered that the discussions on TK, as well as on TCEs and GRs, needed to be structured in a way that helped the Committee to make progress. To start with, the Committee should examine those existing Committee texts that focused on the subject for protection. In this respect, it said that finding clear cut definitions of TK or TCEs should be prioritized. It added that the relation to public domain was of vital importance in this aspect. It said that the question of beneficiaries also needed to be analyzed at an early stage. At the next step, it envisaged that the Committee had to address objectives and scope of protection and that exceptions and limitations, as well as the issue of duration of protection, must be dealt with in due course. It recalled that the Committee had worked on the interplay between intellectual property and TK, TCEs and GRs for more than eight years and that significant achievements had been made during this time. It was however of the view that a lot of work was still to be carried out. Many difficult questions regarding the essence of the sought protection and its interplay with existing intellectual property rights needed to be analyzed and answered. The Delegation of Sweden, speaking on behalf of the European Union and its Member States, was ready to engage constructively in this work and endeavor to reach progressive results that would be acceptable for all WIPO Member States.

37. The Delegation of Algeria, speaking on behalf of the Arab Group, congratulated the Chair and thanked his predecessor. It also expressed its gratitude for the presence of the Director General and the importance that he gave to the work of this Committee. It warmly welcomed the renewal of the Committee's mandate for the next biennium 2010-2011 and added that this mandate was based on the very clear assumption that negotiations would now take place on the basis of texts related to documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a). It also said that the mandate established a very clear work agenda with a very precise schedule including IWGs. It hoped that this renewed mandate would mean an improvement to the Committee's work and invited all Member States to adopt more flexible positions in order to permit the Committee to make progress in its work and to achieve its objectives, i.e. to establish a legal instrument. It was of the view that the new mandate foresaw the establishment of a legal instrument as an international legally binding instrument. Such an international legally binding instrument would represent the most effective way of protecting GRs, TK and TCEs of the local and indigenous communities living in developing and developed countries, and might re-establish a balance that had been lost in the IP international system and WIPO. It noted that many existing IP conventions considered any infringement of IP as an offence and provided for protection of patents, copyrights and so on. It nevertheless acknowledged that there was a great deal of cultural diversity and traditional knowledge which were constantly exposed to infringements. It expressed the hope that Committee would put an end on this unbalanced situation. The Delegation of Algeria, speaking on behalf of the Arab Group, welcomed the idea of having intersessional meetings which would enable the Committee to achieve its objectives and to prepare the legal instruments of protection of GRs, TK and TCEs. It paid tribute to the Voluntary Fund and encouraged Member States to contribute to it.
38. The Delegation of Cambodia welcomed the renewal of the mandate of the Committee for the next biennium. It believed that the extended two years would allow the Committee to complete its work in looking for an agreeable solution to internationally ensure effective protection and appropriate use of TK, GRs and TCEs, adding that TK, GRs and TCEs were of significant value for the developing countries and in particular the LDCs. In order to reach this agreeable solution, it urged the Committee's Member States to pursue texts based negotiations on these three subjects as provided for by the new mandate. It also believed that all Member states would be able to compromise on the different positions and pay more consideration on the mentioned areas, including the drafts of policy objectives, which could set common general directions for protection and provide a consistent policy framework, general guiding principles that would ensure consistency, balance and effectiveness of the substantive principles, and finally specific substantive principles, which could define the legal essence of the provided protection. It emphasized that it attached great importance to the development of an effective international protection of GRs, TK and TCEs and that the full support from all member states and international organizations, especially WIPO, was needed in order to achieve this goal.
39. The Delegation of Mexico expressed its satisfaction with the decision adopted by the WIPO General Assembly as a result of which the Committee's mandate had been extended. The renewal of the Committee's mandate was fundamental to achieving the adoption of an international legal instrument or instruments centered on protecting TK, TCEs and GRs. The work of the Committee should be mainly

focused on defining a methodology to be used during the next two years so that the 2011 WIPO General Assembly voted in favor of holding a successful diplomatic conference at which the Organization's Member States would be presented for consideration with a text or texts sufficiently prepared so as to obtain the necessary ratifications for the entry into effect of the final document or documents. It opined that participants in the Intersessional Working Group meetings should be experts from the respective countries appointed by their governments. These meetings should be open to the participation of the representatives of indigenous peoples and other accredited observers. Intersessional Working Groups may not take decisions, but only make recommendations and/or prepare conclusions for submission to the Committee. It underlined the importance of documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a), specifying that their content should be revised, updated and contextualized in the light of the Committee's concerns. It stated that Mexico had a rich biological diversity and had a large tapestry of cultural expressions. Mexico was a pluricultural nation originally maintained by its indigenous peoples, and its national laws protected and promoted the development of its languages, cultures, practices, customs, resources and specific forms of social organization. It stated that the current consultations with 62 indigenous peoples on the form of protection for TK, TCEs and their associated GRs were at a very advanced stage. It hoped to finalize consultations the following year. It expressed its readiness to continue examining the tabled proposals and to propose alternatives, as it had done during the whole process in a spirit of helping the Committee reach a successful conclusion to its work.

40. The Delegation of Indonesia informed the Committee about the proceedings of the like-minded countries ("LMCs") meetings on GRs, TK and TCEs that had taken place in Montreux (Switzerland) on October 29 to 30 and in Bali (Indonesia) on November 23 to 27, 2009. It said that the LMCs had had constructive discussions and exchange of views on the relevant issues. They reiterated their commitment to start text-based negotiations by building on the three WIPO documents as cited in the decision of the WIPO General Assembly in October 2009, namely documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a). The LMCs had examined those documents and noted that the first two documents on TCEs and TK were already well-advanced and provided sufficient material for commencing negotiations, while the third document on GRs contained a list of options that required further work. Both meetings emphasized that the issues under discussion in the Committee complemented and did not undermine the processes being undertaken in other fora, especially the negotiations under the framework of the CBD and in the WTO. The Delegation of Indonesia said that the LMCs expressed their commitment to continue discussing among themselves to vigorously pursue the establishment of an international legal instrument(s) to ensure the effective protection of GRs, TK and TCEs. LMCs encouraged dialogue among countries of different groups to bridge differences in order to expedite the negotiations in the Committee and the IWGs sessions.
41. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Yemen on behalf of the Asian Group and by the Delegation of Indonesia on behalf of LMCs. It noted that over the past few years the existing IP system had come under considerable criticism for its failure to prevent the misappropriation of TK and for being unfair and unbalanced. It stressed the fact that whereas the technological innovations were highly protected, multinational corporations continued to misappropriate GRs and TK for their

commercial gain, without providing a just reward to the right holders. It added that the IP system had even facilitated the misappropriation and use of TK by multinational corporations, mentioning that a large number of patents had been granted on GRs and knowledge obtained from developing countries, without the consent of the legitimate owners of these resources and knowledge. It was of the view that the only option to change the existing unfair trend was an urgent establishment of new norms and binding rules such as securing prior informed consent, equitable benefit sharing and the concept of collective rights regarding GRs, TK and TCEs. It added that the new rules should be incorporated within the IP regime in order to redress unbalance and prevent bio-piracy and misappropriation of TK. It stated that there was a need to create a *sui generis* protection system of TK with a view of its fair use and commercialization at the international level. It noted that for some developing countries GRs, TK and TCEs were considered as the only potential resources for their sustainable development. It also said that the absence of binding instruments in these areas affected developing countries, had reduced their competitiveness in international markets and hampered their development. It believed that the protection of the heritage of ancient civilizations, as a manifestation of human TK and foundation of cultural heritage within countries, should be ensured through legally binding instruments. It urged the Committee to change the dominant paradigm of the IP system and make it more fair, balanced and development oriented. It said that without such a change developing countries would not be able to use and rely upon IP for their development. It welcomed the decision of the General Assembly of WIPO to renew the Committee's mandate as a new momentum. This new mandate requested that the Committee undertake text based negotiations with the objective of codifying legally binding instruments to fill in the existing legal gaps with new rules and regulations. It also welcomed the decision of the General Assembly regarding the working documents as they constituted a good base for starting the negotiations. It was of the view that given the different nature of GRs, TK and TCEs it would be practical to concentrate the Committee's work on drafting three separate treaties in these three areas. It argued that this approach would ensure the coherence and substantive integrity of the final products. It had no doubt that this process would be challenging and that success would only be achieved through partnership, cooperation and goodwill of all Member States. The Delegation of the Islamic Republic of Iran said that it would spare no collaborative efforts in order to boost the atmosphere of constructive dialogue with Member States in achieving the objectives of the Committee.

42. The Delegation of Peru believed that the Committee's renewed mandate was of vital importance as it had enabled the negotiation process to start with a view to producing a text of a legal and international instrument (or instruments) which ensured protection of GRs, TK and folklore. It stated that its position as a megadiverse country and a source of vast TK and TCEs had enabled Peru to exercise countless efforts to ensure the conservation, protection and promotion of its resources and to avoid biopiracy involving Peruvian biological resources and the collective knowledge of its indigenous peoples, by means of a *sui generis* law enacted in 2002 in relation to TK, and by means of actions carried out by the National Commission against Biopiracy. However, such efforts at the national level had not been sufficient, as it had noted various cases of misuse or misappropriation of TK associated or not with GRs and TCEs. That was why it legitimately hoped for a legally-binding international instrument which would ensure the protection of its biodiversity and related knowledge. It supported the statement made by the Delegation of Ecuador on behalf of GRULAC and expressed its

specific interest in ensuring that the benefits derived from the appropriate use of the IP system also be extended to developing countries, as provided for in WIPO's Development Agenda. It urged other Member States to contribute constructively to that process by means of proposals which would enable a text of a legally-binding international instrument to be produced, according to the Committee's renewed mandate. It stated that the work agenda was considerable and available time limited, and therefore the substantive aspects of the negotiation should be swiftly entered into. It stated that the Intersessional Working Group should comprise all members in order to secure an inclusive and participatory negotiation process in which all the interests were duly reflected. The Intersessional Working Group should examine the three issues of the Committee in parallel, taking into account the level of progress achieved in each, as well as possible developments in other fora, such as the Convention on Biological Diversity. Work should be carried out with clear objectives and with the determination to achieve a successful outcome. It urged all Member States to show the necessary flexibility to fulfill the Committee's mandate. It recalled that in the final analysis what was sought was to develop a better IP system of benefit to all and that the successful outcome of those negotiations would enable that end to be reached and to be of benefit in particular to the poorest indigenous and local communities in developing countries.

43. The Delegation of Bolivia (Plurinational State of) supported the statement made by Ecuador on behalf of GRULAC. It expressed the expectation and hope that finally the multilateral intellectual property system would pursue a task greatly needed by developing countries, i.e. that of developing *sui generis* legal instruments which would duly protect peoples' GRs, TK and TCEs. It stated that it had constitutional provisions which were in line with new developments in international law, such as the United Nations Declaration on the Rights of Indigenous Peoples dated September 2007. However, that had not been enough. Piracy and theft of IP from its peoples persisted. It was necessary for the international intellectual property system to commit to providing the requisite protection, and as such it was necessary to develop new *sui generis* mechanisms for suitable protection. It encouraged all Member States, in the context of the new mandate, to pool their efforts for the benefit of all, but particularly for indigenous peoples.
44. The Delegation of the Republic of Korea underscored the importance of the recognition and respect for collectively generated innovation and creativity by indigenous people. It looked forward to discussions that would deepen understanding and make progress on the issues of GR, TK and TCEs. It was highlighted that strong political will alone could not provide a solution for the protection of GR, TK and TCEs. The Delegation advised on the importance of discussions based on legal, logical and rational thinking rather than on the interests of each Member State. To this end, the Delegation of the Republic of Korea welcomed the prospect of expert discussions in the inter-sessional working group and expected to have more substantive talks on this issue. The Delegation further looked forward to share experiences with Member States that already had a protection system for GR, TK and TCEs.
45. The Delegation of Thailand aligned itself with the statement made by Yemen on behalf of the Asian Group. The Delegation welcomed the successful renewal of the IGC's mandate with a clearly defined work program and timeframe. In the past 9 years, the IGC had gathered extensive information on various aspects regarding the protection of GR, TK and TCEs, resulting in a better understanding of this important issue. It was stated that it was time to begin text-based negotiations,

building upon the documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A. The Delegation further welcomed the inclusion of the intersessional working groups under the new mandate, and looked forward to actively participating in the process. The Delegation was of the view that the working groups should be transparent and effective, in order to assist the IGC in realizing satisfactory and concrete outcomes that would lead to a legal international instrument (or instruments). Such outcome, it was added, would complement on going processes in other fora, especially the CBD and the WTO.

46. The Delegation of Guatemala supported the general statement of GRULAC made by the Delegation of Ecuador. It reiterated what had been said at the last General Assembly, that the protection of TK, TCEs and GRs was an issue which generated great interest and one of the most sensitive components of its government's social agenda, given that the Guatemalan indigenous population accounted for 41 per cent of the total population and comprised 22 different communities, each with its own specific cultural heritage and traditional knowledge. It stated that the outcomes which would be achieved on that issue would have a significant impact on a large proportion of the generally marginalized and impoverished population. It emphasized the work carried out by the Group of Like-Minded Countries, in which it participated and clarified that the Group had set itself the objective of developing and bringing about a search for formulas which would grant international legal protection to TK, TCEs and GRs, pursuing prompt and effective implementation of the mandate given by the General Assembly. It thanked the Government of Indonesia for facilitating the process of coordinating the Group and its work. The Delegation stated that the work of Indonesia had channeled the technical impetus which the African Group had unerringly brought to the Committee.

47. The Delegation of India stated that the terms of reference of the IGC were robust and indicated a clear recognition by Member States of the need for effective protection for TK, TCEs and GRs towards development of international legal binding instrument or instruments that would be taken up by a Diplomatic Conference in 2011. It was stated that early and immediate initiation and time-bound conclusion by 2011 of the development of an international legal instrument or instruments and their content was crucial. It was advised that protection from misappropriation and equitable benefit sharing should be based on principles that protect various forms of IP. India was a vast repository of TK, GRs and TCEs and had faced biopiracy and misappropriation related to TK and GRs for a long time. After the Turmeric patent case back in 1997 and subsequently the Neem patent revocation incident, a conscious decision had been taken by India that made accessible the vast TK in a language and format understandable to patent examiners at a global level so as to establish claims of prior art. This repository of information had helped India identify 35 patent applications at the European Patent Office (EPO) which were based on prior art and the EPO had set aside its earlier decision to grant patents in two cases and six applicants voluntarily withdrew their applications. In addition, India had taken a number of other steps to initiate a legislative framework that protected this knowledge. This included a number of provisions in the National Biodiversity Act, the Patent Act, the Forest Act and the Forest Dwellers Right Act. The Delegation further expressed that it was aware that many other Member States were facing similar problems in cases relating to biopiracy like the Monsanto Soybeans case and the Enola Bean case. It was advised that deliberations in IGC reflected the diversity amongst countries which are depositories of TK. The system of protection that is devised therefore must address both protection of

qualified and non qualified knowledge. The WIPO documents reflected in the Agenda for this session were well developed save for the one on GRs which needed further work. It was highlighted that the documents were derived from the Cochin Declaration of 2006 of the Asia Pacific Policy Forum in which ARIPO had also been present. The work undertaken in the IGC on GRs needed to complement and take forward similar processes under the framework of the CBD. Finally, it was necessary to get down to discussing substantive issues. The Delegation of India looked forward to deliberations under a clear mandate that would carve out a definite area of work for the Intersessional Working Groups.

48. The Delegation of the Philippines looked forward to constructively engaging with all delegations in determining the framework and modalities for the conduct of intersessional working groups to facilitate the elaboration and drafting of an international legal instrument that would effectively provide a legal regime to prevent the misappropriation of GRs, TK and TCEs. It was suggested that this would address the centuries old neglect of indigenous peoples, to correct historical wrongs by according them the long deserved recognition of their distinct cultures and ways of life, and allow them to enrich their lives by sharing the benefits of their creative genius.
49. The Delegation of Pakistan associated itself with the statement made by Yemen on behalf of the Asian group and thanked Indonesia for having hosted the meetings of the Like-minded Group. The new mandate provided to the IGC by the WIPO General Assembly to undertake text-based negotiations with the objective of reaching agreement on text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs would be realized in actuality and that it would not be a false hope to the aspirations of the millions of people whose rights are constantly being misappropriated. The Delegation's preferred option was for a legally binding international instrument against misappropriation of GRs, TK and TCEs based upon documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 and other relevant documents that provided a sound basis for text-based negotiations. It was stated that there was no need to reinvent the wheel in putting different options on the table. A lot of hard work had already gone into the process and the IGC could develop such documents. The Delegation reiterated that the role of inputs that would be received from the Intersessional Working Group Sessions would be vital to reaching a result on the text-based negotiations.
50. The Delegation of Sudan highlighted the importance of GRs, TK and TCEs and their protection. It was explained that the African Group had been able to establish a framework for the protection of GRs and TK which had created a Sudanese law. The Delegation of Sudan looked forward to similar measures within the framework of the IGC.
51. The Delegation of Nepal described Nepal as multi-ethnic, multi-lingual, multi-religious and multi-cultural. There were 100 castes and indigenous nationalities and different religious groupings in Nepal. The Delegation looked forward to implementing the decisions taken by the Committee.
52. The Delegation of Venezuela (Bolivarian Republic of) supported the statement made by Ecuador on behalf of GRULAC. It stated that from a legal viewpoint misappropriation was a concept that came from criminal law and that it implied a

loan of a good which was not returned and an abuse of trust of the legitimate owner. It said that, in the majority of cases related to GRs and TK, there had been a shameless plundering of such knowledge and resources, which in criminal law had a different name and description. It requested that the euphemism for a truly shameful situation be corrected, as that would give the matter its true importance and the seriousness of the past and present situation with such resources would be understood.

53. The Delegation of Egypt supported the statement made by Senegal on behalf of the African Group. The African Group had worked tirelessly in the last session in order to advance the objectives of the IGC. The Delegation also supported the statement made by Algeria on behalf of the Arab Group and the statement by the representative of Indonesia on behalf of Like-Minded Developing Countries Group. The renewal of the IGC's mandate was a step forward in the work that had been going on for the last ten years. The Delegation stated that a new era had begun involving negotiations on the basis of texts, to produce international legal instruments. It was envisioned that a Diplomatic Conference of an international nature would be held by the end of the mandate to sign one or several conventions that would guarantee the protection of GRs, TK and TCEs. The Delegation highlighted the importance of recognizing the universality of IP that would not ignore the most vulnerable countries which had the greatest need, particularly those in the developing world. Three areas of the mandate should be emphasized. These were: (1) the mandate would endeavor to build on what had been achieved in previous years in order to avoid going back over issues that had already been discussed; (2) the texts that would form the basis of the negotiations were the documents WIPO/GRTKF/IC/9/4 on TCEs, WIPO/GRTKF/IC/9/5 on TK document and WIPO/GRTKF/IC/11/8(a) on GRs; (3) the Intersessional Working Groups should be made up of experts who held the necessary knowledge and expertise in the relevant domains. Developing countries had an incredible wealth of GRs, TCEs and TK and for this reason had been the victims of piracy and misappropriation. It was explained that discussions during the previous sessions of the IGC had highlighted the weak points of the international IP system. The system was incapable of providing the necessary protection of GRs, TK and TCEs. There was no necessary coordination between the different international instruments. An appeal was made to Member States to produce an efficient convention that would allow protection of GRs, TK and TCEs. Participation of local and indigenous communities in the work of this Committee and the Voluntary Fund were supported. The Delegation also reaffirmed the importance of having the documents in Arabic as well as those in the other languages. It appealed for the documents to be made available in all six WIPO languages.
54. The Delegation of Bangladesh endorsed the Asian Group statement made by the Delegation of Yemen. Concerns were expressed that the IGC was yet to make much headway in realizing its targeted objectives. Concrete outcomes were needed in the form of a legally binding international instrument or instruments. Protection measures at the national level alone were not enough to safeguard the interests of the holders of GR, TKs and TCEs in developing countries, especially in LDCs. The Delegation was encouraged by the stronger mandate given to the IGC. It was agreed that it was time for the examination of texts and negotiations towards a consensus on an international legal instrument or instruments for effective protection of GRs, TKs and TCEs. The IGC was advised to utilize the Intersessional Working Groups by having focused, topical

and in-depth negotiations among experts in order to deepen and advance its work. The Delegation highlighted that the WIPO Secretariat should provide more assistance to LDCs in specific areas especially for the strengthening of relevant national institutions and support in formulation of national legislations to protect their GRs, TK and TCEs from misappropriation. The WIPO Secretariat was advised to pay particular attention to the LDC Ministerial Declaration adopted earlier in 2009. This Declaration contained a number of ideas that could be pursued further by WIPO to bring concrete benefits to LDCs in such areas.

55. The Delegation of Australia associated itself with the statement made on behalf of Group B by the Delegation of Switzerland. WIPO was facing a range of challenges as it continued to work to improve the efficiency and effectiveness of its operations that would make the IP system fit for purpose in the global knowledge economy of the 21st century. As reflected in the work of the IGC, there was a need to consider how the IP system interacted with and supported all forms of knowledge, not just those developed in the heart of the industrial age. Additionally there was a need to find an appropriate balance between the rights of the owners of IP and the users. Australia remained committed to working positively, and in good faith, with all Member States, the Director General and the Secretariat, NGOs and representatives of indigenous communities, so that WIPO could meet the challenges of improving the international IP system in ways that balanced the interests of all. The Delegation stated that Australia had significant interests in the work of the IGC. The Delegation explained that Australia was a major biodiverse country with vibrant and living indigenous cultures with a strong link to the land, including through their cultural expressions. Domestically, Australia had strong Ministerial support for the work of the IGC as reflected by its support for the UN Declaration on the Rights of Indigenous Peoples. For an efficient, effective and transparent mechanism to protect TK, TCE and GRs, the Australian Delegation suggested a system that (1) balanced the needs of the owners, including traditional owners, and the users of the system; (2) supported access, where appropriate, to TK, TCEs and GRs so they could be used for the benefit of all communities; and (3) ensured benefits were shared fairly and equitably, particularly without detriment to indigenous cultures and communities. The IGC's issues crossed the development divide and regional interests. Pursuing such issues on a North-South basis was unlikely to deliver outcomes which had broad support, and without that broad support any outcome was likely to be ineffective. The Australian Delegation acknowledged that, as reflected in the very informative presentations from indigenous observers, which had highlighted the wide ranging national arrangements that different indigenous peoples operated within, the task ahead was not an easy one. It was suggested that the work during the Intersessional Working Groups and the future IGC sessions be targeted on outcomes and focused on substance. The Delegation reassured that it had come prepared for substantive discussions. It was suggested that discussions be directed towards addressing key policy, legal and technical issues, and also towards gaining a better understanding of the needs and issues of indigenous communities. The work program needed to be elaborated and developed to allow fundamental questions on scope, content and nature to be addressed effectively. With such a focused approach, broad international policy mechanisms, while difficult to achieve, were both possible and valuable. There was a need to take the opportunity provided by the IGC to both help guide and develop coherent domestic responses, and ensure fair, equitable, consistent and transparent treatment of TK, TCEs and GRs internationally.

56. The Delegation of Brazil stated that, as one of the megadiverse countries, it had been actively participating in all the fora related to TK, TCEs and GRs and that the issues were fundamental to Brazil. The Delegation looked forward to the work to be undertaken by the IGC, wishing that it would be complementary and not undermine the work being undertaken in other fora. Text-based negotiations should begin by building on the three WIPO documents mentioned in the mandate given to this Committee by the General Assembly, namely documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/11/8(a) taking into account the different levels of the maturity of the documents. The Delegation emphasized the need for a legally-binding framework that would put an end to the biopiracy and misappropriation that had been witnessed around the world. The Delegation referred to developments in Brazil in this regard. By virtue of a national legal instrument that implemented the CBD in June 2000, access to Brazilian GRs and associated TK needed authorization by a Council which was under the Ministry of Environment. The authorization had to be presented to the Brazilian Patent Office in order to proceed with examination of any patent applications. The Delegation explained that the granting of a patent involving access to GRs and associated TK in Brazil was completely conditional upon the previous authorization for access.
57. The Delegation of Trinidad and Tobago supported the statement delivered by the Delegation of Ecuador on behalf of GRULAC. It was explained that the extension of the IGC's mandate was of great strategic importance to Trinidad and Tobago, which was rich in considerable IP assets in the form of traditional healing practices as well as indigenous cultural expressions, much of which formed an intrinsic part of the lexicon of Trinidad and Tobago and many of which had been catalogued in a Trinidad and Tobago dictionary. The Delegation expressed the need to stave off the perverse practice of the unauthorized and unfair extraction and misappropriation of TK and TCEs. It was explained that the government of Trinidad and Tobago had launched decisive action to quell such practices. As part of a regional initiative by WIPO, Trinidad and Tobago had also concluded national consultations on the establishment of a Caribbean Regional Framework for the protection of TK, GRs and TCEs. The Delegation stated that development of an international instrument was important as a means of preventing any future misappropriation, including the granting of wrongful patents. It was explained that the government of Trinidad and Tobago had suffered such losses before and was on a battle against such practices in respect of a national music instrument, the steel pan.
58. The Delegation of El Salvador reiterated the statements made by its Government throughout the process of the Committee work and also the statement made by Ecuador as Regional Coordinator. It expressed its interest in reaching a successful conclusion in the negotiations which had started in September 2009, with the conviction that an international instrument would be produced. It reiterated its flexibility as regards the form to adopt so as to achieve the objective.
59. The Delegation of Turkey expressed agreement with the statement made by Switzerland on behalf of Group B. The issues discussed by the IGC were important for Turkey as a country rich in GRS and culture. The Delegation looked forward to a binding instrument that would protect TK, TCEs and GRs. It was explained that in the past the IGC had suffered from a lack of focus and direction. The Delegation hoped that the new Intersessional Working Groups

would facilitate the IGC's work by giving it greater focus. The key issues to be discussed included ownership of the rights, definitions, protection method at the national and international level, and exceptions and limitations. It was suggested that guidance be given to the Member States legislating on these issues at the national level and as well as inclusion of minimum standards for the protection of TK, TCEs and GRs.

60. The Delegation of Malaysia aligned itself with the statement made by the Delegation of Yemen on behalf of the Asian Group and also by the Delegation of Indonesia on behalf of the Like-Minded Countries. The Delegation reiterated that the IGC's work be focused on the existing work carried out using the documents WIPO/GRTKF/9/4, WIPO/GRTKF/IC9/5 and WIPO/GRTKF/IC/11/8(a). It was explained that as a megadiverse and cultural country, Malaysia was equally concerned with the phenomenon of biopiracy as well as the misappropriation of TK and GR. The Delegation stated that the Intersessional Working Group would be important in facilitating and ensuring the effective protection of GRs, TKs and TCEs in time for the 2011 General Assembly which would decide on convening a Diplomatic Conference.
61. The Delegation of Morocco supported the statement made by the Delegation of Algeria on behalf of the Arab Group and the statement of Senegal on behalf of the African Group. The Delegation was pleased by the extension of the mandate of the IGC. The Delegation affirmed that this was a new step forward and that the work of the IGC needed to be built upon developments reached in previous mandates despite the fact that there had been no clarity as regards the target. It was explained that, with the clarity of the new mandate, progress had to be made. The Delegation highlighted the importance of the protection of TK, GRs and TCEs for Morocco which had worked in order to put in place legislation for the protection of GRs, TCEs and TK. Such national legislations were ineffective in the face of piracy of TK and TCEs which crossed borders. To deal with the situation, international rules were needed to combat piracy and illegal ownership of TK, GRs and TCEs. The Delegation welcomed the establishment of the Working Groups and suggested that they should remain closed in order to smoothly advance the objectives of the IGC. The Delegation also welcomed the participation of indigenous peoples in the work of the IGC and supported the role of the Voluntary Fund in assisting the representatives of these peoples to attend the meetings. The Delegation looked forward to a legally binding instrument (s) in order to protect TK, GRs and TCEs
62. The Delegation of Japan supported the statement made by Switzerland on behalf of Group B. The importance of GRs, TK and TCEs was highlighted and the Delegation had been engaged in the discussion with a constructive spirit. The Delegation, therefore, welcomed the renewal of the mandate of the IGC. The protection of GRs, TK and TCEs were being discussed in various international fora. The Delegation was of the view that the IGC was the best forum to discuss the relationship between these issues and IP because of its expertise in the field of IP. The Delegation further suggested that the important task of the session was to reach the consensus on the arrangements for future work under the renewed mandate. Establishment of a common understanding on fundamental issues such as definitions and the subjects and objects of protection were an indispensable basis for further collaboration to fulfill the extended mandate. It was explained that there were a lot of useful materials previously prepared including the document concerning a list of ten substantive

issues. It was advised that the IGC utilize such materials to the maximum extent to render its work effective.

63. The Delegation of the United States of America (USA) associated itself with the statement made on behalf of Group B. The Delegation was pleased that the mandate of the IGC had been renewed. It explained that at the 12th session of the IGC, the members of the IGC had requested the Secretariat to prepare two sets of working documents. These documents had described existing obligations, provisions and possibilities at the international level for the protection of TK and TCEs, as well as possible “gaps” in the international framework, and related considerations, and had described possible options to address such gaps. The Delegation believed that such documents remained important tools that would help facilitate discussions to continue the work in the 15th session. It was explained that the “List of Options” also remained a useful basis for continuing the work on GRs, along with the useful factual update on international developments in this area of the IGC’s work. The Delegation explained that a critical part of the mandate, namely to “continue its work,” should not be overlooked. It was explained that by adhering to this part of the mandate, a sound foundation for “text-based negotiations” would be built upon and lead to meaningful end results.
64. The representative of the Mbororo Social Cultural Development Association (MBOSCUDA) expressed the hope that significant progress be made toward the achievement of an international binding instrument or instruments for the protection of TK, TCEs and GR during the present session of the Committee in the framework of text based negotiations. He requested that the Committee invite indigenous experts to participate in the intersessional working groups. He thanked the WIPO Voluntary Fund for its continuing support of the participation of indigenous and local community representatives and encouraged Member States and other international organizations to make more contributions to the Fund. It welcomed the renewal of the Committee's mandate.
65. The Delegation of the Democratic People’s Republic of Korea regarded TK, GR and TCEs as important issues in terms of socio-economic development. It added that its Government had initiated the formulation of a new regulation on the protection of TK. It reminded that under the deep attention of its Government, efforts to discover, collect and use TK were made by many institutes, in accordance with their characteristics, including the Ministry of Culture, the Ministry of Commerce, the Invention Office, the Academy of Science, the Academy of Social Science and the Academy of National Medicine, etc. It highlighted the fact that patent officers had examined many patent applications related to TK through TK databases. It said however that the questions related to the content and the method to establish its national TK database were not yet clarified and that the regulation related to TK protection was not yet fully framed. It stressed that the early adoption of a legally binding could facilitate the process of formulating its national TK protection regulation. It added that it was fully committed to the work of the Committee.
66. The Delegation of Nigeria supported the position of the African Group and expressed its willingness to engage constructively in the present Committee and the fulfillment of its new mandate. It said that it was fully committed to text-based negotiations that would include intersessional working groups and would lead to an international legal instrument or instruments, under a clearly defined work program.

67. The representative of the Secretariat of the Convention on Biological Diversity (CBD) updated the Committee on the ongoing activities under the CBD of interest to the work of the Committee with an emphasis on the ongoing negotiations of an International Regime on Access and Benefit-sharing, following up on a call by Heads of States and Governments at the World Summit on Environment and Sustainable Development. He said that these negotiations embarked on the implementation of the new mandate of the Committee. He reminded that the Conference of Parties to the CBD instructed the relevant Subsidiary Body, namely the Working Group on Access and Benefit-Sharing, to continue and finalize these negotiations prior to the tenth meeting of the Conference of Parties that was taking place in October 2010. He reported that this Working Group has met twice since then and has made considerable progress in the negotiation of the Regime and, at its most recent meeting in November 2009, succeeded in putting together, for the first time, a single negotiating text embodying all the chapters and elements of the International Regime. He added that the objective of the Working Group that would meet in March 2010 would be to reach a consensus on the text of the International Regime with a view to its submission for adoption by the Conference of the Parties in Nagoya in October 2010. With regard to the nature of the International Regime, he said that the Co-Chairs of the Working Group pointed out that there was a preponderant understanding among Parties that the negotiations aim at finalizing a draft protocol to the Convention on Biological Diversity. He reported that the chapters dealing with TK and capacity had reached a very advance stage of negotiation and that there was broad agreement on the wording of provisions in the International Regime to ensure that the utilization of TK associated with GR was subject to the prior informed consent of the indigenous and local communities concerned and to mutually agreed terms for the sharing of benefits deriving from the use of such knowledge. He said however that more work was needed with respect to the scope of application of the International Regime, which involves clarifying the exact meaning of some key terminology and concepts, as well as to other three main components, namely fair and equitable benefit-sharing, access, and compliance. With regard to benefit-sharing and to access, he stated that the concepts under consideration included prior informed consent and mutually agreed terms. He added that the development of international minimum conditions and standards and the development of model clauses for material transfer agreements were also under consideration, as well as the possibility of having simplified access rules for non-commercial research and taxonomy. With regard to measures to monitor and enforce compliance with national ABS requirements once the genetic resources had left the country of origin, he pointed out that the negotiators were considering measures and tools including clarification of the concepts of misappropriation and misuse; identification of best practices and code of conduct for groups of users; the possible introduction of internationally recognized certificates issued by competent national authorities; the possible introduction of internationally recognized certificates issued by competent national authorities; the possible introduction of disclosure requirements for patent applications; and measures to facilitate access to justice. The representative of the Secretariat of the CBD highlighted the fact that these negotiations were taking place at a critical juncture in the life of the CBD and against the backdrop of the International Year on Biodiversity that would start on January 1, 2010. He stated that many of the measures contemplated in the International Regime on Access and Benefit-sharing were related to the work of the Committee and that therefore the two processes needed to cooperate closely with a view to ensuring harmonization, mutual support, and to avoid overlap. He

assured the Committee of the full cooperation of the Secretariat of the CBD in this regard, as the Secretariat of the CBD had enjoyed and appreciated an excellent working relationship with WIPO over the years. He was looking forward to continue in this direction.

68. The representative of the African Regional Intellectual Property Organization (ARIPO) said he was optimistic that the IGC would witness significant progress towards the development of an international instrument or instruments during the next biennium. He stated that this outcome would enable knowledge holders to benefit from their TK and TCEs, to appropriate the fruits of traditional creativity and know-how, and to promote the wider use and recognition of the knowledge, while ensuring that collective custodianship and ownership are not undermined by private intellectual property rights and curtail the continued misappropriation of their knowledge. He recalled that during the past nine years, ARIPO had participated in the Committee's debate that had led it on a long journey without concrete outcomes. He welcomed therefore the decision of the General Assembly for the Committee to focus on text-based negotiations with the view to developing international instrument or instruments for a possible diplomatic conference by 2012. To achieve this noble objective in a pragmatic manner, he added that it would be essential for the Committee to provide a road map or clearly spell out the rules of engagement for constructive deliberations of the texts as contained in documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a). He urged that issues related to the understanding of what was referred to as text-based which some Delegations had difficulties with during the previous Committee's session. He stated that there was a need to clarify what texts would form the basis for the negotiation, what would be the work plan and methodologies required for the work of the IWGs, in order to ensure transparency and openness as well as enable the Committee to engage constructively and achieve tangible outcomes. He reminded that ARIPO and its sixteen Member States had committed themselves to the international debate on the protection of these resources and taken proactive steps towards elaboration of regional and national legal and policy frameworks for their protection. He added that some time ago, ARIPO, uncertain of the immediate outcome of the IGC process, revised its Protocol on Patents and Industrial Designs within the Framework of ARIPO to take account of the protection of TK. He recalled that this interim measure was found to be inadequate for the protection of these resources and that therefore the ARIPO Secretariat was mandated by its supreme organ, the Council of Ministers, to develop a regional legal instrument to provide effective protection of TK and TCEs as well as use it as a model for the Member States to develop their national legislations. He informed the Committee that following this ministerial decision, ARIPO with technical and financial assistance from WIPO had developed a regional Protocol and Implementing Regulations for the protection of TK and TCEs. At the Twelfth Session of the Council of Ministers of ARIPO, held in Gaborone, Botswana from November 26 to 27, 2009, Ministers considered the Draft Protocol on the protection of Traditional Knowledge and Expressions of Folklore and agreed that ARIPO should hold a Diplomatic Conference in Namibia in March or April, 2010 for the adoption of the Protocol. The representative of ARIPO also said that the Ministers had also requested the Government of Botswana, the current chairman of the Council of Ministers of ARIPO to officially submit the ARIPO Protocol to WIPO as a working document for the normative process of the Committee. He hoped that this would be done as soon as possible and stated that the Protocol addressed the objectives and principles underlying the interplay between IP and GRs, TK and TCEs. He was of the view that the Protocol

when it enters into force would prevent misappropriation, empower knowledge holders to exploit their knowledge and provide legal certainty for the so-called regional TK and Folklore that are of transboundary or multicultural nature. He hoped that the significant achievement made by ARIPO at the Regional level will serve as a stimulus for the Committee to work towards the fulfillment of its mandate, i.e. the elaboration of the international instrument or instruments for protection.

69. The Representative of Tupaj Amaru stated that there had been nearly eight years of discussions on TK and GRs but not much progress had been made. What it was hearing today was what it had heard every year: broad commitments but nothing concrete. It had observed, on the one hand, countries of the South, poor, underdeveloped countries, which wanted an international instrument to protect TK and GRs and, on the other hand, the systematic opposition of rich countries which did not want a legally-binding instrument. The three tabled documents had been drafted more than three years previously. It expressed the hope that indigenous peoples would participate in the negotiation process, not only with broad abstract statements but rather with concrete, specific proposals, with substantive contributions to the negotiation process, and taking into account the possibility of submitting amendments. The Representative considered that the fundamental problem was that it was faced with the major strategic economic interests of major pharmaceutical and agri-food companies.
70. The Representative of FILAIE believed it was vital that negotiations were text based. It stated that it agreed on moving on to substantive discussions. It reminded governments that IP laws were magnificent texts but, as that was a challenging issue to resolve, they needed to be much more flexible and agile. The source of law was not only the written rules which might emanate from a State or group of States in international treaties but also their practices and customs.
71. The representative of the International Chamber of Commerce (ICC), in a written intervention, supported the Director General's plea for a business-like approach in line with normal practice in text-based discussions. He was pleased that the WIPO General Assembly in October had been able to find consensus, to continue discussions of these very important topics. Had this not been possible, much valuable work could have been lost, or delegated to fora in which it might have received less attention from those less well-informed about IP. He was of the view that WIPO was the right place to discuss IP and where the expertise was. He hoped that the discussion would be fruitful and the delegations be flexible and constructive, and avoid as far as possible reiteration of well-understood positions. He acknowledged that all agreed that biopiracy was wrong, and should be stopped. But the Committee was far from any complete agreement on what biopiracy was, and whether, for example, further development of information or materials that had been widely circulated could ever properly be considered as biopiracy. He added that business developed products and services that served the needs of the public. In so doing, he said that business may use traditional knowledge and genetic resources. He stated that business aimed to do so in a manner which respected the proper rights and reasonable aspirations of the holders and provide them with appropriate benefits. Endorsing what had been said earlier, he pointed out that there was a need for true balance between the rights of holders and those of users, as well as of society at large. He said that business could contribute its experience and expertise in using TK and genetic resources, and had firm views, based on its experience, about what arrangements were practical and workable, both for its own

benefit and that of others. He acknowledged that ICC views might not be fully accepted, but they should at least be heard. As far as the IWGs were concerned, he said that IWGs might be an opportunity for ICC to intervene orally. He noted that the intersessional meetings would provide an important impetus to the work of the Committee and hoped that there could be wide participation from informed experts of all kinds. He made a strong plea therefore for representation from business within the IWGs, since business would have the important responsibility of respecting the rules that an international instrument would put in place. He stated that more discussion was needed about principles. He endorsed the statement of the Delegation of Japan that had suggested that this discussion on the principles might proceed in parallel with text-based negotiations. As far as the process was concerned, he strongly supported the proposal made by the Delegation of Switzerland on behalf of Group B that opening statements should be avoided as far as possible, unless made on behalf of regional groupings, and that they should be replaced or supplemented if necessary in writing. He added that this principle was even more forcibly applicable to observers – which was why this intervention had been made in writing.

72. The Representative of the Coordination of African Human Rights NGOs (CONGAF) stated that the African continent was the continent which suffered the most from the disappearance of languages, and that those were one of humanity's riches and heritage. It stressed the importance of the Committee and the opportunity it had been given to save languages the world over.
73. The representative of the Maya To'Onik Association of Guatemala stated, in a written intervention, that Guatemala was a small country with an immense variety of cultures, with more than 23 ethnic groups with their own languages, customs and TCEs and TK, which constituted the fundamental elements of the cultural identity of each one of the ethnic groups. As a result of political and economic phenomena, these foundations of identity were deteriorating on a daily basis. From that perspective, the Maya To'Onik Association supported and welcomed the work being done by WIPO. In general terms, to date at the State level no specific measures had been taken in regard to TK, TCEs and GRs, although there were a broad range of national legal rules and international agreements ratified by Guatemala, which referred to IP from an individualized, commercial and westernized perspective. The subject was as yet not being discussed by academics. In Guatemala, there were registers of historical monuments and archaeologies, as well as laws and entities which protected the individual authors' rights of the different artists and organizations which promoted the commercialization of products of the different craft expressions, and laws and entities responsible for promoting the protection of the environment, indigenous business networks, etc., but these were laws, entities and subjects which had little to do with indigenous cultural and intellectual property. The majority of Guatemalan indigenous organizations had concentrated efforts on eradicating discrimination, promoting gender equality, studying and applying customary law, etc. There were no organizations which focused on the study and defense of indigenous cultural and intellectual property in particular, and this had led to the setting up this Association. According to informal consultations with a number of indigenous authorities and leaders, indigenous cultural and intellectual property fulfilled cultural, social, spiritual and economic functions; the most important of these, however, was the spiritual aspect. TCEs, TK and GRs were "an essential part of human beings and constitute elements of spiritual interrelation". However, they were not protected; on a daily basis, plagiarism, misuse and

counterfeit copies of Maya indigenous cultural and intellectual property could be seen. In the different communities, there was an obvious urgent need for protection, although many leaders considered that the subject should be dealt with very carefully because the commercial interests of individuals could interfere with protection, a fact which was contrary to the Maya indigenous world vision since, according to the leaders, "registering and patenting mean transforming the essence of humanity into private property or into a commodity". As regards the concepts and definitions currently being discussed at the international level, these did not fit into the Guatemalan indigenous world vision; they were western in style and they had a completely different connotation in the indigenous world vision. In Guatemala, a great deal of research was still required to be able to conceptualize and define the subjects correctly, in order to provide an appropriate connotation and perspective. Guatemalan indigenous cultural and intellectual property was based on sharing and common ownership, and not of individual ownership, as was the case in western law. To refer to the subject is to refer to collective ethnic ownership, which, in terms such as copyright, individual ownership and property, owners, holders, proprietors, public domain, etc., had different connotations in Guatemalan indigenous customary law. The Association supported the repeated suggestions made by different countries at the 15th session regarding the preparation of a glossary; this should be prepared by indigenous experts and representatives of indigenous communities. In Guatemala to date, no position had been adopted regarding the definition of the terms TCEs, TK and GRs. The Association had for now adopted the WIPO definition of TCEs. TK had up to now been considered to be the technical knowledge of indigenous communities or peoples exclusively relating to traditional medicine, agriculture, environmental conservation, etc., and according to the Association, GRs referred to the biological diversity and TK of such resources, as well as the task of the traditional enhancement of crops and animals. TK and GRs were basically not commercial objects. For this reason, the laws of Guatemala should not be applied. It was extremely important to conduct comprehensive studies on each one of these subjects in order to determine what type of protection could be applied. Regarding TCEs, in Guatemala, there was a variety of cultural expressions such as verbal, musical, material and tangible expressions. Some were considered to be national heritage such as the Rabinal Achi dance, Maya writings such as Pop vuh, the Kaqchikeles annals, etc. However, many of the cultural expressions, mainly their designs, were imitated or forged and sold on local markets as original articles; as a result, the implicit meanings of each article were distorted. There was also an abundance of articles with original designs of indigenous communities, prepared with plastic materials produced by large industries, mainly those of basket making, pottery, kitchen utensils, etc. Equally, there were fabrics and knick-knacks, etc. produced by industries with original indigenous designs and ingredients. Each linguistic community had its own specific features and, in some cases, a TCE was shared with other linguistic communities; for example, the pottery of the indigenous peoples of Santa Apolonia Chimaltenango and of the poqomames of Chinautla from the municipality of Guatemala, the basket making of the Kaqchikeles of Chimaltenango and that of the tzutuhiles of Sololá, etc. It was important to carry out further research to determine or identify the community owning this cultural expression or to create some procedure for its registration, as appropriate. As regards the use of the term "folklore", in Guatemala the rejection of this term was being envisaged, because it was considered to be an archaic term with negative connotations, associated with the creations of inferior civilizations. As a result, according to Guatemalan

indigenous leaders, TCEs should not be referred to as “folklore”. In Guatemala, TK existed in relation to agriculture, natural medicine, ethnic veterinary science, environmental conservation, hunting, etc. This knowledge, for many indigenous communities, was more effective than that which was practiced in western culture. However, there were no entities or laws to protect TK. Rural indigenous communities were frequented by foreigners who sought information on medicinal techniques, agricultures, etc. These visitors proposed projects for cultivation and the processing of medicinal plants; however, these projects had remained only at the cultivation stage, which led to a suspicion of plagiarism of the TK in the plants. In relation to traditional medicine, there existed knowledge from supposed vocational training schools for Maya medicine, which required their undergraduates to prepare a written piece of work – a thesis – which had to establish their knowledge of the properties of a particular medicinal plant or describe an experiment or some traditional technique, which was suspected to be a form of plagiarism of TK. Many firms, known as “naturist centers”, were owned by non-indigenous people or foreigners who had unlimited access to the indigenous TK within which Maya ceremonies, traditional medicinal practices, etc., were carried out using said knowledge as their sources of economic income. Similarly, university researchers who arrived in rural areas had on more than one occasion appropriated particular TK to achieve their status as scientists. Many national firms used indigenous knowledge for trade purposes, acts which constituted plagiarism of indigenous IP. In Guatemalan agricultural lands, a large quantity of natural resources were used and produced, in particular maize, beans, medicinal plants, etc.; these resources were not isolated from the indigenous world vision, but formed part of what indigenous people believed, thought, knew and lived. From that perspective, the GRs in the country might be considered part of indigenous IP since they had implications for agriculture, food security, rural development, the environment and, above all, the culture of the country’s indigenous communities and peoples. In Guatemala, laboratories had referred to the genetic manipulation of maize, which indigenous peoples had firmly opposed, since this seed was considered sacred as it constituted the essence of the food supply of indigenous families. As regards the idea of patenting GRs, for the Maya people of Guatemala this signified “general plagiarism of the spirits, the death of the environment and the extinction of humanity”. The Maya people considered that although there were discussions in international bodies on protection and a form of fair and equitable distribution of benefits, or the application of the strict requirements for disclosure of GRs, in any case this was the commercialization of life itself because, according to the world vision of the Mayas, “animals, minerals and plants are also human beings”. For GRs, legislative initiatives had been put forward in an attempt to regulate such resources; however, an analysis of those initiatives, from the indigenous point of view, showed their content to be from an individualized and commercial perspective. For this reason in Guatemala there was obvious mass biopiracy. In summation, in Guatemala customary indigenous law existed, which were valid and were trusted by indigenous peoples. Consequently, the community authorities, traditional leaders, male and female elders were people in whom the communities placed trust and, on many occasions, they were the custodians of indigenous IP. The subject of indigenous cultural and intellectual property remained in the same situation as when WIPO carried out fact-finding missions in 1998-1999. There had been no progress. Investment was required to conduct research, workshops, seminars, etc., so that the subject could be discussed.

**AGENDA ITEM 6: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES:
VOLUNTARY FUND**

74. The Chair introduced documents WIPO/GRTKF/15/3 and WIPO/GRTKF/IC/15/INF/4.
75. In accordance with the decision of the Committee at its seventh session (WIPO/GRTK/IC/7/15, paragraph 63), the fifteenth session was preceded by a half-day panel of presentations, chaired by Mr. Preston Hardison, Tulalip Tribes of Washington. These presentations were made according to the program (WIPO/GRTKF/IC/15/INF/5). The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is contained below:

“The panel of indigenous representatives consisted of Ms. Lucia Fernanda Inacio Bellfort, Instituto Indígena Brasileira da Propriedade Intelectual (IMBRAPI), Brazil; Mr. Rodion Suly Andziga, Russian Association of Indigenous Peoples of the North (RAIPON), Russia; Dr. Debra Harry, Indigenous Peoples' Council Against Biocolonialism (IPCB), USA; Mr. Devi Prasad Mazumder, Organization for Social Action and Development (OSAD), Bangladesh; and, Mr. Musa Usman Ndamba, Mbororo Social Cultural Development Association (MBOSCUDA), Cameroon.

Ms. Inacio Bellfort discussed IP issues among the Kaingang peoples that range across five regions in southern Brazil. She explained the great diversity of indigenous peoples in Brazil, the diversity of their languages, and the diversity of their organizations, which includes indigenous peoples living in voluntary isolation. Among the Kaingang, all TCEs, TK and associated GRs and biodiversity cannot be separated from their customary laws, value systems and identity. The Kaingang hold collective title and responsibility for the protection of TK. They make a distinction between the holders and owners of collective knowledge. Holders, such as shamens, use TK but do not control access to it. The knowledge and the right to grant and deny access is vested in the collective owners. She also emphasized the distinction between TK that is publicly available and the public domain. While TK and TCEs may be publicly available, they are still inextricably linked to indigenous contexts, remain under indigenous collective ownership, and thus are not viewed by the peoples she represents as being in the public domain. She discussed the widespread misappropriation of “Ipanema” sandals. “Ipanema” refers to the famous beach in Rio de Janeiro where the sandal style is popular. However, the design is of indigenous origin, and non-indigenous sandal makers also make unauthorized use of indigenous symbols. One line of these sandals, Ipanema Gisele Bündchen, developed by the supermodel, has made some compensation to indigenous peoples through biodiversity conservation projects, but the unauthorized and uncompensated sales of the sandals continues to be widespread. Finally, in addition to respecting the right to grant or deny access, and the right to compensation for authorized uses, she reaffirmed the fundamental importance of respecting customary law.

Mr. Suly Andziga spent much of his presentation putting discussions on TK into their local political and livelihood context. It was the opinion of RAIPON that the issue of TK and TCEs are a human rights issue, and their resolution should represent a summit of human achievement. The IP issues are bound to joint principles of ownership and access to land. Russia has 40 recognized indigenous peoples, and they have worked to find unity in diversity. Many are traditionally involved in animal husbandry, reindeer herding and gathering, with their culture

and identity built around the reindeer. Protection of their TK occurs within the context of larger economic and sociopolitical issues. The indigenous peoples of Russia have been adversely impacted by mining and oil and gas development, and industrial development. Interruptions of their traditional herding and gathering practices by these activities disrupts their ability to maintain and transmit TK. Because their cultures are primarily oral, much of their TK has not been formally documented. Mr. Suly Andziga stated RAIPON's view that there still remains a gap between recognition and implementation of indigenous collective rights to TK and TCEs in Russia. One barrier to their participation at the international level remains the problem of translation, both into Russian and into locally understandable languages, of the contents of the debates at the international level. There is a lack of information flowing both from the international and national level to the communities, and from the communities out to these levels. He emphasized the critical need to build capacity in the communities, and carry on a more enriched dialogue based on mutual respect.

Dr. Harry touched on similar human rights themes in her presentation. She started by observing that many indigenous names are derived from the names of local foods, animals, plants and places, such that their collected identity is rooted in the land. She mentioned several United Nations bodies and instruments of direct relevance to the recognition of this inherent linkage, as well as permanent indigenous sovereignty over their lands and resources, including the Declaration on the Rights of Indigenous Peoples (DECRIPS), the International Covenant on Civil and Political Rights (ICCPR), the Economic and Social Council Working Group on Indigenous Populations (WGIP), the Committee on the Elimination of Racial Discrimination (CERD) and the Universal Declaration on Human Rights. Taken together, these recognize the collective identity of the indigenous as distinct peoples, and the recognition of their right to self-determination under their own customary laws and traditions. She made a distinction between TK, that can be held by local communities, and indigenous knowledge, that refers to the distinct legal context of collective rights holders and owners of knowledge. Those having the right to self-determination as recognized in the United Nations instruments have rights beyond consultation, including the right of free, prior and informed consent (FPIC). Dr. Harry interpreted the protection of indigenous knowledge as referring to knowledge that is collectively held, inherent and inalienable. She held that the IP system compartmentalizes indigenous knowledge and recasts it into a form that leads to its alienation. Putting indigenous knowledge into IP terms changes its nature, and offers a context in which it can only be protected as commercial knowledge. This facilitates its commoditization and only provides short-term protections rather than protection in perpetuity under customary law. She then illustrated some of the ways in which tribes within the United States are protecting their indigenous knowledge and indigenous cultural expressions. Under US law, Indian tribes have control and police power over their own territories. Because of this, they have the sovereign authority to pass their own tribal laws and establish tribal codes to regulate their members and agreements with non-Indians. The Little Traverse Band of Odawa Indians has adopted an ordinance prohibiting the patenting of living organisms. Several tribes have developed research agreements that require community review, ownership over primary data, retained ownership over indigenous knowledge, and control over publication. In this way, they are increasingly defining and asserting their inherent property rights over their knowledge and expressions. To explain her interpretation of the relationship between indigenous and non-indigenous legal systems, she gave the example of the Guswhenta, or Two Row Wampum Treaty made between the Five Nations of

the Iroquois and the Dutch government in 1613, which became the basis of all their treaties with the British and the United States. This belt has a pattern of two rows of purple beads on a background of white beads. The Haudenosaunee record the meaning of this belt as follows:

You say that you are our Father and I am your son. We say, We will not be like Father and Son, but like Brothers. This wampum belt confirms our words. These two rows will symbolize two paths or two vessels, traveling down the same river together. One, a birch bark canoe, will be for the Indian People, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our boat. Neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.

In this view, measures for the protection of indigenous knowledge should focus on the right of indigenous peoples to determine their own forms and scope of protections in their own canoe path, separate from that of the international IP system.

Mr. Mazumder focused his talk on the right of collective integrity in his presentation. He discussed the Development Initiative for Inclusive People (DIIP), serving a vulnerable segment of populations in the Chittagong Hill Tracts of Bangladesh. The initiative uses people-to-people communications and telecasting to promote awareness and sensitivity for the protection of their TK and TCEs. One of their main concerns is the widespread misrepresentation of and misinformation about ethnicities. He presented numerous examples from textbooks, sports posters and materials, and other public forums in which the Chittagong Tract peoples have been presented as backwards. Several cases were found to be offensive because either a sensitive Buddhist ceremony was depicted, or because it was depicted in the wrong way or wrong context. He showed an example from an agricultural extension manual that misinterpreted traditional swidden practices. Mr. Mazumder also emphasized the need for literacy in the issues being discussed at WIPO among the indigenous peoples and local communities of Bangladesh.

Mr. Ndamba discussed issues from the perspective of Mbororo-Fulani pastoralists in Cameroon. He noted some of the great challenges facing these peoples whose lives have traditionally been dependent on cattle. There has been a loss of nomadism, and many have been transformed to become semi-nomadic or semi-transhumant. Nearly a third of animal diseases in Cameroon are treated by ethno veterinary medicine. The medicinal plants used in traditional animal husbandry are disappearing, ethno veterinary medicine is being marginalized by non-traditional veterinary medicine, elders are being lost without transmitting their knowledge, and youth are migrating to the cities. Although the Mbororo-Fulani have much traditional knowledge in sayings, stories, songs and oral teachings by which they transmit their values, codes of conduct and ethics, these are under intense pressure. He concluded with some thoughts about the direction the IGC should take in its discussions. He promoted an internationally binding regime. He urged governments to provide additional funding for the documentation of TK and TCEs. He asserted that IP rights must be in full compliance with human rights, and that their compliance should be assessed and reported to the United Nations. He stated that the process needs to expand beyond the declaration stage into

substantive commitments. Finally, in the absence of a global regime, countries could make progress through binding bilateral agreements.”

Decision on agenda item 6:

76. *The Committee took note of documents WIPO/GRTKF/IC/15/3 and WIPO/GRTKF/IC/15/INF 4.*

77. *The Committee encouraged and called upon members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.*

78. *The Chair proposed, and the Committee elected by acclaim, the following eight members of the Advisory Board to serve in an individual capacity: as members of delegations of WIPO Member States: Mr. Yasmi ADRIANSYAH, First Secretary, Permanent Mission of Indonesia, Geneva; Mr. Carlos GARBANZO, Minister Counsellor, Permanent Mission of Costa Rica, Geneva; Mr. Benny MÜLLER, Legal Advisor, Institut fédéral de la propriété intellectuelle of Switzerland, Berne; Mr. Alain Aimé NYAMITWE, First Counsellor, Permanent Mission of Burundi, Geneva; and Mr. Emin TEYMUROV, Attaché, Permanent Mission of Azerbaidjan, Geneva; and, as members of accredited observers representing indigenous and local communities or other customary holders or custodians of TK or TCEs: Mrs. Haman HAJARA, representative of the African Indigenous Women Organization, Yaoundé, Cameroon; Mrs. Lucia Fernanda INÁCIO BELFORT, representative of the Instituto Indígena Brasileiro para propriedade intelectual (INBRAPI), Brasília, Brazil, and Mr. Devi Prasad MAZUMDER, representative of the Organization for Social Action and Development, Dhaka, Bangladesh. The Chair of the Committee nominated Mr. Abdellah OUADRHIRI, Vice Chair*

*of the Committee, to serve as Chair of
the Advisory Board.*

AGENDA ITEM 7: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

79. At the request of the Chair, the Secretariat introduced the working document prepared under agenda item 7, namely WIPO/GRTKF/IC/9/4.

[Note from the Secretariat: In the discussion that took place under Agenda Item 7, several amendments were proposed to certain provisions contained in the Annex to document WIPO/GRTKF/IC/9/4. Delegations and observers also made several comments and posed certain questions. The proposed drafting amendments, comments and questions are reflected below in an extract from the relevant Annex in which the proposed amendments, comments and questions are reflected. The remainder of the report of the discussions that took place under this Agenda Item covers other interventions made that did not directly propose an amendment or raise a specific question or comment related to the content of the Annex.]

ARTICLE 1: SUBJECT MATTER OF PROTECTION

- (a) *[NEPAL: ~~(a)~~A] “Traditional cultural expressions” or [VENEZUELA: ~~or~~ and/or] “expressions of folklore” are any forms, whether tangible and intangible, [NIGERIA: ~~are~~ and any forms ~~whether~~ tangible and and/or intangible] [NEPAL: ~~whether~~] [INDIA, AUSTRALIA: ~~whether~~ tangible and or intangible][ISLAMIC REPUBLIC OF IRAN: tangible, intangible or a combination thereof] in which traditional culture and knowledge are expressed, appear or are manifested, [PHILIPPINES, similar comment by VENEZUELA, EGYPT, ISLAMIC REPUBLIC OF IRAN, COLOMBIA: such as, but not limited to, ~~and comprise~~] and comprise the following forms of expressions or combinations thereof:*
- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, [EGYPT: etc.];*
 - (ii) musical expressions, such as songs and instrumental music;*
 - (iii) expressions by action, such as dances, plays, ceremonies, rituals [TRINIDAD AND TOBAGO, PLURINATIONAL STATE OF BOLIVIA: sports and traditional games] and other performances, [INDONESIA: theater, including, among others, puppet performance and folk drama,]*
- whether or not reduced to a material form; and,*
- (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, [INDIA: mouldings] pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, [TRINIDAD AND TOBAGO: works of mas]; handicrafts; musical instruments; and architectural forms;*
- which are:*
- (aa) [NEPAL: ~~(aa)~~ (a)] the products of creative intellectual activity, including individual and communal creativity;*

- (bb) [NEPAL: ~~(bb)~~ (b)] characteristic [BRAZIL: ~~characteristic~~ indicative of authenticity/being genuine] of a community's cultural and social identity and cultural heritage [BRAZIL: replace "heritage" with a word meaning "patrimonio" in Spanish]; and
 - (cc) [NEPAL: ~~(cc)~~ (c)] maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law [NEPAL: ~~customary law~~ customary land tenure system or law] [MEXICO, EL SALVADOR: ~~law~~ normative systems] and [AUSTRALIA: ~~and~~ or][ANGOLA: traditional/ancestral] practices of that community [NIGERIA: or has an affiliation with an indigenous/traditional community].
- (b) [NEPAL: ~~(b)~~ B] The specific choice of terms to denote the protected subject matter should be determined at the national [MEXICO: sub-regional] and regional levels.

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Terminology

The Delegation of Brazil suggested that, in sub-paragraph (a)(bb), the word "heritage" in English be replaced by a word closer in meaning to the Spanish "*patrimonio*". The English version did not reflect the idea, present in the Spanish version, that TCEs had a dynamic and interactive nature.

The Delegations of Cameroon, China, Colombia, the Russian Federation, Spain, Sudan, and Switzerland suggested adding an article or glossary setting out definitions of key terms. It was believed to be necessary to use unified terminology for the concepts as the establishment of a working definition of TCEs was one of the prerequisites of a substantive discussion.

The Delegation of the United States of America noted that the Committee had not determined whether TCEs or expressions of folklore were in fact one and the same, and that the definitions remained open.

Meaning of "community"

The Delegations of Australia and of the United States of America posed questions related to the concept of members of a "community" and wished to know what the definition of "traditional community" was.

The issue of community in Diaspora was also raised. The Delegation of the United States of America stated that TCEs were only alive when carried in people, when expressed through people within a political or geographic region that claimed it, or when owned by people across the world in the Diaspora. It gave the example of a Cambodian dancer located in Seattle, who might be accused of pirating Cambodian TCEs, or, similarly, of an Ethiopian group of musicians in Washington, D.C. The Delegation found [in the commentary to this article] that the statement "expressions which may characterize more recently established communities or identities would not be covered" was

confusing.

The representative of the Tulalip Tribes concurred with the Delegation of the United States of America on the issue of communities in Diaspora.

Meaning of “characteristic”

The Delegation of Brazil suggested that instead of using the word “characteristic”, which was deemed too general, some other wording could be used to make it clearer that the TCE should be “authentic and genuine.”

The Delegation of France, in relation to sub-paragraph (a)(bb), posed the question as to who determined what was “characteristic” and at which stage that would be done.

Comments by observers

In relation to (a)(bb) and in response to the question posed by one delegation, the representative of the Saami Council said that it should be the indigenous people or community themselves who decide what would be characteristic. For example, he said that the traditional Saami dress would be a TCE under Article 1 as a traditional costume of the Saami people; it could only be the Saami who could really determine whether it was a costume that was signifying the cultural identity or not. It would not be possible for anyone else than the Saami to do so. In most instances and as a general rule, it would have to be up to the community or people from which the TCE originates to determine whether it was culturally significant or not; in relation to (cc), it suggested to replace the paragraph with: “affiliated with an indigenous people or community due to its cultural significance to that indigenous people or community.”

Definition of TCEs: Open-ended / exhaustive nature

The Delegations of Egypt and of the Philippines said that the definition should be left open for further additions. The Delegation of Egypt suggested adding at the end of the preamble paragraph “etc.”, so as to suggest that there were also other forms of TCEs.

The Delegation of the Islamic Republic of Iran was of the view that the definition was generally acceptable, however, given cultural diversity, the examples in the definition should not be considered exclusive.

Relationship with conventional copyright law

The Delegation of the Republic of Korea noted that there was a possible overlap with copyright protection for adaptations and variations of TCEs, and asked how that conflict would be resolved. The Delegation pointed to the text which read “differing versions, variations or adaptations of the same expression could qualify as distinct TCE/EoF.” It said that not only original TCEs but also variations and adaptations therefrom would also be protected as TCEs. The Delegation said that it was its understanding that such adaptations based on original TCEs could also be protected by the conventional copyright regime. There would thus be two rights on the same subject matter and this would lead to a conflict of rights.

The Delegation of Italy pointed to a conflict with the Berne Convention (Article 2) as far as the definitions were concerned and the relationship between the Berne Convention and the protection intended in the document. It suggested that this issue be looked into by the expert group.

Comments by Observers

The representative of Ibero-Latin-American Federation of Performers (FILAIE) suggested reviewing the reference to “architectural forms”. The potential concern was that neither in the Berne Convention nor in modern IP law were architectural works protected. However, projects, drawings, models, architectural or engineering designs could be protected. The representative stated that architectural works were permanently located in parks, streets, squares or other public places and could be reproduced, distributed and communicated freely through paintings, drawings, photography and audiovisual processes. This could possibly conflict with the Berne Convention.

Relationship with the public domain

The Delegations of Australia and Japan suggested that the impact on the public domain be examined. The Delegation of Japan asked what criteria were used to distinguish the TCEs that were protected from those that were not. Among TCEs, some were handed down only to certain individuals within a small community, while others were handed down in a broader nation-wide cultural context, maintained and used by a wider range of public or sometimes even used commercially. This issue was important since it would have a direct impact on the boundaries of the public domain. Pending the level of protection to be applied to the subject matter, broader definition of TCEs could imply limiting the scope of public domain materials which were currently available.

Drafting suggestions by observers

The representative of the Ibero-Latin-American Federation of Performers (FILAIE), in relation to (a), suggested to add, after “or are manifested”, the phrase “in original form” in order to have a criterion to identify and reference a particular community. The representative also suggested to delete “and knowledge” to avoid any confusion with TK, which was dealt with separately. In relation to (a)(aa), the representative suggested to add, after the semicolon, “which was created by former generations” to focus on the true essence of what was being discussed: cultural heritage and legacy.

The representative of the Saami Council, commenting on the sentence “maintained, used or developed by such community or by individuals having the right . . .” stated that the language suggested that the instrument would only apply to TCEs that were still in the custody of indigenous peoples. The language “maintained, used or developed” suggested that the TCE was still to be managed by the community or the indigenous peoples and he believed that it should also apply to artifacts that might have been non-consensually taken out of the community. He proposed the alternative language “has an affiliation with an indigenous people or a community due to its cultural significance to that community”.

The representative of Tupaj Amaru proposed the following text for Article 1:

“Article 1
Protected material

- (1) Verbal expressions, such as folk tales and legends, folk poetry, stories, epic poems, riddles, other narrations; words, signs, sacred names and symbols;
- (2) Musical expressions, such as songs and indigenous instrumental music, music on percussion instruments and woodwinds;
- (3) Expressions by action, such as dances, plays, ceremonies, ritual expressions and other folkloric performances;
- (4) Tangible expressions, such as art, drawings, paintings, sculptures, pottery, terracotta, mosaic, woodwork and jewelry; basketwork, needlework, textiles, glasswork, pencils, clothing, handicrafts; and
- (5) Musical instruments and architectural works.

The said TK has universal value from a historical, aesthetic and anthropological standpoint and is passed from generation to generation.”

ARTICLE 2: BENEFICIARIES

Measures for the protection of [MOROCCO: national] traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples [ISLAMIC REPUBLIC OF IRAN: individual groups, families, tribes, nations] and traditional and other cultural communities [MOROCCO: or the nation].¹ in whom the custody, care and safeguarding of the TCEs/EoF are entrusted [INDIA: ~~entrusted~~ existing] in accordance with their customary law and [AUSTRALIA: ~~and or~~practices; and who maintain, [TRINIDAD AND TOBAGO: control] use or develop the traditional cultural expressions/expressions of folklore as being ~~characteristic~~ [BRAZIL: authentic and genuine] of their cultural and social identity and cultural heritage [BRAZIL: replace “heritage” with a word meaning “patrimonio” in Spanish].

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Terminology

The Delegation of Brazil reiterated its comments made under Article 1 regarding the English equivalent to the Spanish “*patrimonio*.”

The Delegation of India, concerning paragraph (i), said that the term “entrusted” could have certain legal ramifications in terms of requiring evidence of the custody, care and safeguarding being entrusted to a particular community. It suggested substituting the word “entrusted” with the word “existing.”

Scope of beneficiaries

The Delegation of El Salvador suggested that other groups should also be referred to in addition to “indigenous peoples and traditional and other cultural communities.”

¹

The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

The Delegation of Morocco said that, concerning paragraph (i), the term “traditional communities” was much too broad and should be defined in a clearer and more precise way. The Delegation said that the nation had its own folklore, “national” folklore; however there was no mention of “national” TCEs. It suggested amending paragraph (i) stating that the “national” folklore of the States also needed to be protected.

The Delegation of Indonesia proposed that the definition also include the following elements: (i) other than traditional/indigenous communities as parties who maintained and developed TCE/EoF, governments also needed to play a role in facilitating TCE/EoF protection in case there were other communities who had potential benefits for the utilization of TCE/EoF; (ii) in cases where the owner of TCE/EoF could not be identified, the beneficiary of TCE/EoF protection should be the government, such as the local government, and the TCE/EoF would be used for the sake of community’s interests; (iii) the owner of TCE/EoF eligible to benefit from the protection should be the TCE/EoF owner who had been identified by the local government; (iv) regarding the individual’s contribution to the development of TCE/EoF, it could be rewarded by the existing IP system; (v) a state could play a certain role in facilitating the protection of the community and it could be extended further as a right holder only if it benefited the communities.

The Delegation of the Islamic Republic of Iran believed that the right holders should be individual groups, families, local communities, tribes and nations. However, the rights of holders were considered in the framework of the rights of society. In this regard, national legislation was important and could not be ignored. The rights of local communities who were real owners and their consent should particularly be observed.

Customary law

The Delegation of Australia said that there would be difficulties to prove the relevant customary law for Australia’s indigenous communities, and suggested that “or” should replace “and” in paragraph (i).

Comments by Observers

The representative of the Arts Law Centre of Australia suggested that, in relation to paragraph (i), the requirement that communities prove that they had been entrusted with the custody, care and safeguarding of the TCEs/EoF in accordance with their customary law and practices be deleted and that a presumption should apply in favor of the indigenous community claiming to have been entrusted with the custody, care and safeguarding of the TCEs/EoF. It suggested rephrasing the paragraph for it to read: “in whom the custody, care and safeguarding of the TCEs/EoF are entrusted.” It also said that the end of the sentence should be deleted, and that a new clause should be added at the end of the provision, reading: “The Indigenous peoples and traditional and other cultural communities claiming the benefit of the measures for the protection of TCEs/EoF are presumed to have been entrusted with the custody, care and safeguarding of those TCEs/EoF.” Alternatively, and as a minimum, it suggested that the following change should be made: “in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law or practices.” It also said that in Australia, indigenous peoples considered it disrespectful to use the term indigenous otherwise than with a capital “I” and that therefore, the word “indigenous” should be with a capital I throughout the text. It said that this spelling was consistent with the one used in the Declaration on the Rights of Indigenous peoples.

The representative of Tupaj Amaru suggested that the article should end with the following sentence: “The States will adopt effective means to ensure the prior informed consent of the interested peoples to guarantee the respect and legal protection of traditional cultural expressions.”

80. The Delegation of Senegal, on behalf of the African Group, asked the Committee to keep to what was agreed upon the previous day, which consisted in fully entering into text-based negotiations when Item 7 was under discussion. It also underscored that the African Group had already submitted its comments in the document.
81. The Chairman stated that it was necessary to focus on matters of substance if there was to be any progress. There was agreement on this. It was also agreed that making progress meant building consensus by identifying areas of convergence and obstacles to agreement and then trying to overcome those obstacles. It could be possible to embark on text-based negotiations with the use of a screen, but only three lines of text might be completed in a week. It was better to identify obstacles to agreement and common objectives, and then there would be raw material to give the IWG so that in the near future there could be text-based negotiations. “Negotiations” meant a constructive exercise to create added value for all participants. If, however, the African Group insisted on text-based negotiations, the Committee could see how far it would get.
82. The Delegation of Angola proposed that the text of document WIPO/GRTKF/IC/9/4 be used as the text for negotiations, that discussions take place on an item-by item basis, and that that be put in writing so that the Committee’s mandate were respected.
83. The Chairman stated that the Committee was working on document WIPO/GRTKF/IC/9/4 and that the question was what form should discussions on the document take. It was a question of the negotiating method at this stage.
84. The Delegation of Sweden, on behalf of the European Union and its Member States, took note that the Committee would focus its attention on text-based negotiations with the objective of reaching an agreement on TCEs. While it had agreed to use all working documents of the Committee as a basis, it was ready to revisit document WIPO/GRTKF/IC/9/4 for the discussions. The Delegation underlined that the issues set out in the Annex related to “Policy Objectives and Core Principles”, could provide a basis for discussions and for subsequent consideration of a text. On the “Policy Objectives” (part I of the Annex), the main consideration was that all communities deserved respect and their TCEs should be encouraged. It was the primary responsibility of the States within and across whose borders communities live to respond to their specific needs at first instance. As regarded the “General Guiding Principles” (part II of the Annex), in parallel to discussions in the framework of the Committee, indigenous communities could also be helped to use the current IP system as well as other areas of law. Concerning the “Substantive Provisions” (part III of the Annex), the Committee could try to achieve a better understanding on Members’ views on the definition of “TCEs” and attempt to find a common approach in this respect. Any common understanding on the definition of TCEs would represent a move towards achieving the common

objective agreed at the General Assembly. The Delegation stated that it was willing to contribute constructively to the ensuing discussions on TCEs and supported the process by focusing on the substance of the issues at stake.

85. The Delegation of South Africa pointed out that, as stated by the Delegation of Senegal on behalf of the African Group, further clarifications were needed in terms of process. The Committee would not be fulfilling its new mandate to engage in text-based negotiations if it continued in general discussion mode. The work carried out in the Committee was going to set the stage for the next two years, and it was the understanding of the Delegation that the text would be discussed word by word and line by line which would be a lengthy process. It was looking forward to concrete and technical textual drafting proposals.
86. The Chairman proposed that the Committee listen to specific proposals on the various articles, even specific drafting proposals. Comments should be focused, technical and precise. Then, the Committee would ask the Secretariat to reflect the various specific drafting proposals and also any general comments that were made in a document which would evolve and become a working document for the next session.
87. The Director General stated that it had been a long time since WIPO had engaged in text-based negotiations, and it had been forgotten what was involved unfortunately. So, this would be a learning exercise. It would be helpful to hear if delegations could not accept certain text. If there was general silence in the room, how was that to be interpreted? Did this mean that everyone was in agreement with the text in question? This was the purpose of having some proposals made by the various delegates. Second, would there be drafting recommendations made directly by NGOs? Or would it only be Member States who could propose amendments to the text? As the Chair had stated, there would be a revision done by the Secretariat on the basis of the various proposals that have been made. It would be necessary to put them into some form to reflect on them. This would be for the next session.
88. The Delegation of the Islamic Republic of Iran agreed with the Delegations of Senegal and South Africa that the Committee should work with the text on a screen and proceed with discussions article by article. In previous sessions of the Committee, the divergences and convergences had been recognized and reflected in the text as explained by the Secretariat and the Delegation did not wish to repeat the same exercise.
89. The Chairman stated that time had already been spent on general discussions and repeating past experiences. The idea here was to make progress. The Chairman proposed that, in the spirit of "text-based negotiations", statements by delegations be concrete textual suggestions. The Secretariat would then reflect the suggestions in a document reflecting the concrete textual proposals.
90. The Delegation of Zimbabwe wished to obtain clarifications as to the intervention of the Chair, in which he had mentioned that the comments would be consolidated into different documents to be presented in another meeting. The Delegation wished to know what would be the basis of the new document. The new mandate clearly established that any negotiations were supposed to be premised on existing documentation. The Delegation was not comfortable with the idea of a new document and preferred to go ahead with negotiations on the existing

documentation that would be put on a screen and discussed. Clarifications were needed on how the new document mentioned by the Chair would fit into the new mandate which clearly specified text-based negotiations and not discussions. The Delegation pointed out that it was ready to engage in substance as long as the procedural methods were clearly defined.

91. The Delegation of Indonesia strongly supported the proposal made by the Delegations of Senegal, South Africa and Zimbabwe to start text-based negotiation, on a screen, article by article, on document WIPO/GRTKF/IC/9/4.
92. The Delegation of the United States of America felt that the Committee needed to spend time discussing objectives and principles underlying the text suggested for text-based negotiations. It said that the suggestion of the Saami Council was very helpful and the Delegation hoped that it could be reflected as bracketed text or in some sort of note. Normally text presented by observers could not be added unless it was suggested by a Member State. The Committee could not move directly to text-based negotiations if it failed to continue to ensure that there was a common understanding as to the objectives and principles and of what the Committee was doing and why.
93. The Delegation of India stated that its understanding of the mandate was that the Committee was to start text-based negotiations which would lead to a legally binding instrument. The content of the instrument was of great importance and, in that light, the Committee was to start immediately on article by article text-based negotiations. The text was to be put on the screen to start negotiations and drafting suggestions would be sought from the delegates instead of general discussions.
94. The Delegation of Djibouti endorsed the statements made by the Delegation of Senegal, on behalf of the African Group, and requested that the existing text be put up for negotiations.
95. The Chairman explained the proposed method of work as follows: (1) the mandate of this session was text-based negotiations; (2) the text would be placed on the screen; (3) he would invite concrete drafting proposals, not political statements, nor general comments; (4) this was not a Drafting Committee as such. The proposed amendments would be duly recorded by the Secretariat and would be included in a revised version of the document which the Secretariat would prepare; (5) in accordance with the Rules of Procedure, observers could not make concrete proposals. However, if a Member State agreed with a proposal, such as the one made by the Saami Council, for example, they could say so. Then it would become a proposal from a Member State and then be duly recorded.
96. The Delegation of the Russian Federation pointed out that document WIPO/GRTKF/IC/9/4 had been discussed repeatedly at previous sessions of the Committee. Many delegations, including the Delegation of the Russian Federation, had made numerous comments and proposals on the text. As a result of an analysis of all of the comments and proposals, the Committee at its 10th session, came to the conclusion that this document required clarification on a number of basic legal issues. An analysis of those comments showed that members of the Committee did not have an understanding on fundamental questions such as the subject matter of protection, or the question of the object of protection and the volume and scope of legal protection. That being so, the Committee should give some thought to its working methods. Further, the Committee needed to define the

possibilities of protection and the scope of protection and to agree on the form and the status of the international document that it wished to obtain.

97. The Delegation of Sweden, on behalf of the European Union and its Member States, stated that progress would be made if the Committee moved to text-based negotiations, on a screen to facilitate drafting on specific text. The Delegation was to submit its proposals at a later point. It was important not to lose sight of other issues ahead, such as the intersessional expert discussion and clarification was required on how those issues would be identified in the process of the work of the Committee. The Delegation requested clarifications from the Chair regarding the procedure to discuss not only TCEs but also TK and GRs, as well as the allocation of sufficient time to discuss Agenda Item 10.
98. The Chairman stated that some of the comments made did not respect the decision that had just been taken. The Committee would work on this article by article on the basis of specific proposals. Time had been allotted to each substantive item.
99. The Delegation of France aligned itself with the statement made by the Swedish Presidency of the European Union, and emphasized its surprise that the Committee was rushing into the drafting stage. Although that was not a drafting committee and the Committee was not yet within its new mandate, the Delegation assumed that the session was more intended for laying the foundations, and preparing the ground, for the efficient implementation of its new mandate and that it would focus on the preparation of the work program. [Note from the Secretariat: the Delegation then made some specific drafting proposals or comments, reflected above.]
100. The Delegation of Venezuela (Bolivarian Republic of) stated that the work underway appeared to be more legislative than executive. The second phase ought not to be moved forward as that would become the enforcement of the rules, once the international agreement had been drafted.
101. The Delegation of Egypt felt that the Committee had been going around in circles and that a great deal of what was being said had already been discussed in the first session of the Committee. The Delegation thanked the Secretariat for the draft submitted on the subject matter of protection, which to a great extent met the needs from a technical point of view. Legal experts would have to consider how they may provide for the protection of those points raised in Article 1. Technical comments, comments related to definitions or to the subject matter of protection should be examined within the framework of the Intersessional Working Groups. Any additions, deletions or explanations on the documents being discussed should be put forward and examined by the specialists and experts in order to draft a form of consensus on the matter. [Note from the Secretariat: the Delegation then made some specific drafting proposals or comments, reflected above.]
102. The Delegation of India concurred with the statement of the Delegation of Egypt about the queries raised on substantive issues. It believed that they had already been discussed and under the new mandate the Committee needed to focus on text-based negotiations. [Note from Secretariat: The Delegation then made some specific drafting proposals or comments, reflected above.]

103. The Delegation of the Republic of Korea suggested that a list be prepared of questions and concerns on the text to be negotiated, which would be helpful for the operation of the 15th session as well as for the Intersessional Working Group. [Note from the Secretariat: The Delegation then made some specific proposals or comments, reflected above.]
104. The Delegation of Italy underlined that the Assembly had not designated the texts of document WIPO/GRTKF/IC/9/4 as being the official texts for negotiation, and had only stated that text-based negotiations were to take place. The Delegation had the possibility of submitting other texts on the matter. Any ensuing observations would therefore be provisional. Secondly, it was yet to be established which tasks the Working Group would carry out. [Note from the Secretariat: The Delegation then made some specific proposals or comments, reflected above.]
105. The Delegation of El Salvador stated, as regards the working methodology, that that had just begun and that at the end of the week there could be an assessment of the outcomes of that working methodology. It added that the fact that all members had the possibility of sending comments would allow for the use of experts' knowledge which, as in its case, were not participating in the Committee, due to which it insisted on the possibility of contributing in writing to that exercise as regards document WIPO/GRTKF/IC/9/4. It was pleased to see that use was being made of the information which had been obtained by WIPO, particularly because that meant that rather than starting from scratch, a series of studies on that issue had been produced. It brought to the attention of Member States the book entitled "Intellectual Property Needs and Expectations of Traditional Knowledge Holders", which was a WIPO publication. That book could be of great use to those who were not experts in the area, particularly its explanation of the terms traditions, traditional expressions, traditional cultural expressions or expressions of folklore and the reason for the use of the word "or".
106. The Delegation of Australia said that the language was broadly acceptable of what might encompass TCEs. It said that paragraph (b) gave some important flexibility at the domestic level. It associated itself with the important questions raised by the Delegation of the USA and the Delegation of Japan in particular. [Note from the Secretariat: The Delegation then made some specific proposals or comments, reflected above.]
107. The Delegation of Switzerland welcomed the fact that the Committee was able to hold discussions on substantive issues from the outset. It said that the renewed mandate referred to document WIPO/GRTKF/IC/9/4 in its entirety. The Delegation considered agreement on basic issues such as policy objectives a prerequisite for successful and meaningful work on substantive provisions. It said that it expected that the Committee would, in addition to Part 3, also discuss Parts 1 and 2 of the Annex to document WIPO/GRTKF/IC/9/4 in the further course of its negotiations on an international legal instrument or instruments. The Delegation also said that the discussions aimed at gathering ideas and allowing all participants to express their views. At that point in time, however, no decisions had been yet taken. Therefore, the text resulting from the discussions remained open for amendments and comments. The Delegation considered the establishment of a working definition of TCEs to be one of the prerequisites of a substantial discussion. It said that the definition of TCEs as contained in Article 1 constituted a good working definition. As such, the definition would be helpful to guide further discussions on the protection of TCEs. It said that it was clear that the Committee could revisit the

definition during the course of its negotiations should it deem it necessary to amend or modify the definition. The Delegation sought clarification from the Secretariat on the structure of the text of Article 1: it asked if its understanding was correct that all requirements enumerated in paragraphs (aa) to (cc) applied to all forms of TCEs as described in paragraphs (i) to (iv) and that the paragraphs (aa) to (cc) therefore did not only apply to paragraph (iv) alone. The Delegation said that it would be useful to structure the text in order to avoid ambiguities. The Delegation said that it was clear that the definition of TCEs should encompass TCEs from developing countries and developed countries. Furthermore, it supported the broad and inclusive use of the term “communities,” meaning “indigenous peoples and traditional and other cultural communities” as contained in footnote 23 of the Annex of WIPO/GRTKF/IC/9/4.

108. The Delegation of Spain expressed its interest in achieving results and making progress, and in producing a text that was valid and acceptable to all Member States. It believed that it was necessary to agree first on the meaning of what was under discussion, as concepts rather than words were being used. A more detailed analysis of the text's contents was required because, for instance, under I. Objectives (page 3), it stated in ii) “promote respect for traditional cultures and folklore”, while in Article I. it said, “traditional cultural expressions, or expressions of folklore”. There was no consistency in the text and that made it very difficult to arrive at a text which might one day be legally binding. It stated that, in the Spanish version, Article I did not seem to mean very much, as the definition lay in what was defined. It said that it was difficult to arrive at a comprehensible and legally-binding text if discussions remained at the conceptual level without really defining what those were. [Note from the Secretariat: the Delegation made some specific proposals or comments, reflected above.]
109. The Delegation of Bolivia (Plurinational State of) said that many of the questions and ensuing discussions had originated some years previously. It believed that it was important for the Secretariat to provide assistance by indicating the state of discussions as regards certain definitions, for after nine years of work, much had been said on those issues and something must have been retained from those discussions, which would accelerate progress on the matter. [Note from the Secretariat: the Delegation made some specific proposals or comments, reflected above.]
110. The Delegation of Cameroon proposed that at the following session an item entitled “Promoting or adopting definitions” be added to the Agenda. The Delegation proposed renouncing attempts at formulation in order to concentrate on the observations or gaps in the texts so that the experts might assess and reproduce them in the new version to be submitted to the Committee. [Note from the Secretariat: the Delegation made some specific proposals or comments, reflected above.]
111. The Delegation of China endorsed the considerations raised on document WIPO/GRTKF/IC/9/4 and the use of that document as a basis for negotiation. The Delegation said that it would provide additional comments and proposals on the document later on. [Note from the Secretariat: The Delegation then made some specific proposals or comments, reflected above.]
112. The Delegation of Venezuela (Bolivarian Republic of) said that, as regards the issue of the diaspora, the problem was not when someone from a particular part of

the world reflected what their culture was. The problem arose when foreigners took such TCEs and turned them into merchandise. It disagreed with what the Delegation of Spain had stated whereby that was part of a legislative technique. It said that before Article I, there was a preamble containing explanations on why, to what end, how it would be interpreted, what were the objectives and guiding principles of that agreement. It said that by accepting the proposals on definitions and glossaries, progress would take a tortuous route which might take more time to reach that point and that could be a very dangerous trap. It agreed with what the Delegation of Bolivia had said. There had been texts prepared over the course of the past nine years from which it could clearly be deduced what those terms meant and which route should be taken.

113. The Chairman stated that he understood the concerns of the Delegation of Venezuela, but there was no trap in drawing up a glossary. It would help everyone to have a common understanding and to reach a clearer agreement.
114. The Delegation of Canada echoed the statement made by the Delegation of Switzerland, on behalf of Group B, on the importance of objectives. The Delegation had made numerous comments on the guiding principles and draft policy objectives, the latest draft of which was in document WIPO/GRTKF/IC/10/INF 2/Add 2. Also, supporting the statement of the Delegation of the Russian Federation, it said that it would be a good exercise to have document WIPO/GRTKF/IC/9/4 revised in light of the comments provided. The Delegation sought clarification from the Chair on the status of the text, as to whether the document would only be an additional working document of the Committee, or a negotiating text; in the latter case, the Delegation said that the rules of engagement had not been defined yet. It asked whether there would be any attribution for the amendments and suggestions made by delegations in the revised version; in other words, whether, if a country suggested a word, the name of the country would appear in a footnote or in a comment in the revised version.
115. The Director General stated that, on the basis of past experience, the next revised version would indicate all the suggested amendments and on the page opposite would be notes which would guide the reader to indicate which delegation had suggested what amendment. Delegations would also be free to submit written proposals for textual amendments.
116. The Chairman stated that it was not possible to re-open a procedural debate. Progress was being made.
117. The Delegation of Mexico said that a relevant international instrument which would provide appropriate protection of TCEs and folklore should serve as the basis, at the local level, for each country to try and compensate for identified shortcomings, while there currently existed various protection instruments which were not fully adjusted to the needs of the indigenous communities. It suggested that, as regards guaranteeing regional and international protection, already existing UNESCO and ILO instruments should be considered reference frameworks such as: The Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO, Paris, 1972); the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO, Paris: 2003); the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO, Paris, 2005); ILO Convention 169 on Indigenous and Tribal peoples (1989); and the United Nations Declaration on the Rights of Indigenous Peoples (2007). As

regards the possible conflict between the definition of the Berne Convention and the definition of TCEs/expressions of folklore, it stated that in the first instance there might be an overlap, however it could be indicated in Article 1, particularly in paragraphs aa), bb) and cc), that such TCEs or expressions of folklore were identified with, and part of, an indigenous community, and that there was a possibility that they were identifiable and therefore were subject to protection in the language of the present document. [Note from the Secretariat: the Delegation then made some specific proposals or comments, reflected above.]

118. The Representative of Tupaj Amaru stated that an instrument should be consistent, and in keeping with international instruments, such as those which were cited and other instruments such as the CBD. It stated that there were four important issues: protected materials, holders' rights, what was protected and who was to apply such an instrument. It maintained that the Declaration on the Rights of Indigenous Peoples, to which it had devoted 20 years of work should not be ignored and referred to Article 11 of the Declaration.
119. The Delegation of Egypt said that there was a long history of discussions on the topic of definitions either within the Committee or in other international fora. It mentioned that "cultural identity" was in the Mexico Declaration, and in many projects established and adopted by UNESCO. It said that there were over 180 definitions of culture and hundreds of definitions of folklore. It added that there was a scientific procedure used when there were more than one definition: specialists would meet in order to reach an "operational definition", that is, a procedural one that is acceptable by all. The Delegation did not agree that there should be a glossary that would lay out definitions, as it was not possible to find one unified comprehensive definition. The Delegation suggested adopting a scientific approach that would look into an operational definition and leave it to the legal experts to formulate the text in a legal manner.
120. The Chairman stated that the Secretariat would simply draw up a glossary which could be useful for delegations new to the process.
121. The Delegation of the United States of America said that it had asked some questions which the Committee as a whole had not yet answered. It said that it was not the role of the Secretariat to answer the questions posed by individual delegations, unless it concerned procedure or an area where the Secretariat had unique experience. For example, the answer as to how to define "community" was for the Committee to provide. It said that some of the difficult tasks could be appropriate for the Intersessional Working Groups. The Delegation stated that it wanted to start thinking about an appropriate process for collecting all the questions that still needed to be answered and providing answers to these questions.
122. The Delegation of Brazil supported the statement made by the Delegation of Mexico and reiterated that discussions about the concepts were not taking place out of context. It said that, WIPO being part of the United Nations system, it was important to consider the concepts upon which consensus had already been reached in other instruments. [Note from the Secretariat: The Delegation then made some specific drafting proposals or comments, reflected above] It said that it was very important to keep the concept "indigenous peoples and traditional and other cultural communities."

123. The Delegation of Trinidad and Tobago drew the attention of the Committee to the fact that sub-paragraph (ii), which read “who maintain, use or develop the traditional cultural expressions...”, was discordant with the text used in the United Nations Declaration on the Rights of Indigenous Peoples, Article 31 of which stated “who have the right to maintain, control, protect and develop.” [Note from the Secretariat: The Delegation then made some specific proposals or comments, reflected above]

*DECISION ON AGENDA ITEM 7:
TRADITIONAL CULTURAL
EXPRESSIONS*

124. The Committee requested the Secretariat to prepare and distribute, before the end of January 2010, a revised version of working document WIPO/GRTKF/IC/9/4, reflecting the proposed amendments and comments made on and questions posed in relation to this document at this session of the Committee. Amendments, comments and questions of observers should be recorded for consideration by Member States. The Secretariat would invite Committee participants to provide written comments on that revised version before the end of February 2010. The Committee invited the Secretariat then to prepare and distribute a further revised version of the document, reflecting the written comments made, as a working document for the next session of the Committee.

AGENDA ITEM 8: TRADITIONAL KNOWLEDGE

125. The Chair introduced the working document prepared under Agenda Item 8, namely WIPO/GRTKF/IC/9/5.

[Note from the Secretariat: In the discussion that took place under Agenda Item 8, several amendments were proposed to certain provisions contained in the Annex to document WIPO/GRTKF/IC/9/5. Delegations and observers also made several comments and posed certain questions. The proposed drafting amendments, comments and questions are reflected below in an extract from the relevant Annex in which the proposed amendments, comments and questions are reflected. The remainder of the report of the discussions that took place under this Agenda Item covers all other interventions made that did not directly propose an amendment or raise a specific question or comment related to the content of the Annex.]

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

Contribute to safeguarding traditional knowledge

- (vii) [UNITED STATES OF AMERICA: While recognizing the value of a vibrant public domain] contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

Preclude the grant of improper IP rights to unauthorized parties

- (xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring [UNITED STATES OF AMERICA: the creation of digital libraries of publicly known traditional knowledge and associated genetic resources, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;] in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources, as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

The Delegation of United States of America raised the following questions: (1) generally, what objective was sought to be achieved through according intellectual property protection (economic rights, moral rights)? Historically, information had been freely shared, except in limited circumstances, and for periods of limited duration. Furthermore, even with the limited circumstances of Intellectual Property rights such as Copyright and Patent, such legal systems had within them a concept of fair use or research use. How should these norms be balanced with any new exclusive rights granted on Traditional Knowledge? In addition, in the case of patents, not all countries that provided for patents provided for patents in all areas of technology. Some countries excluded “diagnostic, therapeutic and surgical methods for the treatment of humans or animals” from patentability, because they believed that no one should have exclusive rights on such inventions. Should countries be able to exclude from protection TK related to diagnostic, therapeutic and surgical methods for the treatment of humans or animals? Who should benefit from any protection of TK? Who should hold the rights to protectable traditional knowledge? Should holders of TK that reside within the traditional origin of the TK and those who no longer reside within the same area be treated in the same way? How would a new system to protect TK change the right of TK holders to continue to use their TK? How would the international concept of non-discrimination apply? If TK was protectable by patent, copyright or other traditional intellectual property rights, should TK also be protectable by other means, i.e., new national laws? (2) For policy objective (iv), how would an international legal instrument support the maintenance and preservation of

TK more than actively working to maintain and preserve TK in archives, databases and other recorded means? (3) For policy objective (viii), what was misappropriation of traditional knowledge? Can access to such knowledge through channels that were entirely consistent with national laws be considered misappropriation in particular cases? If so, in what cases? For policy objective (viii), what were unfair and inequitable uses of TK? Some examples of fair uses of TK, as well as unfair uses of TK, should be provided. (4) For policy objective (x), how would the restriction of the ability to use TK promote innovation and creativity? (5) For policy objective (xiv), for Member States that required patent applicants for inventions involving TK to disclose the source and country of origin for the TK and/or proof of prior informed consent and/or mutually agreed terms, what were the provisions outside of the patent regime to ensure that commercial uses of TK are done with prior informed consent and mutually agreed terms? For Member States that required patent applicants for inventions involving TK to disclose the source and country of origin for the TK and/or proof of prior informed consent and/or mutually agreed terms, the circumstances under which the requirement must be met should be explained. Examples of inventions related to TK where the requirement must be met and other situations where it did not need to be met should be provided. For example, if the TK was well known by many, and the invention was an improvement that builds upon the TK, was the disclosure requirement still required to be met? For Member States that had a patent disclosure requirement, why was this requirement more appropriate than a requirement to disclose information that was material to patentability?

ARTICLE 1: PROTECTION AGAINST MISAPPROPRIATION [INDONESIA: and misuse]

1. *Traditional knowledge shall be protected against [MOROCCO: misappropriation the following acts if these acts have a commercial goal or take place outside the context of the customary or traditional uses of this traditional knowledge] misappropriation [INDONESIA: and misuse].*
2. *Any acquisition, appropriation [PERU: revelation] or utilization of traditional knowledge by unfair or illicit means [INDIA: shall constitute constitutes] [VENEZUELA: that constitutes an act to derive constitutes an act of misappropriation. Misappropriation may also include deriving] constitutes an act of misappropriation [INDONESIA: and misuse]. Misappropriation [INDONESIA: and misuse] [CAMEROON: may also include also includes] may [INDIA: may shall] also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or [VENEZUELA: fails is negligent in failing] is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.*
3. *In particular, legal means should [INDIA: shall should] be provided to prevent:*
 - (i) *acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;*
 - (ii) *acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;*

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;

(iv) ~~[BRAZIL: if traditional knowledge has been accessed]~~ if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge ~~[INDIA: in violation of the recognized rights of the holders of the knowledge without just and appropriate compensation to the recognized holders of the knowledge]~~ without just and appropriate ~~[BRAZIL: compensation benefit-sharing]~~ compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, ~~[INDIA: and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge]~~ ~~[BRAZIL: and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge and according to the national and international regimes]~~ and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and

(v) ~~[BRAZIL: willful]~~ willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge ~~[MEXICO: and is contrary to ordre public or morality]~~ and is contrary to ordre public or morality.

[BRAZIL: (vi) the granting of patent rights for inventions involving traditional knowledge and associated genetic resources without the disclosure of the country of origin of the knowledge and/or resources, as well as evidence that prior informed consent and benefit-sharing conditions have been complied with in the country of origin.]

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.
5. The application, interpretation and enforcement of protection against misappropriation ~~[INDONESIA: and misuse]~~ of traditional knowledge ~~[INDIA: and other recognized rights]~~, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Relationship with elements of policy objectives and principles

The Delegation of Australia noted this article specifically related to elements of a number of policy objectives and principles in the operative document, particularly Policy Objectives 5 and 8 and Principles (b) and (c). There were elements of these policy objectives and principles that were worthy of further discussion that would assist in a thorough analysis of the operation of any text of this nature. For example, what would the relationship or interface be with the existing IP system, to what extent did it accord with flexibility for national and local implementation, what impact would it have with respect to public domain knowledge, and what elements of such protection related to the IP system specifically, and which elements did not. Also the text was very dense and it might be useful to distill the operative elements and consider each separately.

The Delegation of Japan, New Zealand and Switzerland suggested that in-depth examination of policy objectives and principles was the prerequisite for the discussion on the substantive provisions.

The Delegation of South Africa noted that the objective of protection in this document was too limited. Protection against misappropriation should not be the only objective. The protection of traditional knowledge should expand to other areas, such as sustainable development, promotion of innovation and research, as well as the protection of moral rights.

The Delegation of Switzerland highlighted that the protection against misappropriation of TK should not be the only direction of protection of TK. Therefore, other additional policy objectives were important to the protection of TK and should be reflected in any provision of protection of TK.

The representative of International Chamber of Commerce (ICC) noted objectives needed to be discussed.

The representative of Tupaj Amaru noted indigenous peoples and local communities were the object of protection.

Glossary

The Delegation of Spain called for a glossary.

The Delegation of Nigeria highlighted there was the need for clear definitions in all the articles in order to maintain clear perspective on all the issues and subject matter, since it was observed that certain delegations were ascribing meanings to certain terms based on their perception, interpretation and interest.

The Representative of the Maya To' Onik Association called for a glossary. This glossary should be prepared in line with the viewpoint or worldview of indigenous peoples, taking into account that concepts such as acquisition, misappropriation, ownership and other concepts had other connotations in the cultural worldview of indigenous peoples, particularly in Mayan culture.

The representative of ICC noted that clarity was important because business needed to know what they can do and what they cannot do.

Definition of misappropriation

The Delegation of Cameroon, Morocco, Nepal and Nigeria suggested that misappropriation should be defined.

The Delegation of Italy noted that the list of possible cases of misappropriation included in Article 1 paragraph 3 was not necessary.

The Delegation of Nigeria noted that Article 1 was restrictive as protection of TK should not be solely based on acts of misappropriation. The entire Article should be reviewed to include all rights that should be protected thoroughly under TK, including economic and moral rights.

Definition of TK

The Delegation of Italy and Nepal noted that the definition of TK was absolutely necessary. The kind of definition included in Article 3 paragraph 2 was insufficient.

The Delegation of Japan, Kenya, Morocco and Nigeria noted that there was no clear understanding among members on the fundamental term "TK" and it was no clear what TK encompassed. The definition should be dealt with before entering substantive discussion on respective articles.

The Delegation of Norway highlighted a need for greater clarification of what actually was the subject matter for protection, namely how TK should be defined for this purpose.

The Delegation of United States of America commented on the specific drafting amendment of deleting "if traditional knowledge has been accessed". The purpose of that phrase was to make clear that if someone created that same knowledge independently he would have the right to use his own independent creation. Furthermore, it questioned how to deal with the concept of evolving TK.

Definition of holders and recognized holders

The Delegation of Russian Federation suggested that the terms "holders" and "recognized holders" needed to be defined: (a) were these concepts synonymous?; (b) if not, what was the basis for including holders among "recognized holders".

The Representative of the Brazilian Indigenous Institute of Intellectual Property (InBraPi) stated that throughout the document mention was made of TK holders but only in Article 4 was it clearly expressed that indigenous peoples and local communities were the holders of such TK. Pursuant to Article 4 (iii), it proposed adding, before the word "holders" the terms "indigenous peoples and local communities".

Rights of the holders

The Delegation of Italy suggested that the first thing to do would be to define the rights which were to be recognized to the holders, since misappropriation meant a breach of rights.

The Delegation of Kenya believed that Article 1 did not say what right was offered to the TK holder in which the holders would be able to seek legal redress in case they were misused.

Enforcement

The Delegation of Cameroon questioned what body should be responsible for penalization. It also noted it was not clear, in Article 1 paragraph 3, who should make the legal means available and to whom.

Concept of compensation

The Delegation of Burundi commented on the specific drafting amendment that the concept of “compensation” should remain in Article 1 paragraph 3 (iv).

Commercial and non-commercial issues

The Delegation of Kenya suggested that Article 1 should cover wider issues on exploitation of TK, not only on commercial exploitation of TK.

The Delegation of New Zealand raised the issue of potentially differentiating commercial and non-commercial misappropriation. It noted that Article 1 set a higher threshold for non-commercial misappropriation than for commercial misappropriation. However, the Policy Objective (viii) aimed to “repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities”. It should be sufficient that the effect of the use was offensive.

The representative of Indigenous Peoples Council on Biocolonialism (IPCB) noted that it was important that the legal form of protection should extend to commercial and non-commercial use of TK because misuse often resulted from non-commercial use of traditional knowledge, and traditional knowledge acquired under non-commercial auspices could easily move into commercial use.

Ordre public or morality

The Delegation of Morocco noted that the *ordre public* or morality was different from country to country and the definition of “the *ordre public* or morality” was not clear.

The Delegation of United States of America questioned, if an international regime was created, how to enforce laws of another country when morals are involved, since the perspectives on the concept of *ordre public* or morality could be quite different?

The Delegation of Mexico requested deletion of the respective text as it appeared that the sanction for voluntary offensive use of TK with special moral or spiritual value by third parties, outside the customary context could only be applied when the said offense was considered contrary to *ordre public* or morality. The Delegation believed that the offensive use referred to must be sanctioned owing to the violation which it represented to the moral and spiritual sphere of an indigenous people or community, and the effect this had on community life or identity.

Public domain

The Delegation of Norway highlighted that it was especially important to find the right balance between protectable TK and knowledge which had become part of the public domain. There was not a coherent approach to what the notion of public domain actually meant.

The Delegation of Sweden, on behalf of European Union and its Member States, questioned (1) what was the relationship between the foreseen protection of TK and knowledge already in the public domain? Where was the relevant point of access to TK, which was not fixed locally in nature, to be determined? (2) How Member States foresaw protection of TK contained in databases?

The representative of InBraPi noted that the concept of public domain could not be applied to TK. Publicly available TK should be distinguished from TK in the public domain.

Disclosure requirement

The representative of ICC opposed the specific drafting amendment on requiring the origin of biological materials to be disclosed in patents. However, a full discussion of this proposal between experts was welcomed.

Drafting suggestions by observers

The representative of IPCB suggested to add “or non-commercial” in line 5 of Article 1 paragraph 2 after the word “commercial”.

The representative of InBraPi suggested to add “of the indigenous peoples and local communities, holders of traditional knowledge” after “prior informed consent” in line 2 of Article 1 paragraph 3 (ii).

The representative of the Saami Council suggested, in relation to Article 1 paragraph 2, to delete “by unfair or illicit means” and to replace by “without the free, prior informed consent of the indigenous peoples or communities that have developed traditional knowledge”. He also suggested to replace “the acquisition, appropriation or utilization of traditional knowledge” with “the utilization of traditional knowledge that has entered the public domain without the consent of the indigenous peoples or communities that have developed the traditional knowledge”.

The representative of the Tulalip Tribes suggested, in Article 1 paragraph 3 (v), to add “of the indigenous peoples and local communities” after “*ordre public* or morality”.

The representative of Tupaj Amaru proposed that “shall” in Article 1 paragraph 1 should be replaced with “should”. In relation to Article 1 paragraph 2, he suggested to replace “may include” with “also includes”, to replace in its line 3 “from” by “through” and to replace “the person using that knowledge knows” in line 4 of this paragraph with “the person or persons using that knowledge know or should have known”. In relation to Article 1 paragraph 3, he suggested to add “and sanction” after the word “prevent”. In relation to Article 1 paragraph 3 (i), he also suggested to add “and illicit appropriation” after “acquisition” in line 1, as well as “including recourse to violence” after the word “theft”. In number (ii) he suggested to add “possession” after “acquisition” and also “the legislation currently in place” after “in violation of”. In number (iii) he suggested to change wording to “claims that have no legal foundation”. He noted that number (v) had to be redrafted as the Spanish text was not clear. He proposed “violation of customary rights of indigenous peoples” should replace the concept “morality”. He suggested to add in Article 1 paragraph 4 “indigenous peoples and local communities” and to add “customary laws of indigenous peoples and local communities” in paragraph 5.

Other submissions by observers

The representative of African Regional Intellectual Property Organization (ARIPO) submitted the relevant provision of the ARIPO Protocol on Traditional Knowledge as follows:

“Rights conferred to holders of traditional knowledge

- 7.1 This Protocol shall confer on the owners of rights referred to in Section 6 the exclusive right to authorize the exploitation of their traditional knowledge.
- 7.2. In addition, owners shall have the right to prevent anyone from exploiting their protected traditional knowledge without their prior informed consent.
- 7.3. For the purposes of this Protocol, the term “exploitation” with reference to protected traditional knowledge shall refer to any of the following acts:
- (a) Where the traditional knowledge is a product:
- (i) manufacturing, importing, offering for sale, selling or using beyond the traditional context the product;
- (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;
- (b) Where the traditional knowledge is a process:
- (i) making use of the process beyond the traditional context;
- (ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process.”

ARTICLE 2: LEGAL FORM OF PROTECTION

1. *The protection of traditional knowledge against misappropriation [INDONESIA: and misuse shall ~~may~~] may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to Article 11(1).*
2. *The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.*

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Meaning of “individual”

The Delegation of Ecuador and Venezuela (Bolivarian Republic of) suggested that, in relation to Article 2 paragraph 2 on the scope of the rights of holders of knowledge, the word “individual” should be reviewed due to the collective nature of traditional knowledge.

Meaning of “this paragraph is subject to Article 11(1)”

The Delegation of Russian Federation noted Article 2(1) states that “this paragraph is subject to Article 11(1)”. However, not all the legal measures listed in the aforementioned Article 2(1) may be applied in accordance with the provisions of Article 11(1), i.e. without formalities. For example, the intellectual property legislation referred to in Article 2(1), in relation to individual intellectual property subject matter, required particular formalities to be performed for the provision of legal protection of such subject matter, in particular its registration.

Legal forms or measures

The representative of ARIPO noted that Article 2 provided a range of legal forms or measures that can be used to protect traditional knowledge. However, those measures indicated in Article 2.1, which related principally to forms of existing intellectual property legal tools and were also based on the notion what the instrument seeks to, were to prevent misappropriation, an objective which has been referred to as inadequate or limiting.

Exclusive rights

The representative of ARIPO noted that the commentary on Article 2 suggested that holders of traditional knowledge did not require the creation of exclusive rights over their traditional knowledge. This understanding was not what had been gathered in their experiences with the traditional knowledge holders in Africa. Most of holders had rather called for collective rights over their traditional knowledge and not private or individual rights as had been referred to Article 2.2. Without conferring rights, there could not be consequential action taken. Therefore, he suggested that the Article should be substantially amended to reflect the aspirations of the traditional knowledge holders who had called for a new form of *sui generis* system to protect their traditional knowledge and not a conglomerate of legal options.

ARTICLE 3: GENERAL SCOPE OF SUBJECT MATTER

1. *These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving [SOUTH AFRICA: inter-generational] nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.*
2. *For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and [MEXICO: any traditional] knowledge associated with genetic resources.*

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Relationship with Article 1

The Delegation of El Salvador, Morocco and Venezuela (Bolivarian Republic of) suggested that Article 3 should be merged with Article 1 or moved before Article 1.

Meaning of indigenous and local communities

The Delegation of Italy noted the inconsistency between Article 4, in which “local communities” were not considered, and other provisions. Furthermore, it suggested that the language and definitions used should be the same throughout the document.

The Delegation of Switzerland suggested that the term “indigenous and local communities” in Article 3 paragraph 2 should be understood in the same broad and inclusive sense as the term “communities”, as described in footnote 23 of the Annex of the Draft Provisions on TCEs.

Definition of TK

The Delegation of Russian Federation expressed that the provision of Article 3(2) was an adequate definition of what was assumed by protection in accordance with this document.

The Delegation of South Africa suggested that Article 3 should be clearer and sharper.

The Delegation of Switzerland noted that the establishment of a working definition of traditional knowledge was considered to be one of the prerequisites of a substantial discussion. The definition of traditional knowledge as contained in Article 3 paragraph 2 constituted a good working definition. The IGC could and should revisit this definition during the course of its negotiations to amend or modify the definition if necessary. It was highlighted that the definition of traditional knowledge should encompass all traditional knowledge, that was, traditional knowledge from developing countries and developed countries.

Definition of cultural identity

The Delegation of Morocco suggested to clarify the definition of “cultural identity”.

Traditional arts and artisanal works

The Delegation of Oman suggested adding traditional arts and artisanal works in Article 3.

Drafting suggestions by observers

The representative of ARIPO suggested to add the sentence “The specific choice of terms to denote the protected subject matter under Traditional Knowledge may be determined at the national level” after paragraph 2 of Article 3.

The representative of InBrapi suggested adding “developed” after “activity” in line 2 of Article 3 paragraph 2.

ARTICLE 4: ELIGIBILITY FOR PROTECTION

Protection ~~[VENEZUELA, INDONESIA: should shall]~~ should be extended ~~[VENEZUELA: at least]~~ at least to that traditional knowledge which is:

- (i) generated, preserved ~~[SUDAN: , constituted]~~ and transmitted in a traditional and intergenerational context ~~[INDIA: or]~~;
- (ii) ~~[INDIA, SUDAN: distinctively]~~ distinctively associated with ~~[MOROCCO: distinctively associated with customarily recognized as belonging to]~~ a traditional or indigenous community or people which preserves and transmits it between generations; and ~~[INDIA: and or]~~
- (iii) ~~[INDIA: integral to the cultural identity of]~~ integral to the cultural identity of an indigenous or traditional community or ~~[URUGUAY: cultural identity of]~~ people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or ~~[INDONESIA: applicable national]~~ laws.

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

Criteria

The Delegation of Cameroon noted that the criteria included in Article 4 should not be cumulative. Article 4(iii) was the only necessary criterion of protection.

The Delegation of El Salvador suggested the protection should be broader.

The Delegation of United States of America questioned whether traditional knowledge that was created by a single individual would be eligible for protection and what was the basis for such an inclusion. It also questioned why to provide for protection for some innovations under a system of protection of TK, and other innovations under the patent system?

Definition of TK

The Delegation of Australia suggested that further consideration needed to be given to the definitions, and to the flexibilities required for local circumstances. In particular, for example, how did the wording in Article 4 relate to possible protection for traditional knowledge produced by a contemporary generation?

Relationship with Article 3

The Delegation of Brazil suggested that the wording of Article 4 (i) should be included in Article 3 paragraph 2.

Terms used in Article 4

The Delegation of Italy suggested that the words in the document should be the same. For example, the words "indigenous and local communities" as used in Article 3.2 should also be used in Article 4. It also highlighted that the scope of "local communities" was needed.

The Delegation of China noted that traditional knowledge sometimes was owned by ethnic groups in China. Thus, it suggested that a reference to different ethnic groups should be added in Article 4 (ii).

The Delegation of Uruguay suggested to clarify the words “indigenous or traditional community or people” and “cultural identity”.

The representative of Indigenous Peoples (Bethechilokono) of Saint Lucia Governing Council noted that the term “traditional or indigenous community or people” in Article 4(ii) was confusing. The explanation should be given after consulting outside of the IGC for a study on the terms.

Traditional medicine

The Delegation of India suggested that more legal text should be submitted in writing. It also noted that Traditional Medical Knowledge was not always linked to communities.

The Delegation of Nigeria suggested that Article 4(iii) should include a reference to the nature of ownership of traditional medicine and in particular within the dynamics of its intergenerational use, generation, preservation and transaction.

Drafting suggestions by observers

The representative of Arts Law Center of Australia suggested deleting “distinctively” in Article 4(ii). She also suggested to use “indigenous” with a capital “I”.

ARTICLE 6: FAIR AND EQUITABLE BENEFIT-SHARING AND RECOGNITION OF KNOWLEDGE HOLDERS

1. *The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.*
2. *Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, such as access to research outcomes and involvement of the source community in research and educational activities.*
3. *Those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders.*
4. *Legal means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.*
5. *Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.*

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

The Delegation of United States of America questioned, in relation with Paragraph 3, when TK was used beyond its original context, and then further used in other ways, if the first use acknowledged the source of the TK, whether it would be sufficient for the second

and subsequent uses to reference the immediate prior source. It also questioned when identifying the source, what research the subsequent would be required to undergo to avoid misidentifying the actual source.

ARTICLE 8: EXCEPTIONS AND LIMITATIONS

1. *The application and implementation of protection of traditional knowledge should not adversely affect:*
 - (i) *the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;*
 - (ii) *the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.*

2. *In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.*

Comments made and questions posed at the fifteenth session (December 7 to 11, 2009)

The Delegation of Norway noted, with regard to the question of limitations and exceptions, it was important that TK not hinders fair use, and in particular private use.

126. The Delegation of South Africa asked for clarity on the status of the document that delegations were working on. The Delegation was worried that the particular process and methodology that were being used might be followed as a model and it had difficulties with this methodology.

127. The Delegation of Sweden, on behalf of the European Union and its Member States, once again expressed its appreciation that substantive discussions were being conducted in the Committee. The European Union and its Member States would like to listen with great care to the statements and proposals made and to take them into account when preparing proposals themselves. The European Union and its Member States reserved the right to submit proposals for alternative texts concerning the protection of TK, TCEs and GRs.

128. The representative of Saami Council expressed his disappointment with the statement made by the European Union and its Member States because they had stated in the CBD's ABS Working Group that the issue of misappropriation and definition of misappropriation of TK would be dealt with by this Committee.

129. The Delegation of Yemen expressed its appreciation to the Secretariat for preparing some of the documents in all the official languages of the Organization. The new mandate was that the Member States had to engage in negotiations. However, the Delegation was worried that there would be not be any result achieved at the end if this path was continued on.

130. The Delegation of Bolivia (Plurinational State of) supported the suggestion made by Venezuela to incorporate the contributions of the observers in the text, with an indication of their names.
131. The Delegation of Switzerland stated that the current discussions aimed at gathering ideas and allowed all participants to express their views without any decisions. Therefore, the text resulting from the discussions remained open for amendments and comments.
132. The Chair maintained that trust should be placed in the ability of the Secretariat to reflect correctly each of the suggestions and amendments which had been made. He called for the Delegations' written contributions to be sent to the Secretariat. He pointed out that the Secretariat would make a printed copy of all the concrete proposals and questions raised during the session, so that they were available to all the Delegations in electronic format the following day.
133. The Delegation of the Russian Federation indicated that the status of the document WIPO/GRTKF/IC/9/5 was not entirely clear. Most of the key concepts used in this document were not clear either. The Delegation questioned how a number of the provisions in this document were actually going to be put into practice. It was necessary to cite provisions of the document under consideration in accordance with the requirement of unified terminology. For example, several terms relating to the subject matter of protection were used in the text, such as indigenous peoples, indigenous and local communities, traditional or indigenous community or people etc. In addition, the boundary between TK and knowledge which had become public property should be defined.
134. The Delegation of Canada suggested changing the document name to "Working Document on TK" instead of document WIPO/GRTKF/IC/9/5REV.1.
135. The Delegation of Venezuela (Bolvarian Republic of) believed it was important to collect comments made by observers, as that would facilitate forwarding such comments to capital cities for their consideration.
136. The Delegation of Cameroon stressed that the language used in the texts as regards the protection of traditional knowledge was so transient that it was difficult to recognize what was binding in the text. It added that when referring to grammatical formulae or when the "offender" should have information which would enable him to know that he was not acting in an illicit manner, understanding the approach was not easy. Consequently, the Delegation suggested that in the first Article a definition of what was meant by misappropriation should be included. Once misappropriation had been defined, the Committee could decide on which body would be responsible for applying penalties for such misappropriation. The Delegation stated that the Committee appeared to want to make traditional knowledge the private property of a few. The Delegation said that, by and large, within communities, traditional knowledge belonged to the community and that it was the community which became a victim when someone misappropriated such knowledge. The Delegation therefore proposed that the text would effectively make clear what provided protection against illicit intrusions into cultural heritage, traditional knowledge and related areas.

137. The representative of Saami Council requested that proposals submitted by indigenous people and other organizations be reflected in the next document so that those proposals could be supported by the Member States.
138. The Delegation of Brazil made one general comment on the translation of the text, which may apply to all texts. The words “owner” and “holder” had been translated to two different things in Spanish. For example, “holder” in English sometimes was translated into “*titular*” in Spanish and sometimes was translated into “*detentor*”.

*DECISION ON AGENDA ITEM 8:
TRADITIONAL KNOWLEDGE*

139. The Committee requested the Secretariat to prepare and distribute, before the end of January 2010, a revised version of working document WIPO/GRTKF/IC/9/5, reflecting the proposed amendments and comments made on and questions posed in relation to this document at this session of the Committee. Amendments, comments and questions of observers should be recorded for consideration by Member States. The Secretariat would invite Committee participants to provide written comments on that revised version before the end of February 2010. The Committee invited the Secretariat then to prepare and distribute a further revised version of the document, reflecting the written comments made, as a working document for the next session of the Committee.

AGENDA ITEM 9: GENETIC RESOURCES

140. At the request of the Chair, the Secretariat introduced the working document prepared under agenda item 9, namely WIPO/GRTKF/IC/11/8 (a).
141. The Delegation of Colombia maintained that a disclosure of origin requirement in patent applications should be mandatory. Not only in terms of GRs but also in terms of derived products or derivatives of GRs. It was also necessary to set out coercitive sanctions in case of non-compliance of the disclosure requirement. It stated that, in its legislation, punishment was directly related to the patent application, and to the granting or invalidating of the patent. It pointed out that drawing up an inventory of publications and databases, although a valid alternative, could not be considered the only input or alternative for the purposes of patent examination, as other elements related to GRs and derived products should also be taken into account. It maintained that such provisions on TK relating to GRs should be extensive.

142. The Delegation of Bolivia (Plurinational State of) stated that a multilateral agreement on GRs linked to the TK of indigenous peoples should not only consider commercial aspects, as proposed in several parts of the document. The claims set out by indigenous peoples in Bolivia went far beyond commercial aspects and in many cases were of a more moral nature. It was important to include references to the moral rights of indigenous peoples. It said that the possibility of patenting plants, animals and microorganisms, that is, life in any of its forms, infringed the moral rights and beliefs of the indigenous peoples of Bolivia and of many other countries. The political constitution of Bolivia expressly prohibited the private possibility of appropriating life in any of its forms including microorganisms. That issue should be included in the discussions with a view to achieving clear definitions and avoiding ambiguities in multilateral legislation on that issue.
143. The Delegation of El Salvador requested that the document on GRs be also examined or be a working document of the Standing Committee on the Law of Patents, as it was linked to the field of patents and could enrich discussions in that Committee.
144. The Delegation of Mexico expressed its wish to be informed of the status of document WIPO/GRTKF/IC/11/8(a), in the sense that the mandate of that Committee referred to text-based negotiations and in that document there was only a list of options for consideration. It maintained that the list of options was not exhaustive and that other proposals on the table or others which might arise in the course of the sessions of the Committee and of the Intersessional Working Group should not be put to one side. The options present in the document were not mutually exclusive and could even be complementary.
145. The Delegation of Sweden, on behalf of the European Union and its 27 Member States, looked forward to participating in continuing discussions regarding relationship between IP and GR, and looked forward to seeing progress in this field. It was highlighted that the renewed mandate would help to refocus the Committee's work on substance rather than on procedure. The comments on the document WIPO/GRTKF/IC/11/8(A) made by the European Union at the 11th Session in July 2007 were summarized. Three clusters of substantive questions dealing with the relationship between IP and GR were identified, which included (1) the interface between the patent system and GR, (2) IP issues concerning disclosure requirements and (3) IP aspects of access and benefit-sharing contracts. The European Union believed that these three clusters still constituted a good basis for continuing this Committee's work. As regards the first cluster, document WIPO/GRTKF/IC/11/8(A) listed a range of options to improve the defensive protection of GR and the Delegation listed these. As regard the second cluster, the European Union and its Member states had tabled a proposal for the disclosure of a region or source of GR and associated TK in patent applications. They had a preference for a binding and mandatory disclosure requirement that should be applied to all patent applications. The amendments of Patent Law Treaty (PLT), the Patent Cooperation Treaty (PCT) and, as the case may be, regional agreements such as the European Patent Convention (EPC), would consequently be necessary. The European Union invited all Delegations to revisit its proposal which was contained in document WIPO/GRTKF/IC/8/11. Regarding the third cluster, the Committee had identified a set of draft principles for the development of guide contractual practices or model IP clauses based on which guide contractual practices had been developed as contained in Annex of

document WIPO/GRTKF/IC/7/9. The European Union and its Member States had advocated instruments of a non-binding character such as guide practices and model IP clauses and that the Committee should ensure coherence and mutual support with the work of CBD, FAO and WTO. It was believed that there was a need to give the third cluster increased attention. The 9th Conference of the Parties of the CBD had decided to finalize the International Access and Benefit-Sharing Regime and to submit for consideration and adoption at COP 10 in 2010 an instrument or instruments to effectively implement Article 15 and Article 8(j) of the Convention. Paragraph 7 of Article 15 provided that the benefit-sharing should be upon mutually agreed terms. Therefore, there was an actual demand for developing model IP clauses that could be fed into the CBD process. By providing this valuable input, the Committee as a body of IP experts could help ensure coherence with other bodies dealing with GR. Consequently, the European Union and its Member States had a preference for resuming the substantive discussions by addressing the third cluster. The consideration of the issue of GR was an important task for the Committee and the proposal made by the European Union was entitled to an in-depth discussion alongside the proposals of other Member States.

146. The Delegation of Venezuela (Bolivarian Republic of) supported the statement made by the Delegation of Bolivia, in the sense that, when considering that issue in the Committee, not only commercial values should prevail but also it was necessary to go beyond the commercial, to the moral and beyond the moral to the religious, as religious elements existed for many peoples. It supported the statement made by the Delegation of Colombia, in as much as not only GRs but also derived products should be taken into consideration.
147. The Delegation of Australia highlighted that there were a number of elements in the List of Options that could usefully be discussed in more detail in the first instance, which were (1) defensive protection of GR, (2) disclosure requirements in patent applications for information related to GR used in the claimed inventions, and (3) IP issues in mutually agreed terms for the fair and equitable sharing of benefits arising from the use of GR. With respect to disclosure requirements *per se*, there were many issues relating to the impact and implementation of patent disclosure requirements which had not been adequately considered. Work on alternative and complementary mechanisms should be continued, such as the use of TK databases. The papers on the Swiss and the EU proposals could serve as examples to consider such issues relating to the impact and implementation of patent disclosure requirements. The Delegation highlighted there was a need for substantive legal and technical discussion of patent disclosure, in particular the 'examination of issues' undertaken by an *ad hoc* process in June 2005 developing a list of underlying questions that would benefit from further technical consideration. These questions related specifically to the legal technical aspects of the patent system, including such issues as ownership interests and impacts on innovation.
148. The representative of CONGAF regretted that there was no mention of the United Nations Framework Convention on Climate Change while there were many references to the CBD. He agreed that GRs were a gift of nature and combined with local, community and indigenous human engineering in its use and purpose. He went on to say that GRs had a genetic link to climate change, an inseparable link when interest in product research, use and commercialization centered on a

plant. The representative also spoke of the TRIPS Agreement and its dispute settlement mechanism.

149. The representative of the Center for Peace Building and Poverty Reduction among Indigenous African Peoples (CEPPER) commented on questions of stakeholder engagement and interest and the integration of TK in global fora. He appreciated that there the Committee had achieved much but he also deplored the loss of time and energy. He appreciated democratic engagement. For example, the Chair of the Committee had met with the indigenous caucus and other stakeholders. There was no need for suspicion and mutual mistrust. He believed results would be achieved if the Chair continued in this manner.
150. The Delegation of the United States of America supported the statement made by the Delegation of Australia that all three clusters should continue to be addressed. The Delegation did not believe that the disclosure requirement would be useful, but there should be an honest and open appraisal of that proposal. In addition, numerous written submissions, oral statements and other positions had been offered with respect to the various proposals, but the objectives and principles for the protection of GR had not been yet established. The Delegation believed that, if the Secretariat could help to create such a document, it would be very useful to have objectives and principles written down in a single document. The objectives and principles were very important because they defined what to do and why. Once they were agreed, further work would be much easier.
151. The Delegation of Canada supported the interventions made by the Delegation of Australia and USA. The Delegation was ready to talk about the three clusters in document WIPO/GRTKF/IC/11/8(a) and particularly supported any practical way to address the IP aspects of GR, such as any initiatives that would seek to improve prior art searches conducted by patent examiners. One good example was actually to upgrade the access for IP offices to digital libraries. The Delegation also supported the Committee's renewed mandate with respect to GR and believed that WIPO was the appropriate organization to deal with the IP aspect of GR given its particular expertise. However, there were important linkages of the Committee's work to the CBD. At the end of March 2010, the 9th working group of the CBD would take place and there would be the final stage of the negotiation of a text on an International Regime on Access and Benefit-sharing. That text included many IP measures that were advocated to ensure compliance with the International Regime. Most notably, it included a proposal for a disclosure requirement of origin of GR to be included in patent applications. The Delegation was of the view that the issue of disclosure of origin should be dealt with at WIPO, in this Committee, as soon as possible because the CBD could make a decision on that in March. The Delegation suggested that perhaps the first intersessional working group should address GR. It also suggested that the intersessional working group should take place as early as possible because it could inform what was going on at the CBD and make sure that a decision on the issue of a disclosure requirement would be taken at WIPO, not at the CBD.
152. The Delegation of Japan stated that document WIPO/GRTKF/IC/11/8(a) provided a good overview of the development of the discussion on GR and its related issues. Among several options contained in the document, the Delegation suggested focusing on the substantive IP issues concerning the interface between the patent system and GR. At the ninth and eleventh session of the Committee, the Delegation had made proposals on establishing a one-click database to improve

the prior search environment concerning GR and TK, thereby preventing so-called erroneous granting of patents. Concern was raised about the access by third parties. Thus, the Delegation suggested taking advantage of existing WIPO website linked to various GR-related national databases of Member States, which were open to the public, and making the website more user-friendly as a portal. The Delegation welcomed the announcement made by the Delegation of India that the Government of India had granted the USPTO examiners access to its Traditional Knowledge Digital Library (TKDL). It was believed that members could learn a lot from the Indian experiences and how those libraries could be developed worldwide. The Japanese Patent Office wished to intensify its internal consultation so that it could join other offices as one of the major users of the TKDL. The Delegation believed the WIPO Secretariat could play an important role in making such databases easily available to examiners around the world in order to make the databases more effective. The Delegation appreciated and supported the suggestions made by the Delegation of Singapore at the thirteenth session of the Committee, when it had indicated several key issues related to technical aspects and the contents of an international database. That proposal was believed to be a good base for further deliberation. The Delegation concluded that the establishment of a powerful search tool, which was easily accessible from all IP Offices around the world, would be worthwhile.

153. The Delegation of Peru supported the Delegations of Colombia and Venezuela, in as much as not only GRs as such were to be considered but also products so derived, given that the majority of those were of commercial interest and the basis for developing inventions which later would be the subject of patent applications, without taking into account fair and equitable benefit-sharing. It believed it was important to include disclosure requirements as formal requirements of patent applications.
154. The Delegation of Senegal, on behalf of the African Group, proposed examining the following issues as a matter of priority: developing a range of options on the IP-related aspects of prior informed consent and of access and benefit-sharing arrangements; developing a structured and focused list of options with a view to guiding custodians of GRs to facilitate their decision-making process; developing other proposals for dealing with the link between IP and GRs, as required by the Convention on Biological Diversity; and lastly, developing guidelines and procedures to deal effectively with the IP-related aspects of access and benefit-sharing arrangements. The Delegation agreed that it went without saying that solving such an issue would enable the Committee to make constructive progress in protecting GRs.
155. The Delegation of Brazil agreed that the negotiations at the CBD needed to be supported and commented on by IP experts. However, the support should be mutual and neither of the processes should be slowed down. The Delegation highlighted that timing was everything. It was time to negotiate at WIPO, taking the interests of all Member States into account, and it was time to be more constructive.
156. The representative of the Tulalip Tribes of Washington stated that some of the approaches assumed TK and associated GR existed in the public domain. There were still the issue of lack of PIC for historical access to TK and the issue concerning customary law related to TK and associated GR. With regard to the distinction between public domain versus publicly accessible, he stated that if

somebody encountered TK, they did not have the right to assume the TK was in the public domain and they needed to check back with the tribes who were the holders of that knowledge. However, some mechanisms were needed. With regard to the disclosure requirement, once something was disclosed in a patent application under existing patent rules, even if an indigenous community had entered into a contract, that knowledge would enter the public domain without special protection within 20 years. He highlighted that indigenous people were trying to solve holistic problems, not just trying to solve a patent problem. Information made available was not only information that could be incorporated into patents, but that could be used by other people to create markets. He suggest being careful of the patent solution or an IP solution which did not address the real problem. With regard to so called embodied TK which led to GR, he questioned what the rights were that indigenous peoples had in those genetic products which they had modified so that their knowledge was embodied in the structure of the crops and so on. Document WIPO/GRTKF/IC/11/8(a) did not reflect such issues.

157. The Delegation of the Russian Federation supported the work done by the Committee in seeking to elaborate a system for protection of GR in terms of IP and also supported the areas of work that were set out in document WIPO/GRTKF/IC/11/8(a). The further analysis of a disclosure requirement should be a priority, including analyzing information received in response to surveys. Options 4, 8 and 9 were important. As regard to mandatory requirements for disclosure of GR when filing a patent application, the Delegation believed an ultimate decision could be made only after going through all of the studies and all of the work undertaken to date.
158. The Delegation of Argentina believed it was essential to find in the current forum a swift solution on the issue of misappropriation of GRs. It stated that the mandate given by the General Assembly should be respected and the issues related to GRs, TK and TCEs should be dealt with in parallel. The issue of GRs should not be relegated to the end of discussions, neither in the Committee nor in the Intersessional Working Group meetings. It said that the list of options mentioned in the document was not exhaustive, and that, where the discussions gave rise to proposals which were not included in the list, these should also be taken into account.
159. The Chair referred to the three types of substantive issues mentioned in the document. It argued that there were different possibilities: exploring the three issues one by one or trying to go deeper into one of them. It recalled that there was a proposal made by the European Union to deal with the third issue in depth and invited slightly more substantive comments to be made on that issue.
160. The Delegation of Brazil shared its experiences with the fair and equitable sharing of benefits in Brazil. If there was a patent application involving GR, national law required that a letter should be provided indicating where the origins of the GR were. There was a Council under the Ministry of Environment which dealt specifically with the genetic patrimony of Brazil. If TK associated with a GR in a patent application had been obtained from a tribe, the person who applied for the patent first had to show this Council the contract agreed between the applicant and the tribe. This Council would take note of it, without analyzing it, and give a number to the applicant. If the contract was found unfair or against the interests of a third party who had the same GR or TK, the general public attorney of Brazil who defended the interest of the people of Brazil, or the third party, could take legal

action against that contract. There were pros and cons with such a system. According to the law of Brazil, the act of granting a patent could be reviewed at any time if it was proved that there had been a fraud, for example, that there was contract or benefit-sharing, or if the third party proved that there was some problem in the contract.

161. The Delegation of the United States of America appreciated the intervention made by the Delegation of Brazil. It wished to learn more about the perceived pros and cons referred to and how a patent application was treated that originally did not claim a GR but subsequently was amended to claim a GR. The Delegation of the USA questioned whether the application would be reconsidered to determine whether the proof of PIC and MAT would be required. It also asked whether the access contract would no longer be necessary when the application was amended to eliminate claims related to a GR. The Delegation suggested that, within the next three months or so, the Secretariat should collect updated information related to the sharing of national experiences, experiences with contracts and what additional capacity-building was required, and the other items identified in WIPO/GRTKF/IC/11/8(a), and provide the updated information to the next meeting of the Committee.
162. The Delegation of Venezuela (Bolivarian Republic of) asked the European Union, by way of the Chair, to explain its proposed procedure, and intention, of reversing the third item and making it the first.
163. The Chair clarified that there was no intention of converting the third item into the first, but an attempt was merely being made to identify issues which would lend themselves to brainstorming.
164. The Delegation of Australia supported the intervention made by the Delegation of the USA on access and benefit-sharing regimes. Australia had its own ABS regimes. Australia had a national approach to ABS for GR which operated at a State and Commonwealth levels. Because Australia had a Federal System, ABS regimes were operated at both levels and there were consistent guidelines and principles. PIC arrangements and the facilitation of mechanisms were incorporated to negotiate benefit-sharing directly with the indigenous communities.
165. The representative of the Eurasian Patent Organization (EAPO) said that it dealt directly with the examination of patent applications. Current patent legislation had very strict rules which contained a complex system for determining patentability and the applicant had to go through all the various stages, one by one, in order to obtain a patent. There was a disclosure requirement related to inventions in all areas. In fact, all biotechnological inventions in one way or another were connected with GR. The proposal made by Brazil raised a lot of questions. What would happen if the application was submitted under the PCT system, not on the territory of Brazil? What would the Patent Office of Brazil do if there was an application submitted by the Patent Office of USA dealing with completely different organisms? Would be such an application accepted or not? Thus, the Delegation agreed with the positions expressed by the Delegations of Russian Federation and the USA that first the Committee should concentrate on studying Options 2, 3, 4, 8 and 9. After defining the source or the origin, the disclosure requirement could be discussed. In any case, this requirement could be included in patent legislation but the Delegation was concerned that this might make the work of patent offices even more difficult if this requirement did come into force.

166. The Delegation of Brazil stated that it would share in detail its experience in written form. The Delegation clarified that, since it had referred to national law, the GR the Delegation had talked about were Brazilian GR.
167. The Delegation of Peru explained that disclosure of origin was necessary when filing a patent application as that meant that the application included clear and full details. Peru had an access regime for GRs (Decision 391) which established the conditions that had to be met to draw up an access contract for GRs between the State and the interested third party. Bodies other than IP offices dealt with that issue, but the linkage with IP offices was such that it was for such offices to request, as part of the formalities relating to patent application requirements, the access contract for the relevant GRs.
168. The representative of Tupaj Amaru said that the mandate of the Committee had been and was to examine the issue of GRs in the context of IP, and of sharing the benefits derived from the use of such unprotected resources. It stated that the Committee had not made tangible progress. It recalled the definition of GRs contained in the Convention on Biological Diversity (CBD), in which GRs were understood as genetic material of actual or potential value, and genetic material itself was defined as any material of plant, animal, microbial or other origin containing functional units of heredity. It maintained that it was necessary to protect GRs as their diversity constituted the material and spiritual source of the survival of humanity and in particular of indigenous peoples, that is, the sustenance of all life on Earth. It referred to the preamble of the CBD, which recognized the close and traditional dependence of many local communities and indigenous populations who had traditional ways of life based on biological resources, and the advisability of equitably sharing the benefits derived from the use of TK, innovations and practices appropriate to the preservation of biological diversity and the sustainable use of its parts. It stated that GRs contained an infinite number of living organisms and other forms of life undergoing constant change over the course of millions of years, were an essential part of the heritage of aboriginal nations and local communities, and were a part of humanity's common heritage. It was vital that the Committee examined genetic resources not only in terms of the market, but also in terms of the spirit of preservation, protection and sustainable development for the survival of humankind. It said that the purpose of the guiding contractual arrangements was to assist parties in drawing up legislative measures, administrative measures or model provisions on access and benefit-sharing and drafting contracts, but that was a far cry from solving biopiracy, which continued with impunity under the protection of the deregulation of everything when everything had a commercial value. In practice, the technical procedures and legal terms were overly complex, and their interpretation and application were inaccessible to indigenous communities. It said that the CBD stipulated sovereign control of biological and genetic resources and the need to regulate access to such resources and benefit-sharing rights derived from their use and exploitation, in as much as the Committee had approved a work plan to draft model non-binding clauses on IP. It maintained that indigenous peoples categorically refused to include human GRs in databases, such as blood or human tissue samples, on ethical grounds and out of respect for human dignity.
169. The Delegation of Norway strongly supported measures which could better prevent the erroneous granting of patents. It favored an obligation to disclose the origins of both GR and TK in all patent applications. This had been implemented in

Norwegian legislation for GR in 2004 and for TK in July of 2009 by amendments to the Patent Law. The Delegation highlighted that all TK should be included, not just TK connected to GR. However, a failure to meet such a disclosure requirement should not affect the validity of a granted patent. After the patent was granted, a failure to fulfill the disclosure requirement should be sanctioned outside the patent system. The Delegation also clarified that the failure to fulfill the disclosure requirement at the time of filing of a patent application did not prejudice the processing of an application.

170. The representative of the International Chamber of Commerce (ICC) supported the proposal made by the Delegation of the USA that there be an exchange of national experiences. The explanation by the Delegation of Brazil on the disclosure requirement had been very helpful. However, it was clearly a national system, and extending it more broadly might be difficult. Considering not all GR in Brazil were under the control of indigenous peoples, he questioned whether a patent applicant should still provide a contract when he filed a patent application, if he found a useful new micro-organism in his garden in Sao Paulo.
171. The Delegation of Brazil replied that the GR in the example provided was not associated with the TK of a tribe or of a traditional community, but was a part of the State's patrimony. Thus, there should be a contract between the State of Sao Paulo or the Brazilian Government.
172. The representative of the Tulalip Tribes of Washington drew attention to a study that had been commissioned by the Secretariat of the CBD, entitled a "Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, across Jurisdictions, and International Law" (document UNEP/CBD/WG/ABS/7INF/5). The study contained the recommendations of three indigenous experts on the development of contracts related to indigenous peoples. He quoted from the study as follow: "Rights recognition is a precondition to contractual negotiations. All users will explicitly recognize and affirm that indigenous peoples have prior rights, including a right to self-determination within their territory. Indigenous decision-making processes will be incorporated into the negotiation of ABS arrangements, the contractual terms themselves and the dispute resolution processes arising from the contract. Indigenous people representatives will be pre-certified as the appropriate representative body. Indigenous customary law will be given equal weight in dispute resolution processes. FPIC will form a substantive part of all ABS arrangements and incorporate Indigenous customary law. All ABS arrangements will serve as positive evidence that FPIC of indigenous peoples has been obtained. All ABS arrangements will provide for a process to withdraw FPIC." He suggested that the study could be introduced as an information document in the Committee. He also suggested that, when developing contractual approaches, there needed to be a way to address the situation where TK and GR were shared among multiple communities.
173. The Delegation of Switzerland stated a proper balance should be found when dealing with the three agenda items which were GR, TK, and TCEs, considering they were on an equal footing. Therefore, the present discussions on GR were welcome. The options for continuing the further work listed in paragraph 4 of Document WIPO/GRTKF/IC/11/8(a) included the issue of disclosure requirements. As other delegations, the Delegation agreed that the Committee should continue its work on disclosure requirements under the new mandate. It recalled the proposals

which it had submitted on the disclosure of the source of GR and TK in patent applications in document WIPO/GRTKF/IC/11/10, in which the Regulations of the Patent Cooperation Treaty were proposed to be amended. Switzerland had already introduced such a mandatory disclosure requirement at the national level for patent applications in relation to GR and TK. Options 6 to 10 could also be suitable options for continuing the work of the Committee on GR. The Delegation supported the position expressed by the Delegation of Canada with regard to the importance of dealing with GR in the first session of the intersessional working group. It would allow the Committee to provide its constructive input on IP-related matters to the ongoing negotiations in the CBD on an International Regime on ABS, and other relevant international efforts.

174. The representative of the *Instituto Mexicano de la Propiedad Intelectual* said that Mexican legislation provided for a requirement to disclose clearly, fully and sufficiently an invention contained in a patent application, but there was no specific requirement to disclose the origin of a GR. The representative expressed its interest in hearing of the more significant experiences of the pros and cons of including a provision in patent law, which would regulate the existence, or not, of a requirement as to the origin of a GR, in order to have a better overview and to amend or not legislation in that regard.
175. The Delegation of Indonesia supported the proposal made by the Delegation of Senegal to have further a study of the range of options for IP-related aspects of PIC and ABS. The Delegation was of the view that it is not the task of the Committee to provide inputs to the ongoing negotiations in the CBD as it is not the mandate of the IGC. WIPO can provide its inputs to the CBD, if it deems necessary, through the WIPO Secretariat, likewise as the CBD Secretariat is present in the IGC meetings
176. The Delegation of South Africa supported the intervention made by the Delegation of Senegal. South Africa had made disclosure of origin a requirement under its patent law in 2005. South Africa had put in place a bioprospecting regulatory system that included not only the defensive protection of GR and TK but also the positive protection of TK and GR. The positive part was to balance the rights of researchers and the rights of knowledge holders. In that particular case, the potential for commercialization of TK and associated GR could be pursued in a proactive rather than a defensive mode. It was also indicated that the bioprospecting regulatory system had had some challenge from researchers, leading to an amendment within a short period of time that had established that the benefit-sharing agreement not be signed at the initiation of the contract but later when proof of the potential of the TK and associated GR had been put in place. There had been a slight shift, as part of the process of balancing the rights of knowledge holders and those of researchers. Finally, the Delegation informed that the South African Government had initiated an amendment of all its IP laws. The process was currently in Parliament and its aim was to make all of the IP laws include ABS requirements. The collective ownership of GR and associated TK was the issue that needed to be discussed. A contractual obligation could take care of benefit-sharing.
177. The Delegation of Sweden, on behalf of the European Union and its 27 Member States, discussed the third cluster because it was an area where WIPO could make progress as a body of experts. A proposal for the disclosure of the source of GR and associated TK in patent applications had been submitted as document

WIPO/GRTKF/IC/8/11. According to the proposal, a mandatory requirement should be introduced to disclose the country of origin or source of GR in patent applications. The requirement should apply to all international regional and national patent applications at the earliest stage possible. The applicant should declare the country of origin. If unknown, the source of the specific GR to which the inventor had physical access and which was still known to him should be declared. If the patent applicant failed or refused to declare the required information and continue to do so after being given the opportunity to remedy that omission, the application should not be further processed.

178. The Delegation of China stated that the disclosure of the source of GR in the patent application would be very useful. In China, the patent law had just been amended and entered into force. A new clause requiring the disclosure of the origin of GR had been added. The Delegation wished to exchange experiences and information with other Member States.
179. The representative of the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization (FAO) stated there were two parts of the International Treaty which related to the work of the Committee. First, Part 4 of the Treaty established a Multilateral System of ABS for plant GR for food and agriculture. The system covered the 64 most important food crops for global food security and it also contained a number of IP related provisions which set out modalities for the acquisition and exercise of IP titles over genetic material. Part 3 of the Treaty related to farmers rights and included a reference to the right of protection of farmers' TK that was relevant to plant GR. The Multilateral System established a global gene pool which included more than 1.2 million accessions of plant genetic material of the 64 crops. By ratifying the International Treaty, the contracting parties decided to exercise their sovereign rights over plant GR for food and agriculture through the Multilateral System both to facilitate access to plant GR and to equitably share the benefits arising from the use of those resources. The representative highlighted that it would be useful to recognize the Multilateral System of the Treaty in disclosure requirements in patent applications for GR in a claimed invention, if the Committee was to further work on such a requirement. In practical and concrete terms, it meant that if the disclosure requirement required a patent applicant to disclose the source of the genetic material in the claimed invention and if that material had been received by the patent applicant from the Multilateral System, the applicant would indicate the Multilateral System as the source of the GR. In addition, transfers of material within the Multilateral System occurred under a standardized private contract which had been adopted by all the contracting parties of the Treaty, namely the Standard Material Transfer Agreement (SMTA). The SMTA incorporated all standardized conditions for access and the standardized conditions for benefit sharing under the established Multilateral System. The representative briefly introduced a few technical IP related issues from SMTA operations under the Treaty. While facilitating access to food crops for global food security and climate change adaptation in agriculture, the Multilateral System set out four benefit-sharing mechanisms which were (1) exchange of information relating to plant genetic resources, (2) access to and transfer of technology, (3) capacity building for conservation and sustainable use for plant genetic resources, and (4) commercial benefit-sharing. The commercial benefit-sharing mechanism which was directly related to IP required that a certain percentage of net sales of products which included materials from the gene pool of the Treaty and which were not available without restriction for further breeding research and training should be

paid to the benefit-sharing fund of the Treaty. Regarding commercial benefit-sharing, Article 13.2(d) the SMTA provided that a recipient of genetic material who commercialized a product that was a plant GR for food and agriculture and that incorporated material accessed from the Multilateral System should pay to the Benefit-Sharing Fund of the Treaty an equitable share of the benefits arising from the commercialization of that product except when such a product was available without restriction to others for further research and breeding. To the application of this provision in the SMTA, the Multilateral System had become the first fully operational global ABS system which implemented ABS all the way from the level of a public international law instrument, the international treaty, down to the level of an individual GR. Because of the length of the plant breeding cycle which took about 7 years at least to get from initial germ plasm to a new plant variety or another commercial product, there was a normal lag time from the start up of the Multilateral System until genetic material received from the system which was a product stage and generated commercial benefits that could be shared through the Treaty's mechanism. In recognition of this natural inbuilt lag time, several contracting parties of the Treaty had made voluntary contributions to the Benefit-Sharing Fund of the Treaty in 2008. That had led to the launch of the first international multilaterally managed benefit-sharing project in the history of genetic resource law and policy that had been adopted within a binding legal architecture and approved in June of 2009. The representative also highlighted the non-commercial benefit-sharing mechanisms of the Treaty which equally entailed IP aspects and were of equal importance to the Treaty and the work of this Committee. A resolution had been adopted which referred to Article 17 and which had established a global information system on plant GR and provided that this global information system should facilitate non-commercial benefit-sharing. Two interfaces with IP policy and the operation of IP information systems were raised. First, these developments reflected that the Multilateral System addressed not only the material transfers of genetic material within the gene pool of the Treaty but also the intangible information related to the genetic material in the gene pool. The exchange of information was a non-commercial benefit resulting from the operation of the Treaty. The example of the Cassava genome was given. Finally, the representative stated that Article 9 in Part 3 of the Treaty set out recognition of farmers' rights which included the protection of TK related to plant GR for food and agriculture. In relation to this provision, the contracting parties were invited to provide further information on their national policies and measures to implement Article 9 and to convene regional workshops on farmers' rights. The representative concluded that it might be appropriate for the work of this Committee to be taken into account in those workshops and it might be appropriate for a report on the work of the Committee to be provided to the international treaty process.

180. The Delegation of Australia raised some key questions on the source of origin or country of origin, which were (1) how GR access both *in situ* and *ex situ* were treated; (2) what was a relationship between GR and TK and the invention; (3) what kind of evidence was required; (4) what was the compliance burden, penalties for non-compliance and effect on rights; and (5) what level of benefit-sharing had occurred as a consequence of these regime if known.
181. The Delegation of Canada requested the clarification of the status of the documents. The Delegation suggested that perhaps the documents could be renamed as working documents or issued only as revised versions.

182. The Delegation of South Africa requested that the Secretariat revise and reissue documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5.
183. The representative of the Indigenous Peoples Council on Biocolonialism (IPCB) stated that options and mechanisms had to be consistent with international human rights laws, particularly those that require parties to recognize and protect indigenous peoples' rights to the GR that originated from their territories, lands and waters, as well as to associated TK. She referred to and quoted from Articles 26 and 31 of the UN Declaration on the Rights of Indigenous Peoples as well as Erica Daes' "Final Report on Indigenous Peoples' Permanent Sovereignty over their Natural Resources". Certificates of origin and disclosure requirements would fall short of protecting indigenous people rights unless there was a clear recognition of their rights to the GR originating in and from indigenous peoples territories. She concluded that instruments such as disclosure of origin in patent applications or any other IP mechanisms must prevent the usurping of their sovereignty and wrongful taking of their biological resources as well as TK.
184. The Delegation of Brazil appreciated the CBD briefing that had been provided by the Secretariat to the CBD.
185. The Delegation of Nigeria supported the intervention made by the Delegation of the African Group, particularly the need for further study on ABS and PIC. A thorough study of these issues would require amendments to major WIPO treaties and agreements. Nigeria would support all efforts for such amendments at the appropriated time, either within WIPO or outside WIPO. The Delegation highlighted the importance of following work being carried out in CBD, WTO and other UN and regional organizations.

*DECISION ON AGENDA ITEM 9:
GENETIC RESOURCES*

186. The Committee invited Member States and observers to make available to the Secretariat papers describing regional, national and community policies, measures and experiences regarding intellectual property and genetic resources before February 12, 2010, and requested the Secretariat to make these available as information documents for the next session of the Committee. The Committee requested the Secretariat to prepare and distribute, before the end of January 2010, a revised version of working document WIPO/GRTKF/IC/11/8(a), reflecting the proposed amendments and comments made on and questions posed in relation to this document at this session of the Committee. Amendments, comments and questions of observers should be recorded for consideration by Member States. The

Secretariat would invite Committee participants to provide written comments on that revised version before the end of February 2010. The Committee invited the Secretariat then to prepare and distribute a further revised version of the document, reflecting the written comments made, as a working document for the next session of the Committee.

AGENDA ITEM 10: ARRANGEMENTS FOR THE INTERSESSIONAL WORKING GROUPS

[Note from the Secretariat: the following interventions were made on Tuesday, December 8, 2009.]

187. The Chair opened Agenda Item 10 to hear the positions of regional groups as regards the arrangements for the intersessional working groups.
188. The Delegation of Ecuador on behalf of GRULAC stressed the importance of the work of the intersessional working groups. GRULAC considered that membership of those groups should be open and comprise experts appointed by Member States so as to ensure balanced geographical representation. It also underlined the importance of the participation of Member States' observers, indigenous community representatives and NGOs. In that way, the process could clearly and legitimately pursue the common objective of protecting traditional knowledge, associated genetic resources and cultural expressions. The Working Group should issue recommendations for review by the Committee. Its discussions should be based on documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a). As a subsidiary of the Committee, GRULAC considered it necessary for the Secretariat to provide assistance and maintain the same funding for the participation of representatives of developing countries and of indigenous communities such as in the Committee. Lastly, GRULAC proposed that the Chair of the Intersessional Working Group be held by one of the Committee's officers.
189. The Delegation of Switzerland on behalf of Group B proposed that the Committee find a way of organizing the three intersessional working groups, stressing that questions of substance could be refined as the Committee's work progressed, and that the Committee could review procedural arrangements before the following Assemblies. The Delegation noted that the Committee would establish the mandate of the Intersessional Groups and that that Working Group would carry out specific tasks as delegated by the Committee, that it would undertake relevant technical and legal work and that the outcome of that work, or recommendations it might have, would then be referred to the Committee. Taking into account Recommendation 44 of the Development Agenda, the Delegation was of the opinion that the Intersessional Working Group should be open and that meetings should be held in Geneva. In order to make the Intersessional Working Group's work more efficient, and in as much as discussions would be informal, flexible rules of procedure should be established, and should be clearly set out in order to establish how discussions should proceed. As regards participation, the

Delegation proposed that experts be appointed by Member States according to the required knowledge of the topics to be covered. It also proposed that the work be undertaken in a small group by limiting the number of participants per delegation. It recommended that the Chair fix a very clear timetable so that work would progress and limit interventions by Delegations to statements related to the topic covered. The Delegation proposed that the Secretariat support the work of the intersessional groups by providing documents and assistance as well as, if required, by carrying out studies when so requested. On the topics to be covered in the context of the intersessional work and given the different proposals, the Delegation of Switzerland underlined that Group B was still at the deliberation stage and wished to know the views of the other groups. Group B wished that the three topics would receive equal treatment.

190. The Delegation of Senegal, on behalf of the African Group, noted the interest of the Director General in the deliberations of the Committee. The Delegation thanked the Indonesian Government for having organized two important meetings in Montreux and Bali to make progress on the process of the Committee's work. The Delegation highlighted the cooperation which had allowed participants in the discussions to agree on the terms of the new mandate of the Committee at the previous Assemblies and that that mandate provided for intersessional working groups to facilitate and accelerate the work of the Committee. The proposal put forward by the African Group was to set up intersessional working groups comprising a limited number of independent experts. Those working groups would not take decisions and expert comments, information, suggestions and recommendations would enlighten the decisions taken by members of the Committee in formal sessions. The objective of the African Group was to have three different working groups so as to deepen and further the content of ideas relating to the three topics covered, but also to put forward proposals, and to draft international instruments. The contribution of representatives of indigenous and local communities, at all stages of the process, should be duly taken into account. The Delegation concluded by recalling that norm-setting as indicated in recommendations received from the groups working on the Development Agenda should be an exhaustive effort and that that would only be guaranteed by using experts upstream of the deliberations of the Committee by avoiding downplaying the contribution in favor of political considerations.
191. The Delegation of Kyrgyzstan thanked the Secretariat for preparing working document WIPO/GRTKF/IC/15/4. The Delegation raised questions in regard to the funding of the IWG, namely how these meetings would be funded and how the participation of Committee members would be funded. Taking into account the budget of the Organization, the Delegation hoped that participation would be financed by the regular WIPO budget. The Delegation looked forward to discuss how the Voluntary Fund could be used to finance the participation of indigenous and local communities in the IWG. It was also interested to know in which languages the IWG would work and whether there will be simultaneous interpretation made available. The Delegation requested that working documents in Russian be made available as early as possible. This could help the Russian-speaking experts to contribute extensively to the work of the IWG. The Delegation shared the following conclusions reached within its Group: i) the IWG should each examine a particular theme; ii) the agenda of the IWG should be decided upon in the preceding session of the Committee. This agenda should contain priority issues, these would be issues where there still existed divergences; iii) the length of each IWG should be two or three days; iv) the IWG should be an open session;

and v) the Committee should decide on the status of the outcomes of the IWG and on the form of the report to be presented.

192. The Delegation of Yemen, on behalf of the Asian Group, reaffirmed the Group's commitment to realizing the new mandate of the Committee. The Asian Group attached high importance to the organization of the Intersessional Working Group sessions as these sessions would be key in the development of a consensual text or texts of an international legal instrument or instruments to be submitted to the 2011 General Assembly, which may decide on convening a diplomatic conference. To ensure the success of the IWG sessions, the majority of Asian Group countries was of the view that these sessions should be limited to a group of experts selected by the regional groups. The Asian Group was looking forward to working constructively with all regional groups on this item.
193. The Delegation of Serbia, on behalf of the Group of Central European and Baltic States, was of the view that the IWG's work should be documented. Each intersessional meeting should be dedicated to one of the three main issues. The Group was also of the view that, with reference to the Rules of Procedure, the intersessional meetings should be chaired by the Chair of the Committee.
194. The Delegation of China asserted its readiness to work with other Member States and to constructively participate in the discussions of the Committee. There was a need to define the work program and working methods of the intersessional working group, including the Rules of Procedure, timelines and objectives of the discussions. The Delegation believed that equitable geographic representation should be ensured to take into account the different views and thereby achieve concrete results. It supported the Delegation of Kyrgyzstan in regard to the making available of the working documents in the six official languages so that the experts could participate in the intersessionals in an effective manner.
195. The representative of the Saami Council trusted that the Chair would accommodate the full and effective participation of indigenous peoples' representatives in the work of the Committee, including in informal meetings. The Saami Council had participated in the Committee from its first session. During its first seven sessions, the Committee had benefitted from general discussions and exchanges of national experiences, which contributed to the drafting of the draft provisions on TCEs and TK. The discussions, however, had stagnated in the last five sessions. The Saami Council therefore welcomed the decision taken by the WIPO General Assembly on the new mandate of the Committee and agreed that it was time to commence text-based negotiations based on the three documents listed in the mandate, which could result in a legally binding instrument or instruments to be adopted by a diplomatic conference in 2011. The Saami Council pointed out that working documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 were sufficient to serve as a basis for text based negotiations, although these were in need of significant and important amendments. The Saami Council agreed with the African Group on the importance to agree on the rules of engagement, including on the exact role and mandate of the IWG. In this context, the Saami Council submitted the following: i) indigenous peoples' representatives should be included in all informal discussions on the terms of references of the IWG; ii) in regard to the format of the IWG, this should be closed with a limited number of participants. The Saami Council thereby supported the African Group proposal that the IWG should be limited to 27 experts appointed by States, 10 experts appointed by the accredited observers, which included 7 representatives appointed

by indigenous peoples. Indigenous peoples' representatives to the IWGs must be appointed by indigenous peoples themselves. The IWG's should focus on text-based negotiations and be scheduled in a way that these would not clash with the CBD meetings on the ABS-regime.

196. The Chair stated that it would be important to consider the participation of indigenous representatives in the Intersessional Working Group. The Committee had listened to the positions of the regional groups which included many areas of convergence. He stressed that there was a great deal of material to define the characteristics, procedures and objectives of the intersessional meetings.
197. The Delegation of Algeria, on behalf of the Arab Group, supported the proposal on the Intersessional Working Groups, put forward by the African Group.

[Note from the Secretariat: The interventions below took place on Thursday December 10, 2009.]

198. The Chairman recalled that on Tuesday there had been an initial airing of the initial positions of the regional groupings on Agenda 10. It had been agreed to initiate a parallel informal process on this matter. Regional coordinators would have reported to their groups on these informal discussions. These had been productive discussions. They had identified possible areas of convergence and possible obstacles, as well as possible solutions. The Chairman proposed that he report, in the interest of transparency, on the state of play, after which he would suspend the plenary to continue to informals. There was clear agreement as to the nature the work of the IWGs, which would not be negotiating groups. The IWGs would be technical groups, as mandated by the ICG. The output of the IWGs would be submitted for consideration by the ICG. It was quite clear that the profile of the members of the IWGs should be experts not diplomats nor political representatives or negotiators. The experts should have real technical ability in the substantive fields. It was necessary to exchange views to see how issues were resolved in other regions and countries. For example, Norway, Brazil and Australia had presented very interesting case studies. This was for the IWG to do. Another question was how limited or open-ended participation in the IWG would be and this would depend upon the precise definition of the substantive mandate of the IWG. There were legitimate concerns on these questions. The Chair stated that he was extremely grateful for the African Group's written proposal which was an excellent basis on which to initiate the discussion. Proposals had also been made by Group B and GRULAC. The discussion in the CBD was affecting the discussions of the IGC. There was a group of countries which would prefer that GRs be discussed in the IGC rather than the CBD. There was another group which believed the contrary. But this was not really a problem because the IWGs were technical in nature. The Chair then proposed to resume discussions in informal session.
199. The Delegation of Switzerland, on behalf of Group B, asked to postpone the resumption of informal consultations for an hour or two in order to allow Group B to finalize its own thoughts.
200. The Delegation of Algeria supported the request made by the Delegation of Switzerland and requested that consultations took place in a larger-capacity room.
201. The Delegation of Zimbabwe insisted that discussions on Agenda Item 10 take place in plenary for the sake of transparency.

202. The Chairman stated that the work of the Committee had been going on for nine years. What was being asked for had been done on Tuesday morning. The Chairman assumed that regional coordinators were informing the members of their groups as to the content of the informal discussions. The proposals made by Algeria and Switzerland were constructive and reasonable.
203. The Delegation of Venezuela (Bolivarian Republic of) said that it should be established that there would only be working groups at intersessional meetings and that the final decision would be left to the Committee.
204. The Delegation of Senegal, taking the floor on behalf of the African Group, recalled that the African Group had been willing to discuss the issue of the intersessional working groups on the basis of its proposal and by showing flexibility. It underscored, however, the urgency of the issue and recalled that it had proposed covering that item at the top of the Agenda. It recalled, in support of the Delegation of Zimbabwe, that it had been agreed to exchange in plenary viewpoints so as to set out the markers for the discussion. It made clear that it was puzzled by the statement made by the Delegation of Switzerland which brought the plenary to a deadlock and moreover requested a postponement of informal consultations. It underscored that it was a priority to find a solution to the issue of intersessional working groups before the end of the current session of the Committee.
205. The Chairman stated that he wished to be efficient and effective and to achieve results. If the African Group felt it indispensable to have a plenary discussion on Agenda Item 10, this could be done. The Chairman had no intention of imposing solutions, but was only trying to move forward.
206. The Delegation of Angola expressed its concern at the procedure. It stated that it understood the concern expressed by the Delegation of Zimbabwe. It considered it was important to see in plenary the statements of each delegation on whether the Intersessional Working Groups should be open or closed, among other points. That would facilitate coordinators' discussions in informal meetings.
207. The Delegation of Senegal, on behalf of the African Group, stated that there were two fundamental problems which arose from the informal consultations organized by the Chair. It continued by stating that solving those problems would perhaps lead to solutions to other related problems, such as participation, language, working documents, the length of sessions, the Chair, etc. The first issue concerned the limiting or not of the size of the working group. From the consensus on the technical nature of the working group, it followed that the working group should be limited in number. The Delegation maintained that it was impossible to form a technical working group unlimited in size. The second issue touched on whether the three topics should be dealt with separately or simultaneously. The Delegation underlined that the proposal put forward by the African Group mentioned simultaneous treatment and that it provided a response to each of the questions raised by document 15/4. The Delegation stated that there was no other proposal that was so well structured and that that was the difficulty. In sum, the Delegation recalled that there was consensus on the technical nature of the working group. That agreed position implicitly led to another point on which there might also be consensus: the limited nature of the working group. If those two points could be solved it would leave the question of dealing separately with the

topics to be resolved. The Delegation repeated the reason for dealing with the topics separately: it ran the risk of inextricable confusion.

208. The Delegation of Angola supported the proposal put forward by the African Group, and stated that it was clear and that there should be three intersessional working groups. It added that the question was therefore to ascertain whether each intersessional working group should work on each of the three topics separately or whether to work on all the topics at the same time. It also touched on the issue of the number of experts, with the African Group proposing five experts. It stated that the African Group was open to increasing the number of experts, possibly to as many as 14 or 15 members. The Delegation agreed that Member States' fears of not being represented were unfounded, as at the following session of the Committee, it was still possible to accept or not, or even to make reservations on the recommendations made by the group of experts, and that that was recognized by the Vienna Convention. The Delegation underscored that it was not only the African Group which supported the reduced size of the working groups. The Delegation urged members to be constructive and open, and to leave to the regions the task of appointing their experts.
209. The Chairman proposed that three principles guide discussions on the degree of openness or restrictiveness of the IWGs, namely transparency, effectiveness and representativeness. There were many options in order to achieve the convergence of these three principles.
210. The representative of the IPCB, on behalf of the Indigenous Consultative Forum, expressed its appreciation for the proposal of the African Group recommending the inclusion of a minimum of seven experts from indigenous and local communities to be nominated by the Indigenous Consultative Forum to participate in the upcoming Intersessional Working Groups. The Indigenous Caucus was of the view that the regional experts should come from Africa, the Arctic, Asia, Latin America and the Caribbean, North America, the Pacific and the Russian Federation and former Eastern Europe, and there should also be three additional indigenous semantic experts. She said that each indigenous region would nominate its own representative and all regions had well working mechanisms for and extensive experience with appointing representatives to various international meetings. Selecting competent and indigenous representatives to the intersessionals would constitute no problem. She believed the ability to select their own representatives was integral to the right of self determination of indigenous communities. The Indigenous Caucus understood that the use of the Voluntary Fund to support the participation of indigenous communities had been well received by the parties in informal consultations and the Caucus was appreciative of this support as well. The African proposal stated that the rules of procedure of the Committee would generally apply to the Intersessionals. The Caucus strongly underlined, however, that the rules of procedure of the Intersessionals had to be amended and/or applied in a flexible manner so as to provide for effective indigenous peoples participation. The working methods needed to be adopted to give the opportunity to State delegations to seriously consider, in a timely manner, text proposals by indigenous representatives. She recalled that since the Intersessional Working Groups had not existed when the Voluntary Fund was established this had created some uncertainty regarding the timing and selection process for indigenous experts to the Intersessionals. To deal with that unforeseen situation, the representative proposed that the parties request the Advisory Board to the Voluntary Fund to set aside funds that would be used to support indigenous participation in the

Intersessional Working Groups until a time specified in the future. This would allow members of the indigenous caucus to undertake consultations so that they could decide upon their regional nominees to the first Intersessional Working Group. In the interim, the Indigenous Caucus would like an opportunity to meet with key interested parties to work out a proposal for any modification necessary for the use of the Voluntary Fund to support its participation in the Intersessional Working Groups. As a final note, the Indigenous Caucus supported the African Group's recommendation that the Intersessional Working Group meetings be closed and that TCEs be the first topic addressed by them.

211. The Delegation of Egypt stated that these issues had been discussed before. In respect to the formation of the Intersessional Working Groups, the Delegation agreed that the principles which should guide their work were efficiency, specialization, transparency and a fair representation of the various regions. Each Working Group should work on one theme. Membership of the Working Groups should be limited to experts on the basis of their CVs. In addition, the Working Groups should have legal experts specialized in IP. There would be a negotiation within the Working Groups in order to reach a draft legal text.
212. The Delegation of Argentina maintained that the experts should be appointed by Member States and that the three topics, TK, TCEs and GRs, should be dealt with concurrently in each intersessional meeting. The topic of GRs should not be relegated to the end. It recalled the mandate of the General Assembly, which specified that the work of the Committee would be without prejudice to the work being undertaken in other fora.
213. The Delegation of Portugal supported the Chair's approach and wished to participate in a flexible and open manner in these negotiations. The Delegation expressed its disappointment that the Chair's suggestion to convene in informals had not been accepted by all. Group B was engaged in very constructive discussions. Speaking then in its national capacity, the Delegation addressed the question of participation from a technical and legal, rather than political, standpoint. Portugal believed that participation in the Intersessional Working Groups had to be open so that the intergovernmental character of the Committee would be respected. The Delegation could see no legal grounds for experts to be appointed. Would the experts be chosen by the whole Committee or by each Member State? The Delegation further questioned whether they would be paid by WIPO or by Member States. Would the experts come from the different regions of the world corresponding to the regional groups in WIPO, and how many for each region?
214. The Delegation of Algeria, on behalf of the Arab Group, supported the statement made by the African Group and the contents of its proposal regarding the Intersessional Working Groups. The Working Groups should be of a limited membership and they had to be distinct in their activities from those of the Committee. The distinction would relate to their working methods and composition. The Delegation underscored that working groups with limited membership was a common practice in the UN system. The Arab Group found the composition of 37 representatives to be a sound and balanced proposal. As to the participation of the Member States in the work of the Working Groups and their working methods, the Arab Group welcomed the proposal made by GRULAC. The Delegation supported further the working structure proposed by the African Group, namely, three groups each examining one of the three subjects discussed in the Committee.

215. The representative of the Saami Council supported the statement by the Indigenous Peoples Caucus. He stated that the seven regions recognized by the UN had mechanisms for appointing their representatives to meetings such as the intersessionals being discussed. The representative stressed that the indigenous participants should appoint their own experts to such meetings. It was not appropriate that the selection would be made by the Advisory Board of the Voluntary Fund. He underscored that the people applying to the Voluntary Fund might be new to the process and not necessarily the right people for the intersessionals. There were experts that received funding from other sources than the Voluntary Fund and they should also be considered for participating in the intersessionals. The appropriate way to select representatives from indigenous peoples for the intersessionals would be to have their own mechanisms and not to use the Advisory Board.
216. The Delegation of Turkey respected the able guidance of the Chair but disagreed with certain aspects. The Delegation supported the adoption of international rules on the protection of TK, TCEs and GRs and appreciated the proposals of the African Group. But, like the Delegation of Portugal, Turkey believed that the Working Groups should be open-ended. It was inevitable that policy and political issues would arise in the Working Groups. The Delegation was surprised that the African Group had asked for a restrictive approach because Turkey, like the African Group, in all fora in the UN and in WTO had advocated inclusiveness and transparency in all negotiations.
217. The Delegation of Morocco supported the statements made by the Delegation of Senegal on behalf of the African Group and by the Delegation of Algeria made on behalf of the Arab Group. The proposal submitted by the African Group was in harmony with the three principles the Chair had referred to, namely efficiency, transparency and representativity. The composition of the Working Groups should be restricted. Efficiency could not be achieved within an open-ended Working Group. The Working Group had to be composed of specialist experts. The three sessions of the IWG should each tackle one of the three subjects. Furthermore, the Committee should not seek to have a second Committee, an "IGC*bis*". The Working Groups should be composed of experts aiming at assisting the Committee and providing it with their opinions and expert views. This should not exclude member countries but there could be a coordinator present for each group of member countries. This would allow the members to follow closely developments within the Working Groups.
218. The Delegation of Cameroon recalled that the proposal put forward by the African Group was the only one to have been submitted. It stressed that a separate approach to the topics would facilitate achieving concrete outcomes, by avoiding repetition. As regards the issue of the composition of the Intersessional Working Groups, it stated that the more restrictive approach of the African Group was more pragmatic and more likely to produce a text than a broad approach with a wider scope. It mentioned the experience of national parliaments in setting up small working groups to facilitate the preparation of normative acts.
219. The Delegation of Indonesia thanked the Chair for the three principles he had mentioned. In the informal meetings there had already been a growing agreement that the Working Groups should be technical and not a negotiating forum. The Working Groups, in order to fulfill the three criteria, should be limited. If they were open-ended, they would be the same as the Committee. There would also be

representatives from the regional groups and also indigenous communities. On the issue of transparency, the result of the discussions would be circulated to all of the members of the Committee.

220. The Delegation of Switzerland, on behalf of Group B, referred to the consultations in progress on the format of the Intersessional Working Groups and expressed the wish to see them come to an agreement before the end of the current session. It stated that the underlying objective of the Committee's mandate was, within two years, to provide international legal instruments which would bring effective protection to genetic resources, traditional knowledge and traditional expressions of folklore. It believed that the creation of the Intersessional Working Group should meet that objective by catalyzing the work of the Committee. On the nature of that Working Group, it stressed that it should be the agent of the Committee. Due to the intergovernmental nature of the Committee, the Delegation found it logical, as underscored by the Delegation of Portugal, that all Member States wishing so to participate might be part of the working groups. Referring to the previous statements made by the Delegations of Egypt and Cameroon, which implied that the Intersessional Working Groups should produce a legal text, the Delegation of Switzerland, on behalf of Group B, believed that the best way of ensuring that the text would be accepted by the Committee was to allow all Member States to take part in those Working Groups. Touching on the issue of the three criteria, it believed that an open group could be efficient in as much as it was given clear rules, such as not making fruitless or inconclusive general statements, with the Chair being authorized to enforce them. It also proposed, in order to ensure the effectiveness of the Working Groups, that the Committee assign them a specific mandate and agenda. Making reference to the criterion of transparency, it believed that the work report of the Working Group should not be exhaustive, but contain conclusions made by the Chair, and those conclusions should reflect such work, both at Member State and observer level. The Delegation stated that it was the participation of all of the Member States and observers that would guarantee transparency. It recalled in that regard Recommendation 44 of the Development Agenda providing for all formal and informal meetings and consultations relating to norm-setting to be held in a transparent manner. On the criterion of representativeness, it considered that a membership open to all Member States, and with the authority to appoint their own experts, should avoid controversy on their representative nature. It stressed that the experts appointed within a limited context would represent regional groups, while within each region, different viewpoints could exist. In that connection, it did not understand why the number of observers should be drastically reduced, and recalled Recommendation 15 of the Development Agenda which provided for all norm-setting activities to be inclusive.
221. The Delegation of Namibia supported the statement made by the Delegation of Senegal on behalf of the African Group and recalled the mandate of the Committee. In order to achieve this mandate, Namibia believed that the working procedures or rules of engagement should be agreed upon first, as proposed by the African Group. The Delegation underscored that the African proposal contained core issues and it was gratified to see broad support for it.
222. The Delegation of the Republic of Korea appreciated the three principles that had been identified. The issue was how to increase the efficiency of Working Groups as it had been said that working in small groups was more efficient than open-ended groups. The Delegation believed that the main task of the Working Groups was to provide conceptual clarity on the issues of GRs, TK and TCEs and, based

on that conceptual clarity, the Working Group could draft a text. It had been suggested that a list of the suggestions and concerns that many delegations had been compiled and the Secretariat could provide such a list. Then the Working Groups would tackle each concern and give some clarification. In this way the Committee could find conceptual clarity and a framework, on the basis of which the Committee could work on the draft of the text. The Committee could also designate the experts in advance and give them “homework” based on the questions, subject and issues, and the experts could communicate with each other even before the Intersessional Working Groups met.

223. The Delegation of Australia expressed its disappointment that it had not been possible to continue bilateral and informal sessions, as these were often the only way to gain a shared understanding of issues. Australia commended the African Group for the work it had undertaken in developing a proposal for intersessional work and agreed with the intent of the proposal, particularly in attempting to develop a proposal which would ensure the deliberations be conducted in an efficient manner and transparent manner. However, Australia had consistently indicated that the work of the Committee crossed regional groupings and boundaries and development status. For example, its own region Oceania, which included Australasia and Pacific States, who were not always represented internationally, included mega-diverse countries and developed, developing and least developed countries, all with strong indigenous cultures with strong links to their lands. In determining the experts for the Intersessional Working Groups, it would be important for countries with significant interests and expertise in TK, TCEs and GRs to have the option, in the interests of transparency and efficiency, to be represented. The Delegation was concerned that the current proposal by the African Group did not take account of this reality in relation to the numbers proposed, accepting that this was not an easy issue to resolve, and it appreciated some of the proposals made by delegations indicating some flexibility on this issue. Whilst this might result in a large group, this could be managed through sub-Working Groups, which, while complex, was common practice in a range of fora. Secondly, Australia stated that it did not understand the approach which pre-determined the topics for discussion at all three sessions, and did not appear to take account of the very discussions the Committee had had during this meeting across all three topics. However, the Delegation strongly supported discussion of the broad issues for discussion across the three areas, proposed in the African proposal, particularly in relation to definitions, objectives of protections, exceptions and limitations and beneficiaries. These were all cross-cutting, important issues. However, before determining options, gaps and limitations in existent systems needed to be completed. Then, options to address these gaps and limitations, including *sui generis* options, should be looked at. Australia's preferred approach was to focus on the key issues that had been identified to date. Discussions so far had clearly indicated a need to ensure that the Committee made progress across all three subject matter areas and that linkages between the three subject matter areas were maintained. While Australia accepted that some areas of text were more mature than others, e.g. TCEs, it would also recognize that there were significant legal and technical issues to be addressed particularly in relation to TK and in addressing GR issues relating to disclosure and ABS. If the Committee would wait until late 2010 and 2011 to address these substantive issues then Australia considered that it could not adequately progress on its work in IGC 16 and 17. Australia believed that it should sequence the work based on the elements proposed by the African Group with some modification. In addition, through its

discussions at IGC 15, Australia had identified a need to address further technical and legal issues to the Working Group.

224. The Delegation of Kenya fully supported the proposal of the African Group and the three principles which had been outlined. For effectiveness, it was considered imperative that the Working Groups be of limited membership, while ensuring equitable geographical representation and participation of experts on all subject areas. It would be difficult to achieve effectiveness in an open-ended Working Group. The Committee should not re-invent the wheel. It was normal in the UN to achieve results through groups of experts. Kenya believed that, with some minor modifications as suggested by some delegations including Australia, the Committee could achieve agreement on Working Groups that were representative, efficient and transparent.
225. The Delegation of Algeria supported the proposal put forward by the African Group and formulated by the Delegation of Senegal and was highly supportive of the statement made by the Arab Group, which it had made on the Group's behalf. It stressed that the African proposal was exhaustive, clear and structured, but might still be refined or supplemented. It stated that the expert group planned in the Committee's mandate was to prepare and support the Committee's decisions. It believed that an open membership would contradict the principle of efficiency and that the representative nature of the Intersessional Working Groups might be guaranteed without necessarily opting for an open membership. It added that the principle of efficiency required that the topics be covered separately, without prejudging the need to ensure Committee-level consistency of approach. It stated that the transparency of the working groups could be ensured by implementing information and consultation mechanisms between experts and regional groups. It believed that the most pressing issue aimed rather at the Committee monitoring the work of experts and its linkage with the progress made within the Committee. It recalled that the Committee's mandate required concrete results and the establishment of one or more texts as effective instruments of protection. It concluded that it was that objective which would dictate the format of the Intersessional Working Groups.
226. The Delegation of Sweden, on behalf of the European Union and its member States aligned itself with the statement forwarded by Switzerland on behalf of the Group B. The delegation welcomed the idea having technical discussions that could feed into the Committee's work. The delegation fully supported the three guiding principles for the Committee's work announced by the Chairman. Based on the principles of transparency and representativity, the Intersessional Working Groups should be open-ended allowing Member States experts as well as representatives of indigenous and local communities to participate.
227. The Delegation of Yemen, on behalf of the Asian Group, fully supported the African proposal, in particular having three different sessions for the three different subjects. The duration should be up to ten days or less if the experts could manage to finish earlier. The representation during the sessions of the Intersessional Working Groups should follow the three principles. The proposal of GRULAC increasing the number of experts from regional groups and observers would ensure fair representation. The Delegation supported the five key elements of African proposal for the work of the Intersessional Working Group without prejudice to other relevant topics or issues. The Intersessional Working

Groups should be mandated to make proposals for a draft international legal instrument or any alternative language to the consideration of the Committee.

228. The Delegation of Pakistan aligned itself with the proposal of the African Group and also supported the statement made on behalf of the Asian Group. Pakistan considered the three principles that had been mentioned were very important and that they were already addressed in the proposal. The Delegation doubted whether an open-ended Intersessional Working Group would be efficient. This was exemplified by the Committee having worked for years and it was still far from an outcome. Five representatives per group had been mentioned in the African Group's proposal. The Committee could increase that number to eight as had been proposed by GRULAC. The composition would then be efficient, transparent and representative.
229. The Delegation of Kyrgyzstan, on behalf of the Regional Group of Certain Eastern European, Central Asian and Caucasus countries, referred to the proposal of the African Group. Each session of the Intersessional Working Groups, should focus on one of the three substantive issues, GR, TK, and TCEs. This kind of approach would allow the Committee to maximize its efforts instead of dealing with all these issues at a single meeting. Meetings of the Intersessional Working Group should not be longer than five days and not ten days. The format of these meetings should be open-ended and respect the three principles announced. A restrictive membership would not achieve effectiveness of the work of the experts. Therefore, the experts should be selected and appointed by Member States.
230. The Delegation of Egypt referred to the issue of open-ended or limited Intersessional Working Groups. In the statement made by the Delegation of Switzerland the delegation noticed a misunderstanding about the function of the Working Groups. It consisted in confusion between functionality and principle. The principles mentioned by Switzerland in the WIPO Development Agenda, specifically recommendations 44 and 15, dealt with norm setting activities that should be inclusive and Member States driven. In this case a norm setting activity would be the work of the Committee itself because any Member States would be free to accept or reject whatever derives from the Intersessional Working Group. Therefore, this principle was safely guarded. Concerning recommendation 44 and the background of the WIPO Development Agenda itself, the delegation highlighted that it arose out of a particular meeting outside of Geneva that dealt with substantive matters on the Patent Law Treaty. This had been seen by some as an attempt to engage in norm setting activities outside of the proper channels of governance of the organization. In any case, the African proposal was not against the spirit of the WIPO Development Agenda as it concerned a specific expert group that would give particular advice and in order to be functional and to succeed by a limited composition. In fact, recommendation 18 of the WIPO Development Agenda required this Committee to move ahead on this substantive issue. Therefore, the reference made to transparency was out of context. In respect to functionality, an open-ended expert meeting would not achieve the goal of recommendation 18. All Member States should focus on the functionality of the Intersessional Working Groups. A limited group could give clear advice that could be rejected by a single Member State in the Committee if it wished not to agree with the content of that advice.
231. The Delegation of Brazil strongly supported the proposal of the African Group. It reflected some of the concerns that all members have expressed here during

the nine years of work of this Committee. No extra budgetary costs as guiding principles within WIPO and all Committees were needed. It contained a very well structured work plan. If the Committee had the three issues in the same week costs would be very high, at least, for developing countries and the delegation did not believe that WIPO would fund all experts, representatives of the indigenous communities and other persons to discuss the three issues at the same time. It would be very helpful if the Committee had sufficient funds that developing countries could be equally represented as developed countries. The delegation agreed with the Chair about the “ghost” in the room but unfortunately it was real probably costing hundreds of millions of dollars. Concerning timing the delegation recalled, as presented in the side-event by the representative of the CBD, that CBD was well ahead and they received the mandate to deliver a text in the middle of next year on many issues that this Committee was starting to think about. The delegation questioned why to duplicate something that is almost half done – and the Committee, almost the same members, could be a huge step forward using complementary the work which were done in another forum. Regarding the composition of this group an open-ended Intersessional Working Group would be no different from having a Committee and the mandate distinguished between Committee and Intersessional Working Group. Therefore, it should be ensured that those experts would be different and that there was enough time for deliberations in the Intersessionals.

232. The Delegation of El Salvador thanked the African Group for submitting its proposal which it considered highly useful and of real value. It stated that it agreed with many of the points raised in that proposal, particularly with the order in which issues were to be dealt with. It considered it very beneficial and timely to start dealing with those issues which had been sufficiently developed, namely TCEs and TK, during 2010, and the issue of GRs during the first quarter of 2011, also taking into account the expected outcomes in other fora, in that case the CBD. It aligned itself with another aspect of the African Group’s proposal, in as much as the Intersessional Working Groups were to submit draft texts and recommendations, which would serve as a starting point for negotiations within the Committee. It thanked the Chair for its explanation on the Group of Experts which would carry out doctrinaire or highly technical work and on the Committee which would have the opportunity to take negotiation-related decisions. It maintained that Member States should be permitted to attend Intersessional Working Group meetings under certain conditions. It considered that it would set a very negative precedent for WIPO not to allow Member States to attend. It requested that it be put on record that El Salvador was willing to work in that direction, in as much as its presence was allowed, although not necessarily its participation in the Group of Experts.
233. The Delegation of South Africa aligned with the proposal of the African Group putting into practice the three principles that the Chair had outlined. The delegation challenged the concept of transparency by some of the Group B countries if the Committee could not even move forward in the plenary session and should go to closed informals. There was a fundamental misunderstanding. The reason to have Intersessional Working Groups without presence of Member States was to focus the discussion on efficiency. These representatives or experts would attend the meetings in their individual and not national capacity. The Intersessional Working Groups would not be a body for negotiation but for technical discussions. As a Chair’s conclusion would not be sufficient, a record of the discussions could be considered in the Committee for its negotiations. Usually confusion started with drafting text. Even if the experts drafted, i.e. writing and

putting words together for the consideration of the Committee, that would not necessarily mean that the Committee would accept the text. The proposal of the African Group had been already presented at the 13th session. The delegation did not see any options coming from Group B countries and raised strong concerns about the process in the Committee.

234. The Chairman stated that plenary sessions were not designed for real dialogue, exchanges of views and negotiations. That was why there were informal meetings.
235. The Delegation of Thailand aligned with the Asian Group and the proposal of the African Group. The Delegation shared the idea of having a small and limited number for the intersessional expert meeting, but saw the merit of increasing the number of experts from each region as proposed by the GRULAC. For the sake of transparency, the meeting should be close-circuited, telecasted to another room or webcasted, for the benefit of all countries interested in following the progress of the expert meetings. Moreover, the expert meeting should propose options for legal texts to be considered by the Committee.
236. The Delegation of Canada aligned with the delegations of Argentina and Australia. To organize the Intersessional Working Group most rationally all three issues should be attacked in the first meeting taking into account the cross-cutting nature and the inter-linkages. Otherwise, the meeting would risk being more inefficient and duplicating some of its work. The delegation supported the Delegation of Switzerland on behalf of Group B. In respect to the issue of closed versus open sessions, it assumed that efficiency was guaranteed through a sound structure as well as very clear terms of reference and tasks. Even if the proposal of the African Group was the only one on the table, it did clearly not enjoy consensus. Canada reminded that the suggestions to outsource this work to experts groups were not covered by the mandate. Moreover, it wanted in this respect take a look at the concerns raised by Group B and other countries and to precedents as way out of the deadlock. Experience showed that Working Groups were not closed and limited in its numbers and therefore the Delegation suggested being inclusive to promote greater transparency in the process. Looking at experiences in WIPO concerning inclusiveness and how the Working Groups had operated, the delegation thought that there was no need to deviate from this practice as guidance to the Committee.
237. The Chairman asked whether delegations wished to continue in informal meetings.
238. The Delegation of Senegal, on behalf of the African Group, thought that the previous consultations would have allowed respective positions to be identified very clearly. It stated that it was willing to continue the consultations.
239. The Delegation of Yemen supported the African Group.
240. The Delegation of Angola proposed continuing the consultations in Room B.
241. The Delegation of Venezuela (Bolivarian Republic of) stated that there was a need to separate efficiency and effectiveness of the closed or open parties or groups.
242. The Delegation of Zimbabwe reiterated the principles laid down by the Chairman. However the delegation expressed its constant surprise by the manner in which this organization was working. It seemed as if it did not really adhere to the UN

bodies. The Delegation felt strange if human rights member states agreed that a *rapporteur* was an expert to undertake a specific research or study and come up with recommendations and options for Member States to deliberate on and in the meantime this *rapporteur* was elected by a Member State.

243. The Delegation of Portugal raised concern about the concept of transparency and drafting of the delegation of South Africa and the statement which was potentially worsening the atmosphere in the Committee.
244. The representative of Mbororo Social and Cultural Development Association (MBOSCUDA) aligned with the Saami Council, the chair of the Indigenous Caucus, and the African proposal. The Intersessional Working Groups should be limited in number of participants. The indigenous peoples should nominate its representative through regional platforms. Most of the region had a well organized regional platform for indigenous peoples, in African all were members of its individual organization and also member of the African Indigenous Platform (IPACC). It believed that IPACC had the technical and logistical means to carry out the regional process of selecting of indigenous expert and therefore it should be given the right to carry out the selection, as to ensure transparency and effective representation of indigenous and local community. The indigenous peoples had always successfully carried out this kind nomination process in another UN system like the Permanent Forum, the Expert Mechanism for the right indigenous peoples. The selected experts for the Intersessional Working Groups should be funded by the WIPO Voluntary Fund.
245. The Chair informed the plenary that he had held informal meetings with the regional or group coordinators so as to find a formula which would enable all the groups to reach agreement on the mandate, nature and characteristics of the Intersessional Group. He recounted that he had tabled a concrete proposal, as follows:

“Terms of Reference for the Three Intersessional Working Groups:

The Intersessional Working Group is a technical space and not a negotiating or decision making body.

The Intersessional Working Group will be guided by the principles of effectiveness, transparency and representativity.

The Intersessional Working Group shall provide legal and technical advice including where appropriate options and scenarios for consideration of the Committee on all aforementioned issues without prejudice to any outcome.

The Intersessional Working Group shall submit a report on its debate reflecting all views and recommendations for consideration by the IGC for its further work according to its mandate.

Each Intersessional Working Group shall be regionally balanced and composed of 41 experts nominated by Member States on a regional basis, and 10 experts nominated by Accredited Observers. Accredited Observers would include 7 expert observers from indigenous and local communities nominated by them, and the remaining expert observers from, inter alia, international organizations and agreements, industry, research institutions/academia and non-governmental

organizations.

Member States, shall be entitled to attend as observers in the work of the Intersessional Working Group, through its regional coordinators +2 and will be able to participate at the end of each working day, while ensuring the most effective contribution of the IWG.

The participation of representatives from developing countries and LDCs shall be funded by WIPO.

The participation of representatives from indigenous representatives shall be funded by the WIPO Voluntary Fund for accredited Indigenous and Local Communities.

The Rules of Procedure of the IGC (as contained in WIPO/GRTKF/IC/1/2), which incorporate the General Rules of Procedures of WIPO, will apply to the intersessional working groups unless otherwise decided by the IGC.

The working languages of the intersessional working groups are the six official UN languages.

The IGC would give the intersessional working groups its mandate.

The intersessional Working Groups will take as a basis of its work, all WIPO working documents, including WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/11/8(a) in line with the WIPO GA mandate.

The outcome of the Group's work as presented to the IGC shall be translated into all United Nations languages, as well as published to the fullest extent possible, and circulated as a WIPO document no later than one month before the 16th session of the IGC.

Frequency and venue of the meetings:

The three Intersessional Working Groups shall meet according to the work plan annexed to the General Assembly 2009 decision.

The duration of each meeting shall be 10 days.

The meetings shall take place in Geneva at WIPO Headquarters.

The Chairman of the IGC shall appoint, in consultation with regional groups and with the members of the Working Group, a coordinator of the Group from among the experts in order to facilitate its proceedings.

Recognizing the need for intersessional work as highlighted at the 12th Session of the IGC and in view of the mandate to decide on a date for the Diplomatic Conference in 2011, the following three (3) Intersessional Working Groups are proposed:

First Intersessional Working Group — February/March 2010

Intersessional Working Group shall focus on Traditional Cultural Expressions (TCEs) and Traditional Knowledge (with the exception of the TK associated with

Genetic Resources)

Second Intersessional Working Group — October 2010

Intersessional Working Group shall focus on Traditional Knowledge (TK) associated to Genetic Resources and Genetic Resources

Third Intersessional Working Group — February/March 2011

The IGC/17 will determine the issues to be addressed for Traditional Cultural Expressions, Traditional Knowledge and Genetic resources by the third IWG.”

246. The Delegation of Senegal thanked the Chair for his efforts and for his proposal put forward during informal consultations, which amended the proposal made by the African Group. That proposal was acceptable on the condition that the Committee did not prejudge the recommendations which the Intersessional Working Group might issue. The Delegation added that the mandate was not a problem and underscored that the African Group had shown flexibility on the matter as well as on the composition of the Working Group. Furthermore, the Chair's proposal to increase the number of experts per region from five to eight had been deemed acceptable, as well as the proposal to involve the regional coordinators. As regards the Agenda, the Delegation of Senegal stated that the African Group would keep to the contents of its proposal. The first session would cover traditional cultural expressions, the second, traditional knowledge and the third, genetic resources. The Delegation added that the proposal to extend the term of the Working Groups to 10 days was also acceptable and that it was for the Group of Experts to appoint its own Chair, in line with the rules of procedure.
247. The Delegation of Switzerland thanked the Delegation of Senegal for having communicated the reactions of the African Group to the outcome of the day's informal discussions, and also thanked the Chair for the way in which he had led discussions and consultations. The Delegation underlined the efforts undertaken by the Committee to identify the points which required more clarity with a view to drafting texts which would enable international legal instruments to be established. Group B would have liked to commit itself to the norm-setting work, and in that regard and so as to respect the principles of inclusiveness and transparency, the best formula would be for all Member States to take part in those consultations. The Delegation thought that what had been said during the consultations in the context of bilateral exchanges on the subject of small groups was acceptable. However, Group B was of the opinion that the work should be carried out by an open group and underlined that a closed group was possible if the drafting work was not included in the work of the Group of Experts, and if the Committee gave the working group a genuinely expert mandate to enlighten it as to the problems which had been identified during the 15th session. The Delegation noted the lack of clarity as regards the possible drafting role of the Group of Experts as well as the need to establish a mandate with clearly defined rules of engagement for all. In that regard, the Delegation was of the opinion that a closed committee would not achieve the clarity required by Group B. As regards the three points that Group B would have liked to deal with concurrently, the Delegation deplored the absence of traditional knowledge and genetic resources in the proposal for the first session. The Delegation stated that it would distribute the document produced by Group B taking into account the discussions of previous Committees and which were submitted during the previous day's informal consultations. The Delegation recalled that Group B had accepted the Committee's new mandate, that it had

committed itself to that and had indicated that it would have liked its hopes and needs to have been taken into account in the context of the Committee's work.

248. The Delegation of Ecuador, on behalf of GRULAC, also thanked the Chair for his efforts and leadership. It stated that there was still hope that positions might be narrowed and a result could be achieved. It said that GRULAC agreed with the proposals submitted by the Chair in the informal group and reiterated its flexibility. As regards the composition, and on behalf of GRULAC, it was thankful for having accepted its proposal to increase the number of participants. On the order of the topics which would be covered in intersessional meetings, it regretted being unable to adopt a position as a regional group for the time being.
249. The Delegation of Angola noted a feeling of a failure as regards the Committee while praising the efforts of the Chair to arrive at a compromise to establish intersessional expert groups in order to speed up the work of the Committee and to carry out the mandate defined at the Assemblies. The Delegation deplored the indecisiveness of the Committee and the opposition to its work and wished to see specific rules defined regarding its objectives.
250. The representative of CONGAF raised questions on issues related to the intersessional working groups, such as the geographical representation and participation of TK holders. He then shared with the Committee information concerning the adoption and content of the Law of the Sea Treaty, the Convention on Biological Diversity and the Convention to Combat Desertification.
251. The Delegation of Brazil requested the Chair to distribute his proposal in writing so as to receive more clarification on it and thereby prevent any misunderstanding.
252. The representative of Tupaj Amaru welcomed the proposals made by the Chair and the African Group's flexibility in reaching a consensus. It regretted the absence of consensus and the fact that, meanwhile, resources were disappearing and indigenous peoples were being dispossessed of their knowledge. It proposed, given the critical situation, not creating an intersessional working group, but rather that each government delegation bring its own experts to the Committee and analyze the issue with its own experts. In that way, the work would be more democratic, more open, more inclusive, and savings would be made on financial and human resources.
253. The Delegation of the United States of America reminded the Committee that it had already begun text-based negotiations and that it had made progress. In an efficient manner, Member States, accredited NGOs and representatives of indigenous and local communities had suggested changes to working documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a), which was a positive step. Other positive steps were that the Committee's work on the three substantive areas had been addressed on an equal footing, participants had posed questions and some answers had been given, and lastly, Member States had shared their national experiences. Although much work still needed to be done, this week was a week of many positive steps for a good continuation of the Committee's work.
254. The Chair considered that arrangements had not been sufficiently developed to take a decision on that issue but stressed that there had been significant progress, as it had been the first time in a long time that a substantive discussion had taken

place on Items 7, 8 and 9, since there had been growing consensus, and increasing convergence on the long-term objectives, spirit and intentions on the Committee's issues, and as there had been some progress on overcoming the deep mistrust which existed in the IGC. He emphasized that all the Delegations had shown flexibility to a greater or lesser extent and had made genuine efforts to make progress, but there had not been sufficient flexibility as the problem of deep mistrust had not been solved. He stated that in his opinion it was not possible to have an intersessional group until such time as, in the following Committee, there had been discussions on, and solutions to, its mandate, membership, characteristics, etc. He gave the floor to the Secretariat so that it might clarify what the *status quo* was.

255. The Director General of WIPO agreed with the Chair's assessment of the situation and that, if the Committee was unable to determine terms of reference, agenda and composition of the intersessional working groups, it would be impossible to hold them and therefore the next step would be to hold the next session of the Committee in June.
256. The Delegation of Egypt suggested that the documents be made available by the Secretariat in January 2010.
257. The Secretariat stated that the documents would be made available as soon as possible, bearing in mind that as from 2010 documents would be prepared in all 6 languages.
258. The Delegation of Canada commented on items 7, 8 and 9 of the draft decisions, requesting that in the paragraphs dealing with those items that the words "proposed amendments" be replaced by the word "suggestions".
259. The Delegation of Egypt acknowledged the Secretariat's point that documents would be provided in all 6 languages and suggested that since the documents would be a factual recording that they be made available by the Secretariat in the second half of January, in order to expedite discussions within other concerned fora as well as at the national level.
260. The Delegation of the USA proposed that the documents be made available by April 15, 2010 to allow delegations sufficient time to comment in writing on both TK and TCEs before the next session of the Committee. After further discussions with the Chair, the Delegation agreed to consider that the documents be published by the Secretariat in January thus allowing the Committee members to present their comments until the end of February to include them in the revised versions of the documents.
261. The Delegation of South Africa welcomed the suggestions made by the delegation of the USA but wished to seek further clarity in regard to the articles. The articles referred to were the articles that had been discussed in the meeting.
262. The Delegation of India suggested that, because the Committee had actually started on text-based negotiations, the word "amendment" as appeared in the paragraphs of the draft decisions under items 7, 8 and 9 be retained.
263. The Delegation of the United States of America stated that it had also made comments and posed questions regarding the objectives and principles in the

documents. Therefore, it was proper for the questions and information to be submitted on all parts of the documents.

264. The Delegation of Australia wished to support the textual suggestions made by the Delegation of Canada with respect to the words proposed amendments in the draft decisions on items 7, 8 and 9.
265. The Delegation of Brazil commented on the proposals made by the Delegations of Canada, Australia and South Africa regarding the wording, and noted that if the word 'amendment' was taken out, the decisions would not reflect what had happened.
266. The Chair said that, as regards the proposal made by Canada, the commitment made since the start of the substantive discussion was that it would reflect the approaches of the delegations, whether those were proposals for new paragraphs, proposals in abstract terms or proposals for amendments. He clarified that, pursuant to the decision of the General Assembly, the current meeting was carrying out "text-based negotiations". It was appropriate to include the term suggestions and amendments as there had been suggestions and amendments.
267. The Delegation of Canada pointed out that it had made several interventions during the week enquiring as to whether documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 were to be considered as negotiating texts or working documents. The Director General had said that the aim was to reissue document WIPO/GRTKF/IC/9/4 as a revised working document, side by side with the provision at the left and then the comments submitted by parties and accredited observers on the right side. The Delegation explained that it had not been said that the documents would be negotiating texts. The Delegation was uncomfortable with the word "amendment" and requested that it be changed to "suggestion".
268. The Chair specified that the exercise undertaken during the current session of the Committee was text-based negotiations. He stated that the General Assembly's decision was to work on documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a), among others, however during the session only three documents had been discussed. He stated that there had been concrete proposals which needed to be reflected, such as new drafting proposals and amendments.
269. The Delegation of South Africa concurred with the interpretation of the Chair and supported the intervention of the Delegation of India.
270. The Delegation of Indonesia fully supported the statement made by the Chair that the Committee had embarked on text-based negotiations. The Decisions should be a factual reproduction of what had been discussed, and the word "amendment" should be retained.
271. The Chair stressed the importance of clearly reflecting the positions of the delegations on the issues decided upon by the Committee.
272. The Delegation of the United States of America proposed that instead of using the words "proposed amendments" that "proposed edits" be considered, in light of the Delegation's understanding that documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a) were a basis for the work of the

Committee, not negotiating texts, and that the Committee was looking at all documents.

273. The Chair opined that it was now inappropriate to refer to “comfort levels” but reference should be made to the strict terms of the mandate contained in the decision of the General Assembly, which was “text-based negotiations”. He reiterated that that was what had occurred on Items 7, 8 and 9, and that as regards documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8(a) there had been amendments and suggestions.
274. The Delegation of Venezuela thanked the Chair for his efforts and said that the word amendment should appear as that was the agreed term.
275. The Chair replied that the word amendment would be retained.
276. The Delegation of the United States of America requested confirmation that the document on TK would be available in January 2010 and suggested that the deadline for submitting comments could be a little later than February 2010.

*Decision on Agenda Item 10:
Arrangements for the Intersessional
Working Group Sessions*

277. The Committee decided to refer further consideration of this item to its next session.

278. The Delegation of Senegal asked if it was possible to swap the following Committee session for the Intersessional Working Group and proposed that the following Committee session take place in February and the Working Group on the dates initially scheduled for the Committee.
279. The Delegation of South Africa suggested that the wording indicate that the Committee decided to conclude this item at its next session.
280. The Chairman stated that sufficient time would be needed to prepare the documents in all languages for the next session and this affected the dates of the next session. The Secretariat had stated that it would set the dates for the session as soon as practically possible.
281. The Delegation of Senegal emphasized that its proposal was intended to bring forward a Committee session so as not to lose a Working Group session, following the recommendation of the Assemblies and to schedule that session once an agreement had been reached, if possible in the following Committee session, as regards questions of procedure on holding the meeting.
282. The Chairman pointed out that there could not be a session of the IWG as there was no mandate. The next IGC would be organized as soon as possible but this depended on several logistical and practical matters. The report would include reference to the wish that the session be held as soon as possible. The Secretariat had said it could have the revised versions of the documents ready by end January 2010 and comments would be invited for a month thereafter. Then, time would be needed again to re-issue the documents in all the UN languages

and delegations would then need time to discuss the revised documents at home. In the Chair's view, the next session could perhaps be held in late April or thereabouts. The Secretariat would make all efforts to organize the session as soon as practically possible.

283. The Delegation of Egypt noted that, had the Committee come to an agreement on the modalities for holding the IWGs in February or March 2010, the Secretariat would have been required to revise documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 as well as WIPO/GRTKF/IC/11/8(a) in time for the IWGs. The Delegation proposed that the time slot allotted for the IWGs be used to hold the next session of the Committee at which it would set out to reach an agreement on the intersessionals, discuss further articles as had been done in the fifteenth session, and that the time allotted for the sixteenth session in May/June 2010 be used to hold the first IWG.
284. The Chairman stated that although a time had been set aside for the first IWG, this session could no longer take place. Because the documents for the next IGC had first to be revised, then commented on and revised again, in all 6 languages, it would not be possible to hold the next IGC at exactly the same time as had been planned for the IWG. When dates for the first IWG session had been proposed, it was not expected that the three main documents would have to be revised twice and re-issued after comments before the first IWG. These documents will be needed, however, for the next IGC and it would be held as soon as practically possible.
285. The Delegation of Venezuela (Bolivarian Republic of) supported the proposal made by the African Group and the Delegation of Egypt on holding the following Committee session as soon as possible so as to make progress on the work of the Committee and to determine the provisions relating to the meetings of the Intersessional Working Group.
286. The Chairman reiterated that the next session of the IGC would take place as soon as possible. If the next IGC were to take place in March 2010, delegations would have only the first revised versions of the main documents before them, whereas if the meeting were held later they could have the next versions available which also included the written comments expected to be made by delegations in the month of February 2010.

ITEM 11: ANY OTHER BUSINESS

287. The Delegation of Australia recorded its disappointment that the Committee had not reached a position on item 10, and agreed with the Delegation of the USA that progress had been made, in view of the discussions on text, suggesting increased trust. In the interest of building on trust and showing good faith, maintaining the tempo of the work of the Committee and increasing a shared understanding of the issues and policy approaches of Member States, the Government of Australia was considering a regional workshop in the first half of 2010, to provide a formal opportunity to meet and share knowledge and build genuine momentum in relation to the work of the Committee. The Delegation stated that it would keep Member States and the Secretariat informed regarding its proposal.

288. The Delegation of South Africa confirmed that the Committee had failed to reach an agreement on item 10.
289. The representative of the Tulip Tribes of Washington stated that his organization and the Saami Council believed that the Indigenous Panel had been a useful way for parties to be exposed to the experiences, concerns and recommendations of the indigenous organizations. However, he noted that the panel had been increasingly less attended by Member States over the years and proposed that the members of the Committee support the Secretariat to work with the accredited indigenous observers to improve the format of the indigenous panel in order to address the new phase of text based negotiations. He suggested that the form of the panel needed to be changed and reorganized to focus directly on the issues being dealt with by the Committee rather than regional presentations of experiences.
290. The representative of the Indigenous Peoples Council on Biocolonialism (IPCB), speaking on behalf of her organization, of the Brazilian Indigenous Institute of Intellectual Property (InBraPi) and of the Indian Council of South America (CISA), thanked the Chair for the inclusive manner in which he had led the discussions of the Committee. Commenting on the future intersessional working groups, she stated that indigenous peoples should be strongly represented, with the right to speak for themselves, to select their own representatives and to have regionally balanced representation. The rules of procedure in the Committee and the intersessional working groups should be applied in a flexible manner so as to give them the freedom to comment on, submit text, and engage in any negotiations that affect them. She also urged the Secretariat to explore modifications to the Voluntary Fund or the creation of alternative funding mechanisms to support indigenous participation in the intersessional working groups for consideration at the next IGC. She further stated that the Indigenous Panel could play a vital role in illuminating the views of indigenous peoples in relation to the topics addressed in the Committee. The panelists should be free to represent the wide range of views and experience topics related to Indigenous peoples.
291. The Delegation of Switzerland invited the Secretariat to reflect on the necessary changes that would have to be introduced into the rules of the Voluntary Fund to ensure that the Advisory Board would be able to adopt its recommendations, in an efficient and transparent manner, with regard also to the funding of the participation of representatives of accredited observers representing indigenous and local communities in intersessional working group sessions.
292. The representative of CISA stated that it was critical that the intersessional working group recognized the status and mode of participation of indigenous peoples. He proposed to keep the broadest level of participation of indigenous experts and representatives so that their interests were not only reflected in an international treaty, but that their rights be fully applied and respected in the deliberations in creating the treaty.
293. The Delegation of Brazil, to echo the statement made by the Delegation of Switzerland, stressed the need to look at the Voluntary Fund regulations to ensure the funding of the participation of indigenous and local communities during the intersessional working groups.

AGENDA ITEM 12: CLOSING OF THE SESSION

Decision on Agenda Item 12:

294. The Committee adopted its decisions on agenda items 2, 3, 4, 6, 7, 8, 9 and 10 on December 11, 2009. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.

295. The Chair thanked all those present for their active participation and commitment. He stated that all had made considerable efforts and certainly no time had been lost. He particularly thanked the Secretariat for its constant support and enormous dedication. He thanked the interpreters for their efforts and work. He stressed that the debate had been productive, the delegations had had the opportunity to express themselves and progress had largely been made towards what would surely one day become a reality. The Chair noted that such projects were lengthy and took time to mature in a multilateral environment, which could be felt in all organizations and also at WIPO. He recalled the words of Victor Hugo, a well-known opponent of injustices and against bad things in his society, who said that “no one is able to oppose an idea whose time has come”. The Chair stated that the time would come when all the ideas and proposals would come together and decisions, surely different from those today, would be taken.

296. The Chair closed the meeting.

[Annex follows]

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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(dans l'ordre alphabétique des noms français des États)
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UNION AFRICAINE (UA)/AFRICAN UNION (AU)

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III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/ INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

FONDS DES NATIONS UNIES POUR L'ENFANCE (UNICEF)/UNITED NATIONS CHILDREN'S FUND (UNICEF)

Pascal VILLENEUVE, Associate Director, Programme Partnerships, Geneva

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME/OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

Jose DORIA, Geneva

ORGANISATION MONDIALE DE LA SANTÉ (OMS)/WORLD HEALTH ORGANIZATION (WHO)

Peter BEYER, Technical Officer, Public Health, Innovation and Intellectual Property, Geneva

ORGANISATION DES NATIONS UNIES POUR L'ALIMENTATION ET L'AGRICULTURE
(FAO)/FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

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ORGANISATION ISLAMIQUE POUR L'EDUCATION, LES SCIENCES ET LA CULTURE
(ISESCO)/ISLAMIC EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION
(ISESCO)

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GROUPE DES ÉTATS D'AFRIQUE, DES CARAÏBES ET DU PACIFIQUE (GROUPE DES
ÉTATS ACP)/AFRICAN, CARIBBEAN AND PACIFIC GROUP OF STATES (ACP GROUP)

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ORGANISATION BENELUX DE LA PROPRIÉTÉ INTELLECTUELLE (OBPI)/
BENELUX ORGANISATION FOR INTELLECTUAL PROPERTY (BOIP)

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ORGANISATION EURASIENNE DES BREVETS (OEAB)/EURASIAN PATENT
ORGANIZATION (EAPO)

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(UPOV)/INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
(UPOV)

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**IV. ORGANISATIONS INTERNATIONALES NON GOUVERNEMENTALES/
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African Indigenous Women Organization

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American Intellectual Property Law Association (AIPLA)

Albert TRAMPOSCH (Deputy Executive Director, International and Regulatory, Arlington)

Association internationale pour la protection de la propriété intellectuelle (AIPPI)/

International Association for the Protection of Intellectual Property (AIPPI)

Konrad BECKER (Chairman, Special Committee IP GRTKF, Basel)

Association littéraire et artistique internationale (ALAI)/International Literary and Artistic

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Arts Law Centre of Australia

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Center for Peace Building and Poverty Reduction among Indigenous African Peoples
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Civil Society Coalition (CSC)

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Coordination des ONG africaines des droits de l'homme (CONGAF)/Coordination of African
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El Molo Eco-Tourism, Rights and Development Forum

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Ethio-Africa Diaspora Union Millennium Council

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Musa Usman NDAMBA (Yaounde)

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Traditions pour demain/Traditions for Tomorrow

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