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

Eighteenth Session
May 9 to 13, 2011, Geneva

REPORT

adopted by the Committee

INTRODUCTION

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "IGC") held its eighteenth session in Geneva, from May 9 to 13, 2011.

2. The following States were represented: Algeria, Argentina, Australia, Austria, Azerbaijan, Barbados, Belgium, Bolivia (Plurinational State of), Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, China, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Guatemala, Haiti, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Kyrgyzstan, Kuwait, Lebanon, Luxembourg, Malaysia, Mexico, Monaco, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saudi Arabia, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Swaziland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Venezuela (Bolivarian Republic of), Viet Nam, Zambia and Zimbabwe (96). The European Union and its 27 Member States was also represented as a member of the Committee.

3. The following intergovernmental organizations ("IGOs") took part as observers: African Intellectual Property Organization (OAPI), African Regional Intellectual Property Organization (ARIPO), African Union Commission (AUC), Eurasian Patent Organization (EAPO), European Patent Office (EPO), Food and Agriculture Organization of the United Nations (FAO), International Union for the Protection of New Varieties of Plants (UPOV), Office of the High Commissioner for Human Rights (OHCHR), *Organisation Internationale de la Francophonie* (OIF), Organization of the Islamic Conference (OIC), United Nations Environment Program (UNEP), United Nations Conference on Trade and Development (UNCTAD), United Nations University and the World Trade Organization (WTO) (13).

4. Representatives of the following non-governmental organizations ("NGOs") took part as observers: American Folklore Society (AFS); Art-Law Centre; Assembly of First Nations (AFN); Association for the Development of the Angolan Civil Society (ADSCA); Centre for International Intellectual Property Studies (CEIPI); *Centro de Culturas Indigenas del Perú (CHIRAPAQ)*; Chamber of Commerce and Industry of the Russian Federation (CCIRF); Civil Society Coalition (CSC); *Comisión Juridica para el Autodesarollo de los Pueblos Originarios Andinos (CAPAJ);* Coordination of African Human Rights NGOs (CONGAF); Creators Rights Alliance (CRA); CropLife International; El-Molo Eco-Tourism, Rights and Development; Ethnic Community Development Organization (ECDO); Foundation for Aboriginal and Islander Research Action (FAIRA); Friends World Committee for Consultation (FWCC); Ibero-Latin-American Federation of Performers (FILAIE); Indian Council of South America (CISA); Indian Movement "*Tupaj Amaru*"; Indigenous Peoples Council on Biocolonialism (IPCB); Intellectual Property Owners Association (IPO); International Association for the Protection of Intellectual Property (AIPPI); International Center for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Committee of Museums of Ethnography (ICME); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Federation of the Phonographic Industry (IFPI); International Federation of Reproduction Rights Organisations (IFRRO); International Publishers Association (IPA); International Society for Ethnology and Folklore (SIEF); International Trademark Association (INTA); International Union for Conservation of Nature (IUCN); International Video Federation (IVF); IQ Sensato; Knowledge Ecology International (KEI); L'auravetl'an Information and Education Network of Indigenous People (LIENIP); Library Copyright Alliance; Max Planck Institute for Intellectual Property, Competition and Tax Law (MPI); Mbororo Social Cultural Development Association (MBOSCUDA); *Organizaciones Indigenas de la Cuenca Amazónica (COICA)*; Queen Mary Intellectual Property Research Institute (QMIPRI); Rromani Baxt; Sámi Parliament; The International Committee for the Indigenous PeopleS of the Americas (INCOMINDIOS);

The Saami Reproduction Rights Organization; Third World Network (TWN); Traditions for Tomorrow; Tulalip Tribes; World Self-Medication Industry (WSMI) (49).

5. A list of participants is annexed to this report as Annex I.

6. Document WIPO/GRTKF/IC/18/INF/2 provided an overview of the documents distributed for the eighteenth 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 eighteenth session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

9. Mr. Christian Wichard, Deputy Director General, WIPO, welcomed all participants on behalf of the Director General. He stated that the IGC had made good progress since the IGC had received its robust mandate in September 2009. There was this and one further IGC session before the WIPO General Assemblies of 2011, when the General Assembly would decide on the future of this process. The last IGC session before the General Assembly would take place in July, 2011. The Deputy Director General stated that he was grateful to all who had been involved in this process, notably the IGC's Chair, Ambassador Philip Richard Owade, who, with his able leadership, had enabled the IGC to establish a constructive working atmosphere and to structure and focus its work. He also thanked the Chairs of the intersessional working groups (IWGs), namely Mrs. Savitri Suwansathit (IWG 1), Dr. Ian Heath (IWG 2) and Mr. José Ramón López de León Ibarra (IWG 3). They had greatly supported the work of the IGC by structuring the IWGs in a way that had produced tangible outcomes in the form of texts that provided a firm basis for further discussion at the IGC. The Deputy Director General was also grateful to his colleagues at WIPO for their untiring efforts to keep this process running. The IGC had already had an opportunity to discuss the outcome of the first IWG, which had focused on traditional cultural expressions (TCEs), at its last session in December 2010. That session had made good process in further refining the text on TCEs. In February and March of this year, there had been IWGs 2 and 3 on traditional knowledge (TK) and genetic resources (GRs), respectively, and both IWGs had produced texts which provided a good basis for the further deliberations of the IGC on TK and GRs. Mr. Wichard hoped that the IGC would make good progress on all three items, in particular by digesting the outcomes of the most recent working groups on TK and GRs and by further refining and clarifying the texts. If one looked at the list of documents before the IGC, it was clear that this process had already reached a certain maturity. However, there was still a lot of work to do and he urged all participants to use the limited time available as economically as possible for focused substantive work. The Secretariat would do everything it could to facilitate the work of the IGC so that it could make good progress on its very important work.

10. The Chair, His Excellency Ambassador Philip Richard Owade, stated that as the IGC was conducting substantive negotiations, and needed to do so in an effective and timely manner, he wished to make the most of the limited time available. To this end, there would be no opening or general statements. Participants wishing to make opening statements could submit them to the Secretariat, and they would be reflected in the report of the session. He recalled that in September 2010, the WIPO General Assembly had established a Development Agenda coordination mechanism whereby WIPO bodies report through the WIPO General Assembly to the Committee on Intellectual Property and Development (CDIP) on their implementation of the Development Agenda recommendations. In his view, this matter would be addressed fully at IGC 19 right before the General Assembly. The Chair noted that the participation of Indigenous and local communities was crucial to the credibility and quality of the negotiations. Therefore every possible effort would be made to allow their effective participation. The IGC should reach an agreed decision on each agenda item. On the last day, Friday May 13, 2011, the decisions, as already agreed, would be circulated for formal adoption by the IGC.

The draft report of the entire session would then be circulated as soon as possible after the meeting to allow delegations to check their own interventions as reported, and then a further draft would be prepared for adoption at the nineteenth session of the Committee (IGC 19) taking place from July 18 to 22, 2011.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

11. The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/18/1 Prov. 2 for adoption and it was adopted.

12. The Chair reaffirmed that any delegations which wished to submit written opening statements may do so and indicated that these would be reflected in the session's report. A few delegations availed themselves of this opportunity and submitted the following written statements. Other general statements which related to specific agenda items were also handed in and these are reported on in this report under those agenda items.

13. The Delegation of Poland, on behalf of the Central European and Baltic States, looked forward to an efficient and fruitful meeting under the able chairmanship of Ambassador Owade. The Delegation thanked the Secretariat for the organization of the various IWG and IGC sessions and for the preparation of the documents, including the glossary on IP and TK, emphasizing its great value for clarification and approximation of diverging positions. During the IWGs, experts from the Group's countries had actively participated and considerable progress had been achieved. Efficient and fruitful discussions would be continued during this session, taking into account the draft articles on the protection of TK prepared at IWG 2, as contained in document WIPO/GRTKF/IGC/18/7 and the draft objectives and principles relating to IP and GRs prepared at IWG 3, as contained in document WIPO/GRTKF/IGC/18/9. The Chair was also thanked for having undertaken and organized an informal electronic consultation on the draft articles on TCEs and which had resulted in preparation of a Chair's Note on this matter. As for specific issues concerning TK, GRs and TCEs, it stressed the importance of clear cut definitions, the question of beneficiaries, and the scope and objectives of protection. In the area of GRs, the proposal for a mandatory disclosure requirement was supported. In the area of TK, the Group acknowledged the need to protect TK through finding the right balance among the interests of its holders and users. In the field of TCEs, while the Group preferred a legally non-binding option, it stood committed to participating in the discussion in a constructive manner, especially as regards the objectives and principles of the text. It was committed to working hard at the current session and to making all the efforts necessary in order to eventually reach a long-awaited compromise in all three subjects dealt with by the IGC.

14. The Delegation of Nicaragua, on behalf of the Member States of Latin America and the Caribbean (GRULAC), expressed its satisfaction at the Chair's continued chairmanship of the IGC. GRULAC reiterated the willingness and cooperation of all its members to work decisively on the subjects proposed for the current session and during the work to be done in the future. GRULAC expressed its gratitude to the Secretariat for the preparation and presentation of valuable documentation for the discussions to be held, as well as for the holding of the information meetings conducted prior to the current session. Similarly, it welcomed the organization of IWGs 2 and 3, whose legal and technical analyses of the subjects of TK and GRs respectively, and the draft texts which they had produced, enriched the IGC's discussions on the appropriate mechanisms for the protection of GRs, TK and TCEs. GRULAC recognized that progress had been made but it was necessary to continue working, and to take into account the documents produced by the IWGs and at previous IGC sessions. The documents constituted a significant contribution to the debate and it was important for negotiations to be based on those documents, for which reason it encouraged the Member States to participate constructively in the different deliberations with great attention and care, particularly with a view to the

decisions to be taken by the General Assemblies. The Group undertook to make the best possible effort to achieve balanced agreements for the benefit of all members of the Organization. In relation to the WIPO Voluntary Fund, GRULAC welcomed the recent contribution by the Government of South Africa and urged the other Member States and public and private bodies to continue contributing to and strengthening the Fund. GRULAC reiterated its commitment and willingness to continue participating actively in the work of the IGC which, in accordance with the mandate given by the General Assemblies in September 2009, the Member States should carry out jointly, in order to achieve the adoption of an international legal instrument(s), allowing for the protection of TK, TCEs and GRs, for the benefit of all the parties involved, particularly since Latin America and the Caribbean enjoyed a broad and rich biological and cultural diversity, whose due protection was being discussed at the national, regional and international level.

15. The Delegation of Indonesia, on behalf of the ASEAN Member States, namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam, congratulated the Chair on his continued Chairmanship of the IGC. It also congratulated the two Vice-Chairs, and it was confident that under their able stewardship, the IGC would prove fruitful and result in constructive discussions with ideas for the way forward. ASEAN also conveyed its gratitude to the WIPO Secretariat and to the technical experts for their professionalism as demonstrated in the IWGs. ASEAN attached great importance to the work done by the IGC, and to the mandate renewed by the 2009 WIPO General Assembly. ASEAN had been very encouraged by the developments that took place during the IWGs. The IWGs had realized their mandate of supporting and facilitating the negotiations of the IGC by providing sound legal and technical advice and analysis, including where appropriate, options and scenarios for consideration by the IGC. Although the IWGs were not decision-making bodies, the outcomes of their work, comments and recommendations were important, and should be taken into consideration along with all relevant documents during the discussions in the IGC and the formulation of next steps. This was the third IGC session under the new IGC mandate. In view of the mandate of the IGC to submit the text (or texts) of an international legal instrument (or instruments) which will ensure the protection of GRs, TK and TCEs, to the WIPO General Assembly in September 2011, ASEAN was committed to continuing the work of the IGC and to actively participating in the text-based negotiations. In this regard, ASEAN would continue working with all WIPO Member States to accelerate the IGC process. This was in line with Recommendation 18 of the WIPO Development Agenda, which urged the IGC to accelerate the process on the protection of GRs, TK and TCEs, without prejudice to any outcome, including the possible development of an international instrument or instruments. It was imperative that all WIPO Member States demonstrated a strong commitment and build upon their work under the mandate to advance the substance that would necessarily drive the process and progress. ASEAN was confident that with the cooperation and flexibility of all WIPO Member States, the success of the work of the IGC would certainly be achieved.

AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE SEVENTEENTH SESSION

16. The Delegation of Bolivia and the representative of Tupaj Amaru each made a correction to the report. The representative of the Tulalip Tribes, who had been the chair of the Indigenous panel at the 17th session of the IGC, presented his report of the panel for inclusion in the report.

Decision on Agenda Item 3:

17. The Chair submitted the draft report of the seventeenth session of the IGC for adoption and, subject to the corrections and addition referred to, it was adopted.

AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 4:

18. The IGC unanimously approved accreditation of all the organizations listed in the Annexes to documents WIPO/GRTKF/IC/18/2 and WIPO/GRTKF/IC/18/2 Add. as ad hoc observers, namely: Fondation des Oeuvres pour la Solidarité et le Bien Etre Social (FOSBES ONG); Fórum de Povos e Comunidades Tradicionais; France Libertés Fondation Danielle Mitterrand; Himalayan Indigenous Nationalities Preservation Association (HIWN); Intangible Cultural Heritage Network (ICHNet); Sámi Parliamentary Council (SPC); and B.I.S.O.N. International.

AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES: VOLUNTARY FUND

19. The Chair introduced documents WIPO/GRTKF/18/3 and WIPO/GRTKF/IC/18/INF/4.

20. In accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63) the eighteenth session was preceded by a half-day panel of presentations, chaired by Mrs. Sharon Venne, Legal Advisor, International Committee for the Indigenous Peoples of the Americas (INCOMINDIOS), Edmonton, Canada. The presentations were made according to the program (WIPO/GRTKF/IC/18/INF/5). The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is contained below:

> "The following Indigenous panelists discussed the issue of Indigenous Peoples' collective rights and intellectual property: Professor James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples, Regents' and James J. Lenoir Professor of Human Rights Law and Policy, University of Arizona James E. Rogers College of Law, USA; Mr. Estebancio Castro Diaz, Executive Secretary, International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, Panamá; Ms. Repeta Puna, Policy Advisor, Office of the Prime Minister, Cook Islands Government; and, Mr. Eliamani Isaya Laltaika, Coordinator, Tanzania Intellectual Property Rights Network, Tanzania.
>
> Professor Anaya said that there is a wide international recognition of Indigenous Peoples collective rights, in particular in the United Nations Declaration on the Rights of Indigenous Peoples of 2007, which also recognizes the right of Indigenous Peoples to self-determination. In addition, a number of UN treaty-monitoring bodies, such as the United Nations Human Rights Committee, the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Committee on Economic, Social and Cultural rights are taking Indigenous Peoples' rights into consideration. There are a number of regional bodies, including the Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights, which have looked at collective rights related to lands and resources. The Special Rapporteur referred to another agreement: the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization adopted,

but not yet ratified, in October 2010. Its Article 7 states that parties should ensure that traditional knowledge associated with genetic resources that is held by Indigenous and local communities is accessed with the prior informed consent of these communities, and that mutually agreed terms have been established.

According to Professor Anaya, one of the issues in the implementation of Indigenous Peoples' rights is definition and representation of beneficiaries of collective rights. This is important in relation to the granting of prior informed consent and fair and equitable benefit-sharing. Customary law and practices is an element of the right to self-determination and the key to addressing such concerns, as they constitute a means by which Indigenous Peoples regulate the use of and distribution of benefits from tangible and intangible objects that collectively pertain to them. However, customary law may not always yield clear answers about definition and representation of the beneficiaries of rights, and Indigenous Peoples themselves will need to work towards defining and clarifying this aspect. He added that practical difficulties should never be an excuse for not doing the right thing.

Professor Anaya acknowledged the significant progress made on a new groundbreaking instrument or instruments at WIPO to protect Indigenous Peoples' traditional knowledge and traditional cultural expression, but further progress is a matter of securing basic Indigenous Peoples' rights. There is also a need for a greater participation of Indigenous Peoples and local communities in the process. He praised the WIPO Voluntary Fund set up in 2005, which finances the participation in the IGC process of accredited observers representing Indigenous peoples and local communities, adding that he wished he saw more Indigenous Peoples' representatives attending sessions of the Committee.

According to Mr. Estebancio Castro Diaz, WIPO has the power to create an instrument which will implement Article 31 of the UN Declaration on the Rights of Indigenous Peoples. An intellectual property regime and access to benefits must allow Indigenous Peoples to claim their collective rights and have control over their culture and heritage. He noted that lack of protection as one of the main reasons for continuous loss of Indigenous peoples' knowledge.

Referring to Indigenous peoples as the ones who should decide what traditional knowledge can apply to the public at large, he emphasized that free, prior and informed consent must be recognized worldwide and captured in international and national laws. He gave the example of Panamá, where free, prior and informed consent has been implemented in practice although not written into the law. States or private sector should consult with Indigenous Peoples to seek their consent before the approval of projects affecting their lands or territories and resources, as well as of other activities that could impact Indigenous communities, or deprive them of their rights. Prior informed consent also aims to prevent misappropriation of traditional knowledge and genetic resources.

Mr. Eliamani Isaya Laltaika added to the points covered by the two previous speakers by giving a concrete example from the Maasai people in Africa on the collective rights over traditional knowledge. He spoke of the general common knowledge known to all members, such as medicines that are learnt at a young age by all members of the people, and the sacred knowledge that is held by the elders and not generally known but passed from generation to generation in certain ways.

Mr. Laltaika addressed the roles of customary laws in development of community-based bio-cultural protocols that operationalize the right to free, prior and informed consent. He concluded that these protocols can exist with national and international laws.

Ms. Repeta Puna provided an overview of developing a policy on traditional knowledge that is inclusive of customary rights and traditional structures, and is currently being converted into a law. For example, in the Cook Islands there is no ability to sell lands - purchaser can acquire a lease interest but not a title interest in land, while the land is held collectively by the Cook Islands peoples. This principle was applied to Indigenous knowledge by referring to holders of

knowledge, users of knowledge and doers of knowledge. All these concepts are rooted in the customary laws.

Ms Puna echoed the statements made by the previous speaker on the two kinds of knowledge: general or generic knowledge and sacred or secret knowledge. She noted that today wisdom can be transferred or stored in a school. The same can be said about knowledge related to medicines – it can be seen to be done in a hospital. In conclusion, she emphasized that individual and collective rights are complimentary opponents".

21. The Chair noted that the report of the Advisory Board of the Voluntary Fund (WIPO/GRTKF/IC/18/INF/6) had been published and was available for all participants. He invited the Chair of the Board, Mr. Vladimir Yossifov, to introduce the report.

22. Mr. Yossifov reported that the Advisory Board had met on Wednesday, May 11, 2011, to select and nominate a number of participants representing Indigenous communities to received funding for their participation at IGC 19. In view of the amount of money available in the Voluntary Fund, the Board had been able to select only five participants, with one additional 'reserve' person subject to availability of funds. The Board's deliberations were reported on in document WIPO/GRTKF/IC/18/INF/6. The Board's deliberations had been friendly and constructive and the Chair thanked the Board members and the WIPO Secretariat for their co-operation.

23. The representative of FAIRA thanked the Board members for their work and stated that it was disappointing that only five people would be assisted to attend IGC 19. The representative believed that only five Member States of WIPO had contributed to the Voluntary Fund in the six years of its operation, and while there was a global financial crisis, there should be more funds available for the Voluntary Fund. States would be provided with another letter asking them to contribute to the Fund. The representative repeated his call to States to provide funding. Even small amounts would help. If more funds were to become available before IGC 19, he enquired whether more Indigenous participants could be funded considering that the Board had already met and concluded its work.

24. The representative of Tupaj Amaru supported the creation of the Voluntary Fund. However, double-standards and discriminatory policies were being applied in the selection of Indigenous representatives to receive funding. There should be fair geographical distribution, but funded representatives come from the same countries. How could one explain this? Were they financed by their Governments or by transnational pharmaceutical companies? For example, he had never seen a candidate from Bolivia being funded. Nevertheless, 60% of Bolivians were indigenous. The representatives of developing countries were funded while Indigenous persons were not and this was an unjust policy. WIPO ought to create its own fund specifically for Indigenous peoples. WIPO received income from patenting, including the patenting of TK.

25. The representative of CHIRAPAQ proposed awareness-raising among donor countries to raise more money for the Fund. Indigenous peoples wished to continue to participate but needed funding. It was also important that Indigenous participants were able to contribute to the concepts, words and terms being discussed.

26. The Chair recalled that he had never missed an opportunity to appeal to Member States, particularly those who were in a position to do so, to make contributions to the Voluntary Fund. He had always emphasized the importance of the participation of Indigenous peoples in the IGC. The Chair reiterated an appeal for funds and hoped that there would be a positive response. At that time, the Chair was delighted to announce that the Fund had received an anonymous donation, for which he and the Committee were very grateful. He invited the Chair of the Voluntary Fund Board to respond to the question posed by FAIRA.

27. Mr. Yossifov stated that the Board had not explicitly considered this question because the Board was bound by its Rules to work within the amount of funds actually available. The Board was composed on an *ad hoc* basis by the IGC, and he could personally not see how a selection could take place intersessionally. It was not clear if the IGC could give *ex post fact* approval to selections made intersessionally. This was unknown territory.

28. The Chair stated that there were other ways in which funding could be made available to Indigenous participants. The Fund could not operate intersessionally but the Fund was only one route. Nothing barred a State from directly funding an indigenous organization or individual.

Decision on Agenda Item 5:

29. The IGC took note of documents WIPO/GRTKF/IC/18/3, WIPO/GRTKF/IC/18/INF/4 and WIPO/GRTKF/IC/18/INF/6. The IGC strongly encouraged and called upon members of the IGC and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities. The IGC noted and warmly welcomed the contributions made to the Fund by the Government of South Africa and an anonymous contributor.

30. The Chair proposed, and the IGC elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Martin GIRSBERGER, Head, Intellectual Property and Sustainable Development, Swiss Federal Institute of Intellectual Property, Berne, Switzerland, Ms. Nina S. DJAJAPRAWIRA, Counsellor, Permanent Mission of Indonesia, Geneva, Dr. Emin TEYMUROV, Attaché, Permanent Mission of the Republic of Azerbaijan, Geneva, Mr. Mandixole MATROOS, Permanent Mission of South Africa, Geneva, Mrs. Zereth del Carmen TORRES MÉNDEZ, Attorney Negotiator, International Trade Negotiations Division, Ministry of Commerce and Industries, Panama, Mr. Juan Carlos JINTIACH ARCOS, Coordination of the Indigenous Organizations of the Amazon Basin, Quito, Ecuador, Mr. John Trygve SOLBAKK, SamiKopiija, Karasjok, Norway, and Mrs. Ali Aii SHATU, Member of the Mbororo Social Cultural Development Association (MBOSCUDA), Bamenda, Cameroon. The Chair of the IGC nominated Mr. Vladimir Yossifov, Vice Chair of the IGC, to serve as Chair of the Advisory Board.

AGENDA ITEM 6: TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

31. The Chair proposed the establishment of an informal open-ended drafting group to work further on the text of draft articles as contained in document WIPO/GRTKF/IC/18/4 Rev. The Chair recalled that IGC 17 had already worked on the results of IWG 1 on TCEs and that the text on TCEs was, therefore, at a more advanced stage. The informal open-ended drafting group work would have the objective of cleaning the text, as far as possible, by reducing its length and complexity through reducing the number of options and alternative drafting proposals, especially, where those were clearly issues of drafting. Further, the drafting group should not add any new text or resolve complex policy issues, as these were for the IGC to resolve. It should, however, identify outstanding policy issues. The goal was to have one or two basic options for each article. The Chair emphasized that the drafting group was not a decision making body, and that the text emanating from the drafting group was not binding. He proposed that the drafting group be chaired by Mrs. Savitri Suwansathit from Thailand, who had chaired IWG 1. The drafting group could appoint its own rapporteur(s), and participation was open to all delegations and observers. Observers had the same capacity as they had in the IGC. The drafting group would work on the English version of the text, and the Secretariat could be available to record the changes to the text, if so required. The drafting group's text would be presented by the group's Chair or rapporteur(s) in plenary on Friday morning for noting, and adoption as the next draft text of the eighteenth session of the IGC. The Chair or rapporteur(s) should also report on outstanding policy issues identified, and such report would form part of the report of the eighteenth session.

32. [Following the completion of the work of the drafting group] The Chair invited the Chair of the open-ended drafting group, Mrs. Savitri Suwansathit from Thailand, to make a brief report and to present the text that was prepared by the drafting group.

33. The Chair of the drafting group stated that the day before, Thursday May 12, 2011, the Committee had established an open-ended informal drafting group (drafting group) to streamline the text of document WIPO/GRTKF/IC/18/4/Rev., the current version of which reflected a long journey traveled by all concerned, including experts and representatives at various past Committee and IWG sessions, some of whom were not present. She stated that the Chair had identified two tasks for the drafting group, namely (1) to reduce the number of options, and to close the gaps that remained in the text; and (2) to try to identify significant policy issues. Therefore, the drafting group focused on the text at hand and tried to improve it as much as possible, in the spirit of mutual respect, understanding and give-and-take, and with a sense of cooperation. She thanked all participants from the drafting group, including the Indigenous experts, for their dedication and cooperation. The exercise in the drafting group had raised some complex issues; nevertheless, there had been a few improvements. She mentioned that some participants, who had raised a point in the drafting group, could perhaps make their comments in the plenary session. She thanked the Chair for having given her the opportunity to serve in the drafting group for TCEs.

34. The Delegation of France, on behalf of Group B, thanked the Chair of the drafting group for her report. It noted that the drafting group's night session had not been as productive as it had wished for. It underlined that, in its view, a discussion in the plenary on the substance and the policy issues and the possibility of amending the text were still needed prior to drafting group meetings.

35. The Delegation of India shared the concern expressed by the Delegation of France. The text prepared by the drafting group at IGC 18 had not been made available to plenary for discussions and proposals. The Committee had broken straight into a drafting group, which was probably one of the reasons for the lack of progress in the group, in addition to the time being very short. At the next session plenary would be needed before going into drafting groups. Moreover, the Committee needed to identify some core areas on which major policy divergences existed, and take the draft articles as a basis for informal consultations, in order to have a better text to be used for moving forward.

36. The Delegation of South Africa, speaking on behalf of the African Group, commenting on the way forward, supported the observations made by the Delegation of India, calling for the deliberate effort to identify the key divergences that existed, so that, while advancing, they were prioritized in terms of further work and streamlining.

37. The Delegation of Japan expressed support for the statement made by the Delegation of France. It fully shared the concern of going straight into a drafting group. In order to have a fruitful discussion, there needed to be an opportunity for substantive discussion and sharing of opinions in the plenary at the next session.

38. The Delegation of Poland, on behalf of the Central European and Baltic States, thanked the Chair and the WIPO Secretariat for having organized an informal electronic consultation on the draft articles on TCEs that took place from 10 February to 31 March 2011 and resulted in preparation of the Chair's Note in this matter. As for specific issues concerning TK, GR and TCE, it emphasized the importance of clear cut definitions, question of beneficiaries and scope and objectives of protection. In the field of TCEs, while it expressed a preference for a legally non-binding option, it stood committed to participating in a constructive manner to the discussion, especially as regards the objectives and principles of the text.

39. The Delegation of China expressed its appreciation and gratitude to the WIPO secretariat for the significant amount of concrete, detailed and fruitful work it had done, and was convinced that these efforts would contribute in a positive manner to the deepening of understanding and the building of consensus. It supported in principle the proposal to use document WIPO/GRTKF/IC/18/4 Rev. as the basic text for the substantive discussions on TCEs. It supported the approach to consider separately, instead of collectively, the relevant issues before the IGC, namely GRs, TK and TCEs, and to adopt outcomes in whichever field in which discussions had made the best progress. It reiterated its suggestion that the IGC make a clear distinction between TCEs and TK to facilitate the discussion of the two issues. Many Member States had expressed similar concerns. It stated that it was not against any approach beneficial to the protection of TCEs, such as IP law, unfair competition law, customary law as well as *sui generis* systems, and it at the same time accepted the preservation and safeguarding of TCEs through administrative measures. The Secretariat was thanked for providing, before the meeting the "Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions" (WIPO/GRTKF/IC/18/INF/7). It said that it needed more time to read it, and would submit its comments or suggestions after the meeting. It indicated that China had been actively making progress in the legislation process on TCEs, and it expressed its willingness to share with WIPO and its Member States the research results produced in the process of legislation on TCEs.

40. The Delegation of the EU and its Member States, said that it was grateful to the WIPO Secretariat for the set of documents it had prepared for that session of the Committee, such as the "Glossary of Key Terms related to Intellectual property and Traditional Cultural Expressions" (WIPO/GRTKF/IC/18/INF/7). It thanked the Chair for his "Note on the Informal Consultations on Draft Articles on Traditional Cultural Expressions" (WIPO/GRTKF/IC/18/INF/10). Likewise, it thanked the Chair and WIPO for having organized an informal electronic consultation on the draft articles on TCEs that took place from February, 10 to March, 31 2011. Work should continue, taking into consideration the progress made on the objectives and principles at the meeting of the First IWG held in Geneva from July 19 to 24, 2010, and on the draft articles at the seventeenth session of the Committee (IGC 17) from December, 6 to 10 2010. It stood committed to participating in a constructive manner at the meeting, and would intervene on specific issues of the draft articles at the appropriate moment. It also looked forward to commenting on the objectives and principles of the text. However, it recalled that it was strongly committed to a non-binding approach. It was confident that the meeting would pave the way for reaching consensus among the diverging positions.

41. The Chair proposed that the Chair's report on the work of the drafting group be included in the report of the session, and that the draft text on TCEs, as prepared by the drafting group, be transmitted to IGC 19. He also proposed that the glossary (document WIPO/GRTKF/IC/18/INF/7), be republished as an information document for the IGC 19. He took note of the suggestions that there would be a need for discussions of that item at the plenary level at the next session.

Decision on Agenda Item 6:

42. The Committee took note of the text of the draft articles on traditional cultural expressions prepared by the open-ended informal drafting group established by the Committee, based on WIPO/GRTKF/IC/18/4 Rev. The Committee requested that the text be made available as a working document for the Committee at its next session (July 18 to 22, 2011). The Committee invited the Secretariat to re-publish the glossary on intellectual property and traditional cultural expressions (WIPO/GRTKF/IC/18/INF/7) as an information document for the next session of the Committee.

AGENDA ITEM 7: TRADITIONAL KNOWLEDGE

43. Upon the invitation of the Chair, Dr. Ian Heath (Australia), speaking as the Chair of the Second Intersessional Working Group (IWG 2), reported to the Committee on the outcomes of the work of IWG 2. He stated that IWG 2 had been brought together to provide legal and technical advice to the Committee on the protection of TK. IWG 2 had considered WIPO/GRTKF/IC/18/5 Prov. in plenary on Monday and Tuesday. Under his guidance, IWG 2 had established six open-ended drafting groups which met all day Wednesday and Thursday morning to try to simplify the text for consideration by the Committee. The six groups had worked on: (1) Scope of Subject Matter; (2) Beneficiaries (including the question of transboundary TK); (3) Scope of Protection; (4) Exceptions and Limitations, and Remedies and Enforcement (including the question of dispute resolution); (5) Administration of Rights, Duration of Protection, and Formalities; (6) Transitional Measures, Consistency with the General Legal Framework, and International and Regional Protection. That structure had mirrored the work of IWG 1 on TCEs. IWG 2 had felt that it was important to make its work as compatible and as practicable with the work of IWG 1 so that, if the Committee so desired and decided, the work on TK and TCEs could be brought together into a single legal instrument. On Wednesday evening he had called a meeting of the chairs of the drafting groups and the rapporteurs as well as the vice chairs to coordinate their work. IWG 2 had met in plenary on Thursday afternoon and all day Friday to consider the work of the drafting groups. Efforts had been made to make sure that the processes of IWG 2 had been transparent and that all experts could participate in the work. Additional efforts had been made to provide interpretation assistance to the drafting groups, and the work of the drafting groups had been made available to the final plenary meetings, translated into English, French and Spanish. He wished to put on record his thanks for the excellent work of the Secretariat, the interpretation and translation services which had made the work much easier. He introduced that the results of the work were before the Committee in WIPO/GRTKF/IC/18/7. That document set out a text with various options and alternatives for the consideration by the Committee to adopt as a negotiating text. The experts in IWG 2 had been very conscious that they were not a negotiating forum. They had been charged with providing a text to the Committee with options, scenarios and alternatives for the Committee to adopt if it so decided. Finally he thanked all the experts who had participated in IWG 2 for their involvement, the good spirit in which they had worked on their task and for the final outcome of their work.

44. The Delegation of Norway thanked IWG2 for its impressive work in preparing the draft articles on the protection of TK in WIPO/GRTKF/IC/18/7. It believed that it was essential that the Committee reach agreement on an instrument on the protection of TK. This would ensure that TK of Indigenous and local communities was recognized and respected by those who wanted to access and use such

knowledge. It was in favor of a legally binding instrument on the protection of TK. However, it could only support a legally binding instrument if the subject matter of protection was clearly defined and delimited. Also with regard to the protection of TK, it believed that it was crucial to secure a robust and vibrant public domain. Recommendations 16 and 20 under the WIPO Development Agenda contained important guidance in that regard. It recalled that the Nagoya Protocol contained some legally binding provisions on the protection of TK that was associated with GRs. However, with regard to TK, a number of important issues were left unregulated in the Nagoya Protocol. It would be a great achievement if the Committee could fill in some of those gaps. Protection of TK not associated with GRs was important; however it was not covered by the Nagoya Protocol. Thus, any outcome of the Committee would be an important addition to the Nagoya Protocol.

45. The Delegation of the EU and its Member States thanked the International Bureau for having organized IWG 2 dedicated to the protection of TK and for providing the meeting with the summary report on it as well as the document setting out the emerging draft articles and the experts' comments thereon. The Secretariat was thanked for the glossary on IP and TK. The glossary further contributed to the valuable in-depth technical documentation that had been generated in the Committee. Experts from the Member States of the EU actively participated in all six informal drafting groups during IWG 2 and were impressed by the excellent organization and cooperative atmosphere of their work. Significant progress had been made and the EU welcomed continued discussions concerning the draft articles as contained in document WIPO/GRTKF/IGC/18/7, alongside all other documents that remained on the table. The various options throughout the text would assist the Committee in its decision-making capacity, and paved the way for reaching consensus amongst diverging positions. He reiterated his understanding that all the documents were still open and there was a possibility for making further comments and suggestions or introducing new text as regards both the objectives and principles and the draft articles. The EU and its Member States stood committed to participating in a constructive manner towards the development of a non-binding instrument.

46. At the request of the Chair, the Secretariat introduced Article 1 (Subject Matter of Protection), and the Chair invited comments thereon.

47. The Delegation of Sri Lanka suggested adding "competencies" after "skills" in Article 1.1(a) of Option 2, because some TK was related to traditional medicine.

48. The Delegation of Guatemala stated that, in relation to the definition of TK, its preference was for the inclusion of a descriptive, but at the same time, inclusive definition. In that regard, it requested express recognition of the existence, and value of TK as scientific knowledge. For Guatemala, for example, the scientific and technological value of the TK of the Maya people was an inheritance which continued to develop and be revitalized. It was sure that that was happening among all Indigenous peoples in the different Member States. Hence, it proposed that the definition should provide explicit recognition for the scientific value of the TK of all Indigenous people in Article 1.1(a). Another way in which that could be done would be to transfer language contained in policy objective (i) from the section on Policy Objectives and Principles of document WIPO/GRTKF/IC/18/5. In relation to the criteria for eligibility, it considered it appropriate to include the following fundamental concepts: (1) distinctive character, (2) the collective nature of TK, (3) its transmission from generation to generation, and (4) cultural identity. All the options provided for in that article included those three criteria and would support it, provided that those criteria were relevant to the protection of TK. It noted, however, that the text included a new criterion of eligibility, which stated that when TK was widely known outside the community, it should not be eligible for any kind of protection. It considered that the subject of public availability was not a criterion of eligibility and should therefore be deleted from the Article. In addition, as it was drafted the term appeared to impose a burden of negative proof on Indigenous peoples, in the sense that such peoples had to prove that the TK belonged to them. That was of course inconsistent with the objectives and general purpose of the legal instrument. It hence requested that sub-paragraph (d) of Option 2 and sub-paragraph (e) of Option 3 be deleted. It considered that the terminology relating to public availability of TK supposed that such knowledge had been authorized previously by its holders so that it could be made available to the public. Therefore, within the concept of public availability the prior informed consent (PIC) of the holders of such

knowledge was clearly inherent. In other words, the owners of the TK must grant their PIC for access to and use of such knowledge. Public availability also stemmed from a mutual agreement reached relating to the direct and fair sharing of benefits. In relation to Article 1.3, it wished to include the term "sacred", so that the text read "secret or sacred traditional knowledge". In that paragraph it had noted the wording "knowledge that is not shared and has not been shared". This implied that sacred or secret knowledge that had been taken or made known in an inappropriate manner or without the consent of the Indigenous people was outside the scope of protection. The mere fact that people outside the Indigenous population knew of that type of sacred knowledge did not imply that the population wished to share it. Any misappropriation of such TK outside the circle of the Indigenous population was not the responsibility of the Indigenous peoples. As it had stated, the secret knowledge might have been extracted without authorization from the Indigenous people. Hence, it requested the revision of the said wording, so that the secret knowledge that had been disclosed without authorization from the Indigenous people was not excluded from protection.

49. The Delegation of Mexico considered that Option 2 of Article 1.1 was more closely related to the characteristics of Indigenous peoples, since it envisaged aspects of community, different forms of transmission, traditional lifestyles, biodiversity, and the inalienable, indivisible and intergenerational nature of TK. Similarly, the third alternative option submitted by the expert Heng Gee Lim was of value, and it supported it. It suggested replacing "often" with "it could be" in sub-paragraph (d). With respect to the criteria for eligibility, it proposed alternative text: "Protection shall apply to traditional knowledge which: (a) is distinctively associated with and customarily recognized as belonging to an indigenous or local people or community; (b) is collectively generated, shared, preserved and transmitted from generation to generation and integral to the cultural identity of an Indigenous people or local community; (c) is part of the identity of one or more Indigenous and local peoples and communities, as shared knowledge; (d) outside its traditional context and for the purposes of this instrument, traditional knowledge may have various uses in its arrangements for processes or products."

50. The Delegation of New Zealand stated that the first part of this article was the definition of TK and the second part was the criteria for eligibility. The criteria for eligibility were being repeated in Option 2 of the definition of TK. It suggested keeping the text as simple as possible. It supported Option 1 of Article 1.1 also because the text in Option 2 would actually make it more difficult legally to qualify for protection. All of those elements that were listed in Option 2 would need to be proved. It reminded that the Committee had been mandated to draft an international legal instrument. Regarding the criteria for eligibility, the text made it more difficult to qualify for protection. For example, paragraphs (d) to (h) of Option 3, which were the descriptive statements, could make it difficult for TK holders to prove eligibility. Moving to all the various options under the criteria for eligibility, many of those were almost identical as they all focused on the three criteria: (1) distinctiveness; (2) collective nature of TK; and (3) cultural identity. It suggested streamlining the text as follows: "Protection extends to TK that is: (a) distinctively associated with an Indigenous people or local community; (b) collectively developed, expressed, held and maintained in a traditional and intergenerational context; (c) integral to the cultural identity of an Indigenous people and local community." Regarding the criteria (a) and (b), it preferred "intergenerational context" because it would cover more situations and perhaps the reference to "generation to generation" could be more limiting. It preferred the first option of the third criterion because the shortest form of words was needed to convey the concept of cultural identity. It believed that some concepts in Option 2, such as "widely known outside the community" were better dealt with in Article 3.

51. The Delegation of Japan stated that, as for both of Options 1 and 2 of Article 1.1, the scope of TK was still vague. For example, the requirement to be "traditional" was not evident. The criteria for "traditional" needed clarity. For instance, it raised the following questions: was it about the time element, such as how many generations were needed to be considered as "traditional"? Or were there some other criteria, such as geographical aspect or background of development of the knowledge? If so, what were they? Furthermore, it was unclear what was included in "traditional context" and "traditional knowledge system". As it had repeatedly mentioned in previous sessions, the

scope of TK had to be clearly defined to the extent that certainty and predictability were ensured. Generally speaking, it was not appropriate to oblige any concrete measures on a subject matter whose scope was vague. The fact that the scope of TK was vague even after intensive work by experts at the IWG might show its difficulties in nature. It remained of the view that a clear definition was prerequisite for progress. Also, for example, further discussion on concrete examples of the subject matter of protection, was still needed. With regard to Article 1.2, it believed that Option 2 was relatively preferable in light of the fact that providing protection to public domain prevented innovation as stipulated in (d). It suggested having those brackets removed. The scope of protected subject matter was still vague in those three options even with the combination of Articles 1.1 and 1.2. As an example of vagueness in those options, it could be pointed out that it was unclear whether knowledge was associated with an Indigenous people or local communities or not.

52. The Delegation of the South Africa, speaking on behalf of the African Group, stated that the definition and eligibility were sides of the same coin. The African Group supported Option 2 of Article 1.1. It went further to expand the definition by looking at the collective nature, and also linking to territorial, spiritual and cultural concepts. There was strong explanation in Article 1.1(d), which was linked to the lifestyles. It was not defined outside the lifestyles, but it had to do with the lifestyles of what was considered to be a traditional society or Indigenous community. It believed that there were only three criteria, i.e., (i) distinctively associated with an Indigenous community; (ii) integral to a cultural identity, and (iii) the issue of collective intergeneration. It suggested narrowing down the options. Regarding Article 1.3, the inclusion of “protected” was quite prejudicial. It suggested bracketing “protected”.

53. The Delegation of Hungary, on behalf of the EU and its Member States, stated that it had an initial preference for Option 1 of Article 1.1, and on this basis proposed alternative text: “For the purpose of these provisions, traditional knowledge refers to the know-how, skills, innovations, practices, and learning resulting from intellectual activity in a traditional context.” In the original text, the meaning of “traditional knowledge systems” was not sufficiently clear, and the inclusion of that term in the definition could result in unknown implications. The other element that was problematic was the reference to beneficiaries. As to Article 1.2, it believed that the eligibility criteria were cumulative and it proposed to add the words "and" after each criterion. It supported Option 2 of Article 1.2 and supported regular 1.2(a), regular 1.2(b) and regular 1.2(c) of Option 1. It noted the proposal made by the Delegation of New Zealand because it was based along the same lines. As regards Article 1.3, its understanding was that secret TK was covered by “not made widely known outside that community”, which was the strongly supported eligibility criterion in Article 1.2(d) of Option 2. Consequently, it believed that secret TK should not be addressed separately.

54. The Delegation of Norway supported Option 1 of Article 1. It proposed some amendments to the text: “Traditional knowledge means knowledge including know-how, skills, innovations, practices and learning which is collectively generated, preserved and transmitted in a traditional and intergenerational context within an indigenous or local community.” Regarding Article 2, its preference would be a combination of Options 1 and 2. It proposed alternative text: “Protection shall be extended to traditional knowledge which: (a) is the unique product of or is distinctively associated with an indigenous or local community; (b) is integral to the cultural identity of an indigenous or local community; (c) has not been widely known outside that indigenous or local community for a reasonable period of time; and (d) is not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.” The criteria in letter (a) to (d) should be cumulative. Regarding the proposed letter c,it stated that the protection should not cease merely because the knowledge had been made widely known outside the indigenous or local community. When someone had accessed the knowledge without obtaining prior informed consent the beneficiaries should have the possibility to ensure that the protection is not lost by taking legal actions to prevent further use of the knowledge. On the contrary, if the knowledge had been widely known and used over a reasonable period of time without such a response from the beneficiary, the protection would cease. The Delegation supported the principles in Option 1 of Article 7 regarding the term of protection and it preferred to move that provision to Article 1.

55. The Delegation of the USA agreed with the Delegation of Japan that there was still a great deal of

ambiguity in the definition of TK. It supported the proposal made by the Delegation of Norway on the definition of TK. Regarding Article 1.2, it preferred the first option of the chapeau because the chapeau served to establish a defined term that could be used throughout the document. As to Article 1.2(a), it preferred the first option. As to Article 1.2(b), it had a question on “intergenerational”. A value in generation to generation was to make sure that it was a continuing living tradition. It was concerned about a criterion that allowed some TK or TCEs to essentially die off and then be rediscovered and reclaimed by a new group. In general, it supported the proposal made by the Delegation of Norway but suggested adding “with prior informed consent” in sub-paragraph (c). There could be something that was out there for a reasonable period of time, but had not been released with PIC. The Delegation of Guatemala had objected to both of those provisions. It believed that the term “on mutually agreed terms” in Article 1.2(e) of Option 3 made no sense. An Indigenous community would decide to release some of their TK for the benefit of humanity. If an Indigenous community decided to do that, it was not on mutually agreed terms (MATs). They simply decided to release the TK for the benefit of humanity. The real issue was PIC, not (MATs). It believed that, as long as PIC was there, a criterion like that was reasonable. Regarding the sub-paragraph (d) of the proposal made by the Delegation of Norway, it stated that, in the realm of patent law, it was well-known that laws of nature, physical phenomena and abstract ideas were not subject to propertization. It would be assumed that, in the world of TK, laws of nature, physical phenomena and abstract ideas at the highest level were not subject to any type of protection. Regarding Article1.3, it had concerns about the addition of the word "sacred" for two reasons. Firstly, the Committee was working on a legal instrument. By inserting "sacred", courts would be invited to determine what was sacred and what was not sacred. That was a troublesome issue. Secondly, it had been said at different junctures that all TK was sacred. If that was true, there was a problem in inserting “sacred”. It proposed alternative text: “Protected secret traditional knowledge is traditional knowledge that is maintained as secret by the beneficiary group and is not willingly shared and has not been shared by those outside the beneficiary group.” It believed that the text met some of the concerns expressed by the Delegation of Guatemala, which felt that the initial language did not adequately capture situations in which an Indigenous people or local community had sought to maintain the secrecy of their TK and had not succeeded. It agreed with the Delegation of Guatemala that where a valiant effort to maintain the secrecy of TK had been made, but there had been a breach of their confidence or trust, the eligibility criteria for secret TK should not be lost.

56. The Delegation of Indonesia suggested replacing “traditional” with “cultural” in Option 1 of Article 1. It proposed to replace “and” with “or” in Article 1.1(a) of Option 2. It suggested adding “and nations” in alternative Article 1.2(a). It proposed to delete “intergenerational context” in regular Article 1.2(b). It suggested adding “or nations” after “community” in both options of Article 1.2(c).

57. The Delegation of Australia supported the intervention made by the Delegation of New Zealand in relation to the need to simplify the text. It believed that many concepts and ideas had been captured in some of the text, and had concerns that, as a legal instrument, it would make it impossible to operationalize. It supported the simple drafting that the Delegation of New Zealand had proposed and found that quite an attractive approach. It supported the intervention made by the Delegation of Hungary, on behalf of the (EU), in relation to the inclusion of the word "and" after each criterion. The issue of the cumulative importance of each of the criteria was something that should not be lost, and should be made clear in the text.

58. The Delegation of Canada believed that the definition of TK needed to be simple and have a good degree of elegance. Consequently, it believed that Option 1 of Article 1.1 was the better basis for discussion, even though that option was not perfect and remained ambiguous in places. Regarding Article 1.2, it believed that an essential element was indicating that TK that was in the public domain was not part of the protectable matter, which would be better addressed in Article 3. It agreed with the Delegation of Hungary, on behalf of the EU, and the Delegation of Norway that the criteria in Article 1.2 should be cumulative.

59. The Delegation of Egypt supported the comments made by the Delegation of South Africa, speaking on behalf of African Group. Regarding the definition of TK, TK was not just the expression of intellectual activity. It was practices which were followed in the real life. There was a link between attitude, behavior, practices, and thought. Thought was expressed in the practice, and therefore, TK was not just an intellectual activity. It pointed out that the activity was not linked only to biological diversity. It was also linked to some other aspects of life. It suggested that the drafting group discuss all the proposals and return with text that would reflect consensus or at least a fairly broad agreement. Regarding Article 1.3, it wondered how to protect knowledge which was secret. The fact that the knowledge was secret was a form of protection itself. The knowledge would remain known only to its authors and would surely guarantee the protection. It was different from what was done with copyright. Copyright did not protect ideas. As long as the invention remained in the mind of the person creating or inventing it, it was protected. That secret would be known only to the person who held it. It agreed with the Delegation of the USA that the word "sacred" needed to be defined, because what was sacred for one person was not necessarily going to be sacred for another.

60. The Delegation of China thanked the IWG experts for their active involvement and cooperation in the drafting of substantial provisions on the protection of TK. It considered that recognition of the diversity in TK would be conducive to the achievement of positive meaningful results in the protecting TK. Regarding Article 1.2, Options 2 and 3 had both added more conditions, notably the requirement that for TK to be protected, it should not be made widely known outside that community. Some knowledge on traditional medicine in China and India had been documented, which led to its wide dissemination although it still maintained distinct traditional characteristics, and even constituted the quintessence of the traditional culture for a country or nation. It believed that appropriate protection mechanisms should be explored for such TK so as not to exclude it from the scope of protection. Therefore, it supported Option 1. Regarding Article 1.3, it considered secret TK as simply one type of TK, and that if it was necessary to define secret TK, one should also define disclosed TK.

61. The representative of the Tulalip Tribes supported the intervention made by the Delegation of New Zealand on having a fairly simple and straightforward definition. He stated that there were many tribes around the world and Indigenous people that were now trying to recover some tradition. Regarding the issue of secret knowledge, he did not support a definition that excluded protection simply because it had been shared outside the community. In many cases people would share secret knowledge with an outsider, but they would share it with the understanding that the person understood what obligations they were assuming when they received the knowledge. He believed that customary law was the touchstone and reference point for the breach. As long as there was no breach of customary law, it should still be protected.

62. The representative of the Tupaj Amaru stated that the text was not legally sound text. It was simply a declaration, and preferred to have a different wording. He stated that secret TK was not a concept being invented by Indigenous peoples. Sacred and secret TK had existed for generations. As long as Indigenous peoples were there, their traditions and their knowledge remained in existence, including secret traditions and knowledge. He proposed alternative text for Article 1: “For the purposes of this international instrument or Convention, traditional knowledge constitutes the product of human intellect and essentially is an intrinsic part of the ancestral cultural heritage of indigenous peoples and local communities, transmitted from generation to generation in time and space. Protection against misappropriation: 1. The traditional knowledge of indigenous peoples and local communities shall enjoy legal protection against all acts of misappropriation. 2. Misappropriation consists in obtaining commercial and financial benefits through the acquisition, appropriation and use of traditional knowledge. 3. In particular, legal rules and measures should be established to prevent and sanction misappropriation: (i) The acquisition or misappropriation of traditional knowledge through theft and fraud including recourse to violence shall be subject to civil and criminal sanction; (ii) The acquisition, possession and control of traditional knowledge in violation of current legislation shall be an act contrary to the interests of indigenous peoples. 4. Indigenous peoples and local communities, holders of traditional knowledge, shall also enjoy legal protection against other illicit acts of unfair competition. 5. The fair distribution of benefits shall be governed by legal agreements, customary

practices and rules, and the prior and informed consent of local peoples and communities, and holders of traditional knowledge."

63. The representative of the CAPAJ supported the Delegation of Guatemala that the scientific nature should be recognized. He suggested not limiting the subject matter of protection to the accumulated result of the intellectual activity. TK was the product of many years of experience and practices. Most were not written down because the knowledge was constantly evolving. It was an ongoing creative and intellectual process. There were many types of knowledge, and practices not only through intellectual activity, but also through the completion of sacred rituals. He believed that the definition should reflect these perspectives.

64. The Delegation of the Islamic Republic of Iran stated that the term "traditional context" was vague. It suggested bracketing "traditional context" in Option 1 of Article 1.1 and bracketing "diverse traditional context" in Option 2 of Article 1.1. It supported Option 2 of Article 1.1, since it highlighted the dynamic nature of TK. It suggested adding "family or individuals" after "nations" proposed by the Delegation of Indonesia. It supported the proposal made by the Delegation of Indonesia on replacing the word "and" with "or".

65. The Delegation of India supported Option 2 of Article 1.1. But it had a concern on use of the words "the intellectual activities". It suggested bracketing "the intellectual activities". It believed that any knowledge which had been passed on from generation to generation was intellectual in nature so there was no need of qualifying it by "intellectual activity". It suggested adding "including codified knowledge systems, continuously developed, evolved and widely used, following any changes in the environment, geographical conditions and other factors" after "framework" and deleting the rest of Article 1.1(a). It suggested adding "natural resources" after "biodiversity" in Article 1.1(b). It believed that there should be no separate article on the eligibility criteria. Once the definition covered all that needed to be protected, that would be enough. But it still made some amendments. It suggested deleting "Protected traditional knowledge is knowledge that is". It suggested bracketing "the unique product of or is distinctively". It suggested replacing alternative Article 1.2(a) with "customarily associated with local or traditional communities". It proposed to delete regular Article 1.2(b). It suggested bracketing "in traditional and intergenerational context" in alternative Article 1.2(b). It believed that eligibility criteria were not cumulative. So it suggested replacing "and" with "or". Any one condition was good enough for the purpose of getting protection. Application of those conditions would completely eliminate substantial amount of TK. It proposed to delete regular Article 1.2(c). It suggested replacing "integral to" with "identified with" in alternative Article 1.2(c). It suggested deleting Options 2 and 3. It believed that there was no need for separate definition of secret TK. The broad definition of TK would cover both.

66. The Delegation of the Bolivarian Republic of Venezuela preferred Option 2 of Article 1.1. It had difficulty with "systems" in Option 1. With regard to the secret nature of knowledge, it disagreed that, if it was secret, there was no need of protection. It believed that it must be protected. Regarding the need to define "sacred", it believed that "sacred" should not have to be defined. It suggested looking at the collective nature in order to define what was secret and what was not.

67. The representative of CRA suggested adding "excepting under conditions of customary law or cultural protocols" at the end of Article 1.3.

68. The representative of IPCB stated that there was no disagreement on the use of the term "indigenous peoples". She recommended that that become standard, except in the cases where specifically referring to a singular indigenous people. Words such as "distinctively" was a very difficult concept to try to prove. She believed that it left too narrow the definition of who were TK holders. The term "collectively developed" tended to exclude individually developed or generated TK that was collectively held. She believed that the requirements for cumulative criteria were problematic. The term "not made widely known" was also problematic because it suggested that once it had been widely known, irrespective of whether it had been taken with or without consent, it could no longer be protected. She believed that sacred knowledge which required a special category of protection must be considered for protection. She recommended using the term "sacred" and taking into consideration the comments

made by the Delegation of the Bolivarian Republic of Venezuela. She also supported that TK was not just an intellectual activity, nor was it limited strictly to biodiversity. Because so much new text had been added, she wished to reserve her right to participate and contribute specific text proposals.

69. The Delegation of Switzerland supported the proposal made by the Delegation of Norway on Article 1.1. That proposal was a short and concise definition with all the necessary elements of a comprehensive definition. As regards Article 1.2, it supported the intervention made by the Delegation of Hungary, on behalf of the EU and its Member States regarding the addition of "and" after each of those elements, which would apply in a cumulative manner. It supported a proposal made by the Delegation of the USA for a new wording of Article 1.3.

70. The Delegation of Guatemala stated that the Delegation of the USA had referred to certain interventions expressed by it. In that regard, it thanked the Delegation of the USA for trying to accommodate its concerns, particularly in relation to Article 1.3. Although it had not retained the exact wording proposed by the Delegation of the USA, it thought that it had heard reference to an element that could provide progress on the paragraph, which consisted in the secret TK being willingly shared by the community. The inclusion of such elements or prerequisites could be positive, but it believed that two more elements should also be added. Therefore, in addition to the requirement that consent be given voluntarily by Indigenous populations, it was also essential for such consent to be granted in an informal manner, that it was expressly stated in writing, and applied to the customary norms of such peoples. As regards the terms “traditional context”, “cultural context” and “intergenerational context”, without supporting one proposal in particular, it recognized the need to harmonize the use of those terms throughout the text. The representative of the CAPAJ had emphasized the spiritual and sacred content of TK, and it therefore insisted on including the term sacred in that Article. In addition, it noted that the connotation of the terms “sacred places”, “rituals” and “pilgrimages” were included in the TCEs text and it therefore believed that it was also appropriate for the terms to be used in the current text. The Delegation of the Bolivarian Republic of Venezuela had provided a number of interesting ideas on that subject and those ideas should be taken into account.

71. The representative of CISA suggested adding “Indigenous knowledge of indigenous peoples and indigenous nations must be protected under the principles of the right to self-determination and the right to development.” at the end of Article 1.1(a).

72. The Delegation of South Africa suggested that the drafting group be given very clear instructions not to multiply the definitions, but to narrow them down.

73. The Delegation of the Russian Federation preferred Option 1. In that regard, it shared the opinion of those delegations which had referred to the lack of clarity of certain terms used in the given definition, *inter alia*, the expression “traditional knowledge systems”. Option 1 was also inaccurate in terms of logic, since in essence it constituted a “circular definition”, i.e., TK was defined as knowledge constituting “part of the traditional knowledge system”. Regarding Option 3 proposed by the Delegation of the EU on behalf of its Member States, that deficiency appeared to be absent. It supported Option 2 of Article 1.2. It also supported the opinion of those delegations which assumed that the criteria should be used cumulatively.

74. The Delegation of the Bolivarian Republic of Venezuela supported the proposal made by the representative of CISA and the comments made by the representative of the Tulalip Tribes.

75. At the request of the Chair, the Secretariat introduced Article 2 (Beneficiaries of Protection), and the Chair invited comments thereon.

76. The Delegation of Indonesia supported the whole article as it was. It suggested keeping the words “and nations”.

77. The Delegation of Australia considered that the primary beneficiaries in Australia should be Australian Indigenous communities. Member States should be afforded the flexibility to include other communities, such as local or cultural, in their domestic application of any instrument. It saw a strong argument for consistency between the TK text and the TCEs text. Article 2 also needed to be

consistent with both the subject matter and the scope. It believed that Indigenous and local communities could be inclusive of nations in some circumstances. It proposed alternative text: "Measures for the protection of traditional knowledge should be for the benefit of the indigenous peoples and local communities who develop, express, hold and maintain the traditional knowledge."

78. The Delegation of Oman supported the statement made by the Delegation of Indonesia. It believed that the beneficiaries should include nations. It suggested keeping "and nations" in the text.

79. The Delegation of Japan believed that the scope of beneficiaries was still unclear because the scope of TK was not clearly defined. The subject matter and beneficiaries were two vital elements in the establishment of an instrument(s). The fact that two vital elements could not be described clearly enough even through intensive work by experts at IWG implied that subject matter could not by its nature fit into an international legally binding instrument.

80. The Delegation of Egypt believed that the beneficiaries of protection were the holders of TK whoever they might be. It suggested only retaining "beneficiaries of protection are holders of traditional knowledge who generate, preserve and transmit knowledge in a traditional or intergenerational context" and deleting the rest. That was sufficient to cover all those who generated, preserved and transmitted TK, and that would provide appropriate protection.

81. The Delegation of the Islamic Republic of Iran proposed that the word "beneficiaries" should replace "rights holders" in all articles. It suggested adding "family or individuals" after "nations". It suggested bracketing the proposal made by the Delegation of Australia. Article 2 dealt with beneficiaries of protection and it believed that Article 2 was not the right place for the proposal made by the Delegation of Australia.

82. The Delegation of Algeria supported the wording as submitted by IWG 2. That was flexible and applied to the various situations which existed in different countries. Therefore, it could basically support the text with the inclusion of the words "and nations".

83. The Delegation of Sri Lanka suggested adding "promote and" before "preserve". It agreed to include "and nations".

84. The Delegation of New Zealand supported the alternative text proposed by the Delegation of Australia.

85. The Delegation of South Africa, speaking on behalf of the African Group, supported the comments made by the Delegation of Egypt on the need for simplicity. It suggested cutting out those words which had already been covered by Article 1. Regarding the proposal made by the Delegation of Australia, it wondered what the difference between "measures for the protection" and "the protection of traditional knowledge holders" was.

86. The Delegation of Canada thanked IWG 2 for its work on that article which provided a good basis for discussions. It suggested replacing "and" with "or". It also suggested using the term "indigenous and local communities" rather than "indigenous peoples, local communities" to be consistent with the rest of the text. Regarding the proposal made by the Delegation of Australia, it pertained more to the scope of any measures than to identifying who the beneficiaries would be. That would be a matter of switching words around. It wished to discuss that issue in the drafting group.

87. The Delegation of Norway strongly supported that the beneficiaries should be Indigenous and local communities that had generated and preserved that TK. It proposed alternative text: "Beneficiaries of protection are those indigenous and local communities who have generated, preserved and transmitted traditional knowledge that is covered by Article 1."

88. The Delegation of Jordan supported the proposal made by the Delegation of Egypt.

89. The Delegation of the Bolivarian Republic of Venezuela proposed alternative text: "Beneficiaries of protection include indigenous peoples, local communities and nations, in accordance with national legislation." It stated that the instrument was going to be implemented by the national legislation.

90. The Delegation of Guatemala stated that there were specific references in Article 1 to TK being held collectively, and being transmitted from generation to generation. It was the community that

collectively had the rights to TK. That article should reflect the fact that the beneficiaries of protection were the Indigenous peoples and local communities. It believed that the proposal made by the Delegation of Norway best satisfied that condition.

91. The Delegation of Barbados stated that it did not have identified Indigenous people and the society was not categorized according to communities. TK belonged to the Barbadian society as a whole. The only word in that article which would accommodate its interests was the word "nations". Therefore, it supported the inclusion of "nations" as a beneficiary.

92. The representative of CISA did not accept that a State could be referred to as a nation or a Nation State with a conglomeration of peoples or communities and that a State could claim ownership or control over the Indigenous peoples' property. It was important that Nation States were aware of the need for the right to self-determination. The representative from Cook Islands gave a good example of how they could have their own government and exercise self-determination. An organization in South America was working on a self-definition of Indigenous peoples of South America. For example, the Lakota were already defined as a nation.

93. The Delegation of the USA believed that the proposal made by the Delegation of Egypt and supported by the Delegation of Jordan was valuable because it was troubled by the word "nation". It agreed with the representative of CISA that if "nation" meant Indigenous people or nation of Indigenous people, it would not be troubled. But "nation" might mean "Nation State". It was cognizant of the point made by the Delegation of Barbados, and it supported the idea that small nations and small island nations might constitute communities. With all those considerations in mind it supported the proposal made by the Delegation of Australia.

94. The Delegation of Colombia proposed alternative text: "Beneficiaries of protection are indigenous and local communities that create, generate, protect and preserve and transmit knowledge in intergenerational context in accordance with Article 1." It was important to make clear that the beneficiaries of protection of TK should only be the Indigenous and local communities and not individuals. It did not agree to include either "nations" or "States".

95. The representative of IPCB supported the comments made by the representative of CISA that the term "nations" must be clarified as to whether if referred to Indigenous peoples and Indigenous nations and was not intended to apply to Nation States. She believed that protection from misappropriation and misuse was special protection that did not exist and countries had the ability to address those issues to through own national laws and were not in need of special protection.

96. The Delegation of Mexico considered that the text could end with the word "communities". The second sentence dealt with the subject of holders. It was its intention to avoid the creation of a list of holders according to the specific features of each country, as had been proposed by the Delegation of the Bolivarian Republic of Venezuela. This could include making reference to the particular denominations envisaged in national legislation. It proposed to replace "and nations" with "and other particular names contained in the domestic legislation of the parties".

97. The Delegation of India believed that the beneficiaries of protection must be kept separate from the conditions that had been put to satisfy eligibility or the definition of TK in Article 1. It suggested bracketing from "who generate" to "holders of traditional knowledge". It believed that the term "nations" was important because some TK had been spread from one community to another community. In such context, national authorities were required to manage rights related to TK, including the benefits.

98. The Delegation of Australia agreed with the Delegation of South Africa, speaking on behalf of the African Group that Option 1 was repetitive and covered many concepts already covered by Article 1. If removed, the text would be "beneficiaries are the holders of traditional knowledge". It believed that that was imprecise and resulted in no improvement in clarity without defining holders. The alternative option mirrored the text where it linked the measures in the instrument with the intended beneficiaries.

99. The Delegation of Ecuador suggested eliminating some term which had already been dealt with in Article 1. It proposed alternative text: "Beneficiaries of protection are holders of traditional knowledge including indigenous communities and other local communities in accordance with Article 1." It understood the need of some States to include the term "nations". But for other countries, that could be very complicated. It believed that that problem could be solved by the use of a glossary. The term could be included in the glossary which could clarify what the term "nation" actually referred to. It would be made clear that "nation" did not refer to "Nation States". That perhaps would solve the problem.

100. The representative of Tulalip Tribes believed that "nations" should not be part of the list. He did not see that they were actually excluded in the alternative proposals. If they were acting as a fiduciary for the benefit of Indigenous peoples and local communities, they would not in fact be fulfilling the requirements of that beneficiary group. If Nation States started to claim that they were the holders of TK at national level, culture itself should be part of that regime. If national level cultural characteristics were included in that regime, it would make it unwieldy and impractical to implement.

101. The Delegation of Thailand supported the formulation because it was the most pragmatic and reasonable. It had acknowledged the rightfulness of the Indigenous peoples and communities to be the beneficiaries. But it had opened the door to include other communities, including nations which meant nations and communities. In certain countries, circumstances, and developments had transcended the TK of local communities into that of nation communities. It subscribed to the proposal made by the Delegation of Indonesia to make sure that the word "nations" was included.

102. The Delegation of the Islamic Republic of Iran proposed to add "and, where the traditional knowledge holders are unknown, State as their legal representative" at the end of the Article. Where the real TK holders could not be specified, the State as the legal representative of the TK holders and not the original owner could and should play a role. It reiterated that it proposed to use the word "beneficiaries" throughout the text.

103. The Delegation of the Russian Federation wished to point out that the Russian text of Article 2 was inconsistent with the English version of the same. For example, the translation stated: "holders of traditional knowledge include, *inter alia* …", while the English text stated: "include, but are not limited to…. With the use of such a construction ("but are not limited to"), the subjects listed in Article 2 would be considered beneficiaries, as would any others. As regards the inclusion of individuals as beneficiaries of protection, it believed that that was inappropriate, since firstly the text referred to collective knowledge and, secondly, the existing IP rules extended to all individuals. Moreover, it agreed with the proposal to change, the conjunction "or" to "and". That concerned the English text. In the Russian text the conjunction "or" should simply be deleted.

104. The Delegation of the EU and its Member States supported the alternative text proposed by the Delegation of Norway with a slight amendment. He suggested replacing "have generated, preserved and transmitted" with "are holders of".

105. The Delegation of the Republic of Korea believed that TK holders should be Indigenous and local communities because the term "nations" had many definitions and made it difficult to recognize the right holders of TK. It proposed alternative text: "Beneficiaries of protection are indigenous and local communities who generate, preserve and transmit knowledge in accordance with Article 1."

106. The representative of FAIRA stated that States should not be regarded as the holders or beneficiaries of TK. States could have a fiduciary duty in relation to those peoples. In the Pacific region, there were a number of small island States and in many cases those States were institutions of the Indigenous peoples of the region. It had to be understood that it was the peoples, not the States who were the holders and the beneficiaries.

107. The Delegation of Canada supported the proposal made by the Delegation of Australia, and supported by the delegations of New Zealand and the United States of America as it was short and concise. It echoed some concerns that had been expressed on the use of "nations". As a part of clarification on

the issue of the use of "indigenous and local communities" or "indigenous peoples and local communities", it believed that the Committee would need collectively to settle on one or the other.

108. The Delegation of China expressed its support, and endorsement to the reasonable appeals of the Indigenous people in respect of TK and GRs although the concept of "indigenous people" was not applicable in China. It stated that provision on beneficiaries should be made in full consideration of the diversity in ownership of TK in various countries. It thus accepted the inclusion of "nations" in that article, and that there should be sufficient flexibilities in the meaning of "local communities". It noted that specific beneficiaries of TK protection were repeatedly listed in several articles in the document, and suggested that for the sake of precision, it would be advisable to consolidate the provision on such beneficiaries in Article 2, so that a reference to them would be enough in other articles, instead of repeatedly listing, unless it would be necessary for special purposes.

109. The Delegation of Trinidad and Tobago understood the dilemma faced by the Delegation of Barbados with respect to an unidentified Indigenous population. Therefore, it aligned itself with the statement made by the Delegation of Barbados and supported the insertion of the word "nations".

110. The representative of Tupaj Amaru stated that the text was unacceptable. The ideas, notions and concepts such as "nations" had never been raised before any legal specialist. He proposed alternative text: "Legal protection of traditional knowledge, be it national or universal shall aim essentially to provide fair benefit or benefits for indigenous people, local communities and owners of that cultural heritage: (a) in whom shall be entrusted the custody, care and safekeeping of traditional knowledge, in accordance with the customary laws and practices and international rules in force relating to intellectual property; (b) who maintain, preserve, develop and use traditional knowledge as authentic and genuine elements of their cultural and social identity and of their cultural heritage." He highlighted the last part because it was actually taken from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

111. The Delegation of Oman did not think that the term "indigenous peoples" was applicable to all countries. There were some countries in which there were no Indigenous peoples as such. Therefore, it suggested using terminology which would take into account the various and diverse situations. It believed that there were only two terms which could be used: "peoples" and "nations". It believed that those would be satisfactory to all parties concerned.

112. The Delegation of Barbados stated that the question which must be considered in the Committee was whether there was TK that needed to be protected from misappropriation. If there was, that knowledge should be protected. It could support all of the alternative proposals with the insertion of the word "nations". Its very first proposal in the Committee regarding beneficiaries was that there should be Indigenous people and non-Indigenous people which was rejected. So it had no alternative but to support the word "nations".

113. The Delegation of the USA expressed concern about the two suggestions from the Delegation of the Islamic Republic of Iran. It suggested bracketing "family or individuals". It would be extremely troubled if the definition of beneficiaries included TK where the holders were unknown and the State became the default legal representative. It suggested bracketing that.

114. The Delegation of Saint Kitts and Nevis supported the comments made by the Delegation of Trinidad and Tobago that it would be beneficial and inclusive if the word "nations" was included within the definition of beneficiaries.

115. The Delegation of Lebanon agreed with the proposal made by the Delegation of Oman.

116. The Delegation of Nigeria stated that, within the context of the possible participation of national authorities in managing institutions that would handle TK issues, it supported the inclusion of "nations". It also supported the inclusion of the term in the glossary for clearer understanding of the term.

117. At the request of the Chair, the Secretariat introduced Article 3 (Scope of Protection), and the Chair invited comments thereon.

118. The Delegation of New Zealand stated that there were two general approaches which could be taken into account: (1) to prescribe rights of beneficiaries; or (2) to identify certain activities or behaviors that should be regulated. It preferred the second approach as it provided greater domestic flexibility. Under the regulatory approach, it was open to countries to take a rights-based approach in legislation. It also enabled other legal approaches to be taken which achieved the same policy objectives. It supported Option 3, which would set out different levels of protection for 3 different categories of TK. The 3 categories would be: (1) protection for secret TK; (2) moral rights-style protection; and (3) PIC for commercial use, where TK was secret or not widely known outside a community. Regarding the specific drafting, it proposed Alternative Option 3: "Adequate and effective legal or administrative measures should be provided to: (1) prevent the disclosure, use or other exploitation of secret traditional knowledge; (2) where traditional knowledge is knowingly used outside the traditional context: (a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise; (b) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders; (3) ensure, where the traditional knowledge is secret or not widely known, prior and informed consent is obtained and any benefits arising from commercial use are shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms." Based on the TCEs text, it proposed Option 4: "The economic and moral interests of the beneficiaries of traditional knowledge should be safeguarded in a reasonable and balanced manner."

119. The Delegation of Japan preferred Option 3 in the prerequisite that "should" was adopted instead of "shall" in the light that exclusive right or economic right should not be given to subject matters whose scope could not be clearly defined. That Article constituted one of the most important parts in the possible instrument. Therefore, appropriate wording should be sought, especially, taking account of objectives and principles on which substantive principles were built. It reiterated the importance of general guiding principles on flexibility and comprehensiveness among others. It proposed to replace Article 3.1 of Option 3 with "Protected traditional knowledge, which has not been disclosed by traditional knowledge holders outside the traditional/cultural context, should be protected from unauthorized disclosure, use or other exploitation in an appropriate way. Prior and informed consent should be obtained for use of the traditional knowledge, and that any benefits arising from that use should be shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms." From the viewpoint of consistency with Article 3.1, it proposed to replace Article 3.2 of Option 3 with "Prior and informed consent should be obtained for the commercial or industrial use of traditional knowledge and any benefits arising from that use should be shared in a fair and equitable way where a user would not have reasonably been expected to know that the traditional knowledge had been previously disclosed." It proposed to replace the chapeau of Article 3.3 of Option 3 with "In respect of protected traditional knowledge including that which has been disclosed outside the traditional context, those using such traditional knowledge beyond its traditional context should, as appropriate, be required to:".

120. The Delegation of Australia supported the proposal made by the Delegation of New Zealand. It believed that that proposal captured the intent of Option 3 in a clearer way. It was also interested in some of the proposals made by the Delegation of Japan.

121. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1. It stipulated step by step what the scope of protection was. Not only did it focus on aligning that with customary law, but it also attempted to connect it with the industrial and scientific scope. The definition of "exploitation" made the implementation of those measures very clear.

122. The Delegation of the USA proposed that "Member States" should be used throughout the instrument. It believed that "Member States" would not presuppose the nature of the instrument. It was a phrase used for protocols, treaties and declarations. It supported the proposal made by the Delegation of Japan.

123. The Delegation of the EU and its Member States had concerns about linking mandatory disclosure to the granting of IP rights and therefore he proposed to delete Article 3.1(e) in Option 1. Article 3.2 of

Option 1 duplicated the purpose of Article 4.1, and he proposed to delete Article 3.2. It supported Option 2 but had concerns about the inclusion of references to PIC and MATs. It suggested bracketing “and in particular any acquisitions, appropriation, or use that fails to meet the prior and informed consent of the traditional knowledge holders or infringes the mutually agreed terms” in Article 3.1 of Option 2. Regarding Article 3.2(b) of Option 2, it suggested replacing “cultural norms and practices of its holders” with “reputation and integrity of traditional knowledge”. That reflected the wording currently proposed in the TCEs text. He believed that Option 3 had some very interesting useful suggestions. It had been amended and he wished to discuss it further in the drafting group. It noted that some of the portions in the current text reflected items in Option 2 in which he had already voiced concerns and those concerns applied equally to the relevant sections of Option 3. It supported the proposal made by the Delegation of the USA concerning replacing “Contracting Parties” with “Member States”.

124. The Delegation of India supported Option 1. Option 1 reflected the concerns on protection of TK with *sui generis* law with respect to the rights of the TK holders. It suggested deleting the word “should” and retaining only “shall”. It suggested adding “collective” after “exclusive”. Regarding Article 3.1(f), it suggested deleting “beyond its traditional context” because it believed that the moral rights needed to be enjoyed even in a traditional context. It suggested deleting “should” in Article 3.2. Regarding Option 2, it had serious concerns. Particularly, the use of the words “adequate and effective legal measures” had not created any binding obligation on Member States to protect those rights for traditional communities. It suggested bracketing Option 2. Regarding Option 3, it stated that that option completely narrowed down the protection to only TK kept in secret. It believed that the exercise which the Committee was doing was not to protect TK kept in secret but TK which had been used by the communities. It suggested deleting Option 3.

125. The representative of CAPAJ preferred Option 1. He suggested adding “enjoy” at Article 3.1(a). He also suggested adding “and fair benefit” after “term” in Article 3.1(c). He suggested replacing Article 3.1(e) with “the repatriation and return of traditional knowledge taken unlawfully”. He suggested adding “and origin” after “source” in Article 3.1(f).

126. The representative of IPCB made some specific contributions to the language of Option 1. She suggested replacing the chapeau with “Beneficiaries of protection as defined in Article 2 shall under this instrument have the rights to:”. She suggested adding “exclusively” before “authorize” in Article 3.1(b). She suggested replacing “based on mutually agreed terms” with “whether such use was authorized or unauthorized” in Article 3.1(c). She proposed to add “require, in” at the beginning of Article 3.1(e) and bracketing “without”.

127. The Delegation of Niger supported Option 1. It agreed with the Delegation of India on deleting “should” in Article 3.1. It supported the comments made by the Delegation of South Africa, speaking on behalf of the African Group.

128. The Delegation of Canada made some amendments to the proposal made by the Delegation of New Zealand. It suggested adding “, policy or” after “legal” and adding “, as appropriate and according to domestic legislation,” after “provided” in the chapeau. It proposed alternative text for paragraph 3: “Encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms agreements with respect to the sharing of benefits arising from commercial use.” It supported the proposal made by the Delegation of the USA on the use of the term “Member States”.

129. The representative of CISA preferred Option 1. He supported the comments made by the representatives of CAPAJ and IPCB. Option 1 was directly related to the right to self-determination of Indigenous peoples. He did not support taking out the term “Contracting Parties” as proposed by the Delegation of the USA and supported by other delegations. That evidently denied the right to self-determination on grounds of racial discrimination. He preferred the word “shall”. He suggested adding “in the exercise of indigenous peoples’ and indigenous nations’ right to self-determination” at the end of Article 3.2. He suggested bracketing the proposal made by the Delegation of New Zealand. He did not agree to the creation of some form of loophole to the access or exploitation of their secret

TK. Regarding the definition of "exploitation", he suggested adding "(c) can not be exploited without the free, prior and informed consent of indigenous peoples and indigenous nations."

130. The Delegation of Sri Lanka supported the comment made by the Delegation of India on the use of the word "shall". It suggested adding "/practice" after "use" in Article 3.1(d). Regarding Article 3.1(d), it had concerns on "country of origin", especially where it was linked with Indigenous medicine and GRs.

131. At the request of the Chair, the Secretariat introduced Article 2 (Beneficiaries of Protection), and the Chair invited comments thereon.

132. The Delegation of Indonesia supported Option 1 and suggested deleting Options 2 and 3. Regarding Option 1, it supported the comments made by the Delegation of India on retaining "shall". It suggested changing "exploit" to "utilize" and changing "exploitation" to "utilization" throughout the text.

133. The Delegation of Thailand supported Option 1. It was consistent with efforts undertaken by the Committee to try to determine the definition of TK and the beneficiaries. It believed that the Committee should not be coy in specifying the set of exclusive rights to be given to the beneficiaries of the TK. Option 1 was also consistent with the TCEs text. It had no objection to the comments made by the Delegation of the USA on the use of "Member States" rather than "Contracting Parties".

134. The Delegation of Guatemala endorsed the statement made by the Delegation of South Africa, speaking on behalf of the African Group. It preferred Option 1. Binding language should be introduced into the first sentence, and therefore suggested deleting "should". It supported the inclusion of the word "enjoy" in Article 3.1(a) and the words "and fair benefits" in Article 3.1(c) as proposed by the representative of CAPAJ. It suggested bracketing "should" in Article 3.2. It reiterated the concern expressed previously in relation to attempts made to exclude from the sphere of protection TK that had been disclosed or made available to the public. It maintained serious reservations as regards Option 3, as had been expressed by the Delegation of India.

135. The Delegation of Algeria supported Option 1 as supported by the Delegation of South Africa, speaking on behalf of the African Group. Option 1 very clearly set out the exclusive rights of holders and granted certainty of legal protection. Regarding Option 2, it suggested bracketing "protected" in Article 3.1. If TK had already been protected, there was no need to discuss how to protect it and to engage in drawing up an international standard to protect it. It believed that the distinction between TK and protected TK was inappropriate and would actually make it easier for TK to be misappropriated.

136. The Delegation of Switzerland had a preference for Options 2 and 3 as the basis for further discussions. The proposals made by the Delegation of Japan brought more clarity to Option 3. It had a number of questions on the original wording of Option 3, and also on the proposals made by the Delegation of Japan. It would raise those questions in the informal drafting group. The Delegation shared the concerns expressed by the delegations of the USA and the EU regarding Option 1.

137. The Delegation of Nigeria fully agreed with the Delegation of South Africa, speaking on behalf of the African Group. It preferred Option 1 because it provided more legal certainty for the protection of TK. It also agreed with the Delegation of India that "should" should be replaced by "shall".

138. The Delegation of Peru expressed strong preference for Option 1 which it believed was the most acceptable. It supported the comments made by the Delegation of India on the use of the word "shall" in Articles 3.1 and 3.2 because the language should be binding. It supported the comments made by the Delegation of Guatemala on Options 2 and 3.

139. The Delegation of Panama supported the proposal made by the Delegation of India and echoed by the Delegation of Guatemala and the Delegation of Peru. It believed that the word "shall" should be used in Articles 3.1 and 3.2 since the Committee was trying to make the document binding. It supported the inclusion of the word "enjoy" as proposed by the representative of CAPAJ and supported by the Delegation of Guatemala. It supported Option 1 which covered its concerns and interest. It suggested bracketing Options 2 and 3.

140. The Delegation of Morocco supported the intervention made by the Delegation of South Africa,

speaking on behalf of the African Group. It supported Option 1 and suggested deleting Options 2 and 3. It proposed alternative chapeau of Article 3.1: "Contracting parties shall provide to beneficiaries as defined in Article 2 the following exclusive rights:".

141. The representative of Tupaj Amaru believed that mandatory disclosure was important, and was contained in many treaties such as the PCT, the CBD and the UNESCO treaties. Regarding the proposal made by the Delegation of the USA on putting "Contracting Parties" in square brackets, he did not think that that was wise. What the Committee was doing was precisely devising a binding international instrument where the Contracting Parties had the obligation to ensure the protection of Indigenous peoples' rights. He agreed with the Delegation of South Africa, speaking on behalf of the African Group, on Option 1. He proposed alternative text: "3.1 The owners of traditional knowledge defined in Article 2 shall have the right to: (a) control, preserve, develop and revitalize, exploit and put into practice their traditional knowledge and expressions of folklore; (b) under the principle of prior informed consent, the beneficiaries shall reserve the right to refuse access and use of their traditional knowledge; (c) have a fair and equitable share of the benefits derived from the use of their traditional knowledge; (d) prevent misappropriation and misuse, including any type of fraudulent acquisitions, appropriations or misuse of their traditional knowledge, without their prior and informed consent; (e) prevent the granting of IP rights to those who use their traditional knowledge without the mandatory disclosure or authorization of the traditional knowledge holders without their prior and informed consent; (f) prevent the use of traditional knowledge outside its traditional cultural context to the detriment of customary norms. 3.2 Contracting Parties shall provide adequate and effective legal measures to ensure the application of these rights taking into account relevant customary laws and practices."

142. The Delegation of Republic of Korea highlighted that independent invention or independent discovery should be respected. It preferred Option 2.

143. In response to the remark by the representative of Tupaj Amaru, the Delegation of the EU and its Member States noted that their position was not one that opposes mandatory disclosure *per se* but had concerns with linking mandatory disclosure to substantive IP rights and the granting of IP rights.

144. The Delegation of Nigeria stated that Article 3 sought to provide legal certainty for TK by providing effective protection to TK holders. It supported option 1 and agreed with the Delegation of South Africa, speaking on behalf of the African Group, as it was in line with the objective that they were working towards the protection of TK based on a *sui generis* system. It agreed with the Delegation of India that the word "should" should be deleted. It called on delegations to avoid contributions that would lead to ambiguity in the language, understanding or interpretation of the Article.

145. The Delegation of Azerbaijan supported Option 1. Regarding Article 3.1 of Option 1, it supported the inclusion of the word "enjoy". It preferred the word "shall" rather than "should" in Article 3.2.

146. The Delegation of the Russian Federation preferred Option 2 with the corrections proposed by the Delegation of the EU and the Delegation of New Zealand, and taking into account the proposals made by the Delegation of Japan.

147. At the request of the Chair, the Secretariat introduced Article 4 (Sanctions, Remedies and Exercise of Rights), and the Chair invited comments thereon.

148. The Delegation of Indonesia stated that Option 1 in principle was relevant to the implementation and implication of the sanction and was in the discussion on the violation of TK. It suggested using the word "shall" instead of "should" and retaining "willful or negligent". It also suggested taking out the brackets around "the economic and/or moral interests". It believed that the dispute resolution would be a comprehensive context on the procedure for the settlement of disputes. It asked for the clarification on the nature of the dispute.

149. The Delegation of Australia was interested in the consistency between the TK text and the TCEs text. It believed that the text needed to take into account Member States' own legal and administrative systems, as well as their Indigenous cultures in implementing the instrument. In light of those issues,

it proposed alternative text, which would be Option 3: "4.1 Appropriate legal and administrative measures should be provided to ensure the application of this instrument, including measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent. 4.2 The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed. 4.3 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge each party shall be entitled to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law."

150. The Delegation of Guatemala stated that it was important for the legal instrument to establish effective enforcement mechanisms which could be applied in practice. Those mechanisms should assist beneficiaries, (i.e., Indigenous peoples and local communities) to fully exercise their rights. For that reason, it preferred Option 2. Regarding Article 4.4 which referred to different alternative settlement mechanisms, it welcomed the initiative, provided that it was designed to offer an alternative or solution which was faster and more dynamic than those provided by ordinary judicial proceedings. It considered that recourse to such proceedings was optional for Indigenous peoples. Nevertheless, it must be recognized that Indigenous peoples, at least in the case of Guatemala, were not necessarily informed of or familiarized with that type of proceedings. For that reason it considered that it would be very useful for the Committee to consider areas of technical assistance, and capacity building for Indigenous peoples, and that Article was one of the areas on which progress could be made. On the same paragraph, it did not understand exactly why the term "independent" appeared. It would therefore appreciate receiving clarification on that matter.

151. The Delegation of Mexico preferred Option 2. It proposed Article 4.5: "To promote relevant measures for the carrying-out of cultural expertise, that take into consideration customary laws, protocols and community procedures for the purposes of dispute settlement."

152. The Delegation of the EU and its Member States supported Option 1 of Article 4.2. It suggested replacing "the economic and/or moral interests" with "protected traditional knowledge" in order to address some of the concerns, and to ensure that the wording of that Article was more explicitly linked to Articles 1 and 3. It supported the inclusion of the words "willful or negligent". It supported Article 4.4 as it presently stood with the word "independent". It was important that any dispute mechanism was inherently and explicitly an independent and impartial. It suggested replacing "Contracting Parties" with "Member States".

153. The Delegation of New Zealand supported the proposal made by the Delegation of Australia, which was an extension of Option 1. It was important that the language be similar to the TCEs text.

154. The Delegation of Niger preferred Option 2. It suggested replacing "should" with "shall". It supported Option 2 because the procedures should be accessible and should not be burdensome for the holders of TK.

155. The Delegation of the Islamic Republic of Iran preferred Option 2 of Article 4.2. Regarding Article 4.3, it needed some clarification on the meaning of "third party interests". It suggested putting the second sentence of Article 4.3 in brackets. Regarding Article 4.4, it proposed to insert a sentence at the end as follows: "The dispute resolution mechanism between beneficiaries and users should be assigned to national law when beneficiaries and users are from one country".

156. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 2. It agreed with the Delegation of Niger on changing "should" to "shall". It suggested bracketing the second sentence of Article 4.3. It supported the proposal made by the Delegation of Mexico.

157. The Delegation of Canada supported the proposal made by the Delegation of Australia as it strived to reach better consistency not only between the TK and TCEs texts but also with other instruments such as the Berne Convention, in particularly Article 5.2. Consistency should be a priority. It suggested adding ", policy" after "legal" and adding "/or" after "and" in Article 4.1 of Option 3. Regarding Article 4.4, it suggested replacing "each party shall be entitled" with "parties may agree to". The Delegation reserved the right to make comments.

158. The Delegation of Morocco preferred Option 2. It supported the proposal made by the Delegation of South Africa, speaking on behalf of the African Group, and the Delegation of Niger. It proposed to add a sentence at the beginning of Option 2 of Article 4.2: "Contracting Parties undertake to implement the mechanism."

159. The Delegation of Thailand supported Option 2 because it was inclusive and flexible enough for Member States to implement that international legal instrument. It suggested replacing "misappropriation or misuse" with "infringement" in Option 2 of Article 4.2.

160. The representative of CAPAJ suggested replacing "enforcement" with "sanction" in Option 1 of Article 4.2. He supported deleting the brackets around "willful or negligent". He suggested adding "effective" after "accessible" in Article 4.3. Regarding the proposal made by the Delegation of Mexico, he suggested adding "as means of evidence essential in these processes" after "cultural expertise".

161. The Delegation of Japan believed that Article 4.1 was well balanced between concreteness and flexibility. Therefore, Article 4.1 was enough and it suggested putting Articles 4.2 to 4.4 in the brackets. As for the wording of Article 4.1, it suggested replacing "Contracting Parties" with "States" and replacing "undertake to" with "should".

162. The representative of the AFN supported Option 1. He suggested deleting "shall". He also suggested adding "Contracting parties should ensure criminal and appropriate civil and administrative enforcement procedures." at the end of Option 1 of Article 4.2.

163. The Delegation of Colombia agreed with the Delegation of Guatemala on the importance of having strict measures to ensure that the terms were properly applied. It preferred Option 2. It supported the deletion of the last part of Article 4.3 because the protection of third party interests and the public interests could actually damage the protection of TK.

164. The Delegation of Panama agreed with the delegations of Guatemala and Colombia. It suggested replacing "undertake to" with "shall" in Article 4.1. It emphasized the binding nature of the document. It supported the statement made by the Delegation of South Africa, speaking on behalf of African Group. It preferred Option 2 of Article 4.2. It supported to replace "should" with "shall", as suggested by the delegations of Niger and South Africa, speaking on behalf of African Group. It believed that the proposal made by the Delegation of Mexico was a good idea. The only concern was the issue of cooperation because those countries which had made more progress on those issues might be fine with that but some other countries might need financial or technical assistance to carry out those studies. It had no proposal on the issue of cooperation at that stage and it wished to come up with the text later.

165. The representative of CISA supported Option 2. He preferred the term "Contracting Parties" and the term "shall". He suggested adding "the rights of indigenous peoples and indigenous nations including their social, economic and moral rights, including their right to self-determination" after "infringement" in Option 1 of Article 4.2. He agreed to delete the last sentence of Article 4.3.

166. The Delegation of India supported using "shall" in Article 4.1. It suggested deleting "as appropriate and" because that gave a lot of flexibility and was not making binding. Regarding Option 1 of Article 4.2, it suggested deleting "should" and retaining "shall". It suggested replacing "appropriate" with "adequate". It agreed to retain "willful or negligent". It suggested replacing "the economic and/or moral interests" with "protection accorded to". It had serious concerns on Option 2 of Article 4.2 because of the word "appropriate" and also because it was confined to any act of misappropriation or misuse. So it did not support Option 2. It suggested replacing "appropriate" with "adequate" in Article 4.3. Regarding Article 4.4, it suggested replacing "shall" with "may" and deleting "independent". It suggested adding "that is most suited to the holders of traditional knowledge" after "national law".

167. The representative of IPCB stated that the words "as appropriate and in accordance with legal systems" in Article 4.1 were problematic and should be deleted. She supported replacing "undertake to" with "shall". She believed that the onus of remedies, sanctions and exercise of rights was not just the onus of States. It must be done in support of the existing indigenous legal systems. So she

proposed to add “These measures must be consistent with indigenous peoples’ legal systems.” at the end of Article 4.1. Regarding Option 1 of Article 4.2, she suggested adding “rights” before “the economic and/or moral interests”. She agreed to delete the last sentence of Article 4.3. The purpose of that instrument was to protect beneficiaries of protection and not third parties.

168. The Delegation of the Republic of Korea preferred Option1. It suggested removing the brackets around “willful or negligent” in Article 4.2. Those who discovered TK independently could not have reasonably known the infringement.

169. The Delegation of Sri Lanka preferred the Option 2 because it was more specific than Option 1. Where the words “misappropriation and misuse” were used, it suggested replacing them with “infringement”.

170. The representative of Tupaj Amaru proposed a new text of Article 4: “The contracting parties will adopt appropriate measures of rights, in accordance with their respectable legal systems and in coherence with the international instruments to ensure the application of the present document. a) In the scope of the illicit appropriation of the traditional knowledge that run the risk of extinction and, in accordance with the scope of protection described in Article 3, the Contracting Parties shall establish mechanisms for remedying disputes and controversy and for sanctions in the criminal and civil fields; b) In accordance with the arranged dispositions in Article 3, a competent authority will be established, in consultation with indigenous peoples and will be tasked, with advising and assisting the beneficiaries provided by Article 2, referring the observance of rights of indigenous peoples and local communities; c) Where traditional knowledge are sharing/or shared by different countries or by indigenous peoples and local communities in several jurisdictions, Contracting Parties will provide cooperation and assistance with the purpose, facilitating the implementation of enforcement mechanisms in the territories of neighboring countries, provided under this instrument.”

171. The Delegation of the USA suggested replacing “Contracting Parties” with “Member States” as proposed by the Delegation of the EU. Regarding Option 1 of Article 4.2, it expressed the concern on the words “willful or negligent”. Regarding the proposal made by the Delegation of Australia, it proposed at the end of Article 4.1 to add “Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.”

172. The Delegation of Azerbaijan supported Option 2. Regarding Article 4.1, it agreed to replace “undertake to” with “shall”.

173. The Delegation of the Russian Federation supported Option 1.

174. At the request of the Chair, the Secretariat introduced Article 5 (Administration of Rights), and the Chair invited comments thereon.

175. The Delegation of the USA suggested replacing “contracting party” with “Member State”.

176. The Delegation of Canada supported the suggestion made by the Delegation of the USA. It suggested alternative language that would replace Article 5.1(b) and Article 5.1(c): “(b) providing advice to traditional knowledge holders and users on the establishment of mutually agreed terms.” It also suggested deleting “, including assisting in the maintenance of traditional knowledge database”. It proposed alternative Article 5.4: “The establishment of national and regional authority or authorities under this Article will not preclude traditional knowledge holders from accessing other mechanisms, as available under domestic legal systems, for administering the protection of their traditional knowledge as set out in mutually agreed terms.”

177. The Delegation of the Russian Federation preferred Option 1. It stated that the expression “a contracting party” should be changed to “Member States”.

178. The Delegation of New Zealand stated that the key concept under Article 5 was management. The government should only have a role where it was mandated by Indigenous peoples or local communities, and where the government in question considered that it was appropriate for it to have a role. It believed that the drafting could be improved to better reflect that concept and to address the fact that not all countries would want to establish national authorities or to have government

involvement. It proposed alternative chapeau of Article 5.1: "Where so requested by traditional knowledge holders a competent authority (regional, national or local) may to the extent authorized by the holders:". It suggested changing "disseminating" to "disseminate" in Article 5.1(a). It suggested replacing the existing Article 5.1(b) with "with the appropriate prior informed consent, negotiate mutually agreed terms" and replacing the existing Article 5.1(c) with "collect and distribute benefits from the use of traditional knowledge". It suggested replacing "assisting" with "assist" in Article 5.1(d). It suggested deleting the existing Article 5.3 because that was an unnecessary administrative burden.

179. The Delegation of the Islamic Republic of Iran suggested adding "in accordance with its national law" after "holders of traditional knowledge". It suggested inserting "the national law and" after "without prejudice to" in Article 5.4.

180. The Delegation of South Africa, speaking on behalf of the African Group, suggested retaining "contracting party". It also suggested keeping Article 5.1 as it was. It agreed to delete ", including assisting in the maintenance of TK databases" in Article 5.1(d). It believed that it was probably unnecessary to be so detailed, and it was only one form of knowledge management. It proposed new Article 5.1(e): "determine whether an act pertaining to traditional knowledge constitutes an infringement or another act of unfair competition in relation to that knowledge". Regarding Article 5.3, it suggested retaining it in the text.

181. The Delegation of the Bolivarian Republic of Venezuela suggested removing Article 5.4 to the beginning as an introduction to that article. It suggested inserting "In the case that the Member State decides thus that they should establish this authority:". It also suggested replacing "holders" with "owners" throughout the text.

182. The Delegation of Mexico agreed with the wording of Article 5 in general. It suggested including at the end of Article 5.1(a) the phrase "under protection of its beneficiaries". In relation to the use of the terms "holders" and "owners", among the Indigenous peoples and communities of Mexico, the owner of TK was the community or people. The holders were those persons who possessed, safeguarded, and put into practice the TK, but the owner would always be the Indigenous people or community.

183. The Delegation of the Republic of Korea suggested deleting Article 5.1(c) because it did not see the practicality in the supervision by a national authority of fair and equitable benefit-sharing.

184. The representative of CAPAJ suggested adding "subject to their consent" at the end of Article 5.1(a) and adding "in administrative terms" after "supervising" in Article 5.1(c). Regarding Article 5.3, he suggested adding "and competencies" after "identity" and adding "which shall issue a favorable opinion prior to its operation" at the end of this paragraph. He also proposed a new paragraph: "5.5. The established authority shall include authorities originating from indigenous peoples so that they form part of that authority."

185. The Delegation of Australia supported the amendments proposed by the Delegation of New Zealand. Member States could afford flexibility to give any rights for investment of Indigenous communities and an authority should not be mandated by an instrument. The national competent authority should not own the rights but act as an agent at most at the request of the beneficiaries.

186. The Delegation of the EU and its Member States supported the suggestions made by the Delegation of the USA concerning changing "contracting parties" to "Member States". It reserved the right to make further comments.

187. The Delegation of El Salvador believed that that Article had really been stripped down as much as possible by the experts at IWG 2. It supported the suggestions made by the Delegation of the Islamic Republic of Iran on "national law" because it was very pertinent. It also supported the proposal made by the Delegation of Mexico.

188. The Delegation of Switzerland stated that it should be the Indigenous peoples and local communities who were the holders, beneficiaries and managers of their TK. Governments should thus only become involved at the request of those peoples and communities and should not hold such rights on their own. It supported the amendment proposed by the Delegation of New Zealand on the chapeau

of Article 5.1 and the amendment proposed by the Delegation of Canada on Article 5.1(b). It also supported to replace “contracting party” with “Member State”. It believed that establishment of such authority should be optional.

189. The representative of CISA suggested remaining “contracting party”. He also suggested replacing “may” with “shall” and replacing “in consultation with” with “free, prior and informed consent of”. He supported the proposal made by the Delegation of the Bolivarian Republic of Venezuela on replacing “holders” with “owners”. He suggested replacing “national or regional” with “indigenous” in Article 5.1. Regarding Article 5.2, he suggested replacing “under Article 1” with “by the contracting parties” and replacing “consultation” with “free, prior and informed consent”. He also suggested bracketing “where possible”. Regarding Article 5.4, he suggested replacing “a national or regional” with “an international indigenous”.

190. The Delegation of Sri Lanka suggested adding “and promoting practices” after “disseminating information” in Article 5.1(a). It also suggested replacing “exercise” with “practice” in Article 5.1(d).

191. The Delegation of Morocco supported the statement made by the Delegation of South Africa, speaking on behalf of the African Group. It suggested merging Articles 5.1(b) and 5.1(c) with a new text: “applying the roles and procedures of the national legislation regarding prior and informed consent and to the fair and equitable sharing of benefits”.

192. The Delegation of Colombia suggested changing “holders” to “title holders or rights holders”. It suggested adding “free” before “prior informed consent” in Article 5.1(b). Regarding Article 5.2, it suggested adding “and approval” after “consultation”.

193. The Delegation of Guatemala suggested using the term “shall” in Article 5.1. It supported the proposal made by the representative of the CAPAJ in relation to Article 5.5, relating to the guarantee of due representation of beneficiaries, in accordance with the terms used in Article 4 of the UNDRIP. In that connection, it wished for something along the following lines to be included: “When establishing a national or regional authority or authorities, States shall implement effective measures to ensure the representation and full participation of indigenous peoples and local communities in matters affecting their rights, in accordance with this instrument.”

194. The Delegation of Indonesia stressed that the authority was supposed to have the administrative function that would guarantee the protection of TK itself in accordance with relevant laws and regulations. The beneficiaries were supposed to be consulted on the administration of rights. Regarding Article 5.1, it suggested adding “in accordance with its national law” as proposed by the Delegation of the Islamic Republic of Iran. It suggested adding “may” before “establish” and adding “or appoint” after “establish”. It also suggested deleting “competent”. Regarding Article 5.2, it supported the proposal made by the representative of CISA. It suggested deleting “competent” and “should” in Article 5.3.

195. The representative of Tupaj Amaru cautioned that the Committee to be careful with some concepts that were being dealt with. For example, one could administer an institution or a company but he or she could not administer the rights. He believed that it should be application of rights. He believed that “dueño” which would be “owner” in English was not the appropriate word in an international instrument. “Propietarios” was used in the CBD. Regarding the establishment of the authority, he believed that the authority needed to be competent. The article was requesting each State to establish that mechanism in order to supervise the way in which rights with respect to TK were being handled. A fundamental point was PIC from the Indigenous peoples, which referred to the participation of the holders of TK.

196. The representative of IPCB agreed with the Delegation of South Africa, speaking on behalf of the African Group, that databases were only one method for protecting TK so she suggested bracketing the reference to databases. She suggested adding “where established and assist in the development of other methods to protect traditional knowledge” at the end of Article 5.1(d). She suggested bracketing “confined” in Article 5.2 because it was difficult to define and was not necessary in that text. She also suggested bracketing “administer the rights” because Parties could not administer the rights

of TK owners. She supported to use “owners” rather than “holders” as proposed by the Delegation of the Bolivarian Republic of Venezuela.

197. At the request of the Chair, the Secretariat introduced Article 6 (Exceptions and Limitation), and the Chair invited comments thereon.

198. The Delegation of Australia believed that exceptions and limitations should be appropriate and balanced, and respect the transmission of TK in traditional contexts, existing IP rights and innovative industries. It suggested maintaining consistency between the TK and TCEs texts. With those comments in mind, it supported Option 1 of Article 6.1. It also supported Option 1 of Article 6.2 with a minor change. It suggested replacing “and is not offensive to the indigenous or local community” with “and does not unreasonably conflict with the cultural norms and practices of the traditional knowledge holders”. Such suggestions made that paragraph consistent with the equivalent language in Article 3. It supported the retention of Article 6.3.

199. The Delegation of Indonesia supported Option 1 of Article 6.1 with the deletion of “as determined by customary laws and practices”. The wording “taking into account the legitimate interest of third parties” in Option 2 of Article 6.2 was not clear enough. It suggested moving Article 6.3 right after Option 1 of Article 6.1 and renumbering it as Article 6.2.

200. The Delegation of the EU and its Member States supported Option 2 of Article 6.1 and Option 2 of Article 6.2. Regarding Option 2 of Article 6.2, it believed that the text “taking into account the legitimate interests of third parties” added an extra degree of balance to that article.

With respect to Article 6.3, there was a certain lack of clarity over what would or would not be defined as secret TK. It suggested deleting Article 6.3 unless that could be clarified.

201. The Delegation of the USA suggested changing “domestic laws of Member States” to “domestic law of the Member State” in Option 1 of Article 6.1. In both Option 1 and Option 2 of Article 6.2, it suggested replacing “Parties may adopt” with “It shall be a matter of national law to permit”, which paralleled the TCEs document. The Delegation proposed a new element: “Member States shall ensure that the protection of traditional knowledge shall neither hinder nor encumber the independent discovery or the independent invention of the same knowledge.”

202. The representative of IPCB supported the used of the word “shall” in Option 1 of Article 6.1. She suggested bracketing “in the traditional and customary context”. She supported the use of the word “owners” rather than “holders”. She supported the deletion of “as determined by customary laws and practices” and suggested bracketing “consistent with domestic laws of Member States”.

203. The Delegation of El Salvador supported Option 1 of Article 6.1. It particularly wished to retain subparagraph (b). It supported to keep “outside the membership of beneficiary community or” within the brackets. It supported the original wording of the Option 1 of Article 6.2. It requested that Article 6.3 be retained.

204. The Delegation of Canada supported Option 2 of Article 6.1 and Option 2 of Article 6.2 as supported by the Delegation of the EU and its Member States. It suggested bracketing Article 6.3 until a point of greater clarity on the issue of secret TK was reached. It supported the proposal made by the Delegation of the USA on the independent discovery. It suggested changing “Contracting Parties” with “Member States”.

205. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1. It suggested using “shall” instead of “should”.

206. The Delegation of the Islamic Republic of Iran suggested deleting the phrase “taking into account the legitimate interests of third party” in Option 2 of Article 6.2.

207. The representative of CAPAJ believed that the delegations of the EU and Canada had not clearly understood the matter of secret and sacred TK. Certain parts of their TK were secret because they wanted to keep them secret. It was not because they did not want to share them. It was because that knowledge was kept normally by the wise men or the expression of the knowledge did not actually

come out in a language that could be translated. Sometimes words were created in order to express the knowledge. He believed that Article 6.3 should be retained.

208. The representative of CISA suggested replacing "consistent with domestic laws of Member States" with "consistent with international law and principles that protect indigenous peoples and indigenous nations and local communities from exploitation". He agreed with the Delegation of the Islamic Republic of Iran on the deletion of "taking into account the legitimate interests of third parties" in Option 2 of Article 6.2. He supported to retain Article 6.3.

209. The representative of Tulalip Tribes supported to delete "taking into account the legitimate interests of third parties" as indicated by the Delegation of the Islamic Republic of Iran and the representative of the CISA. He believed that that term was a kind of balancing test which was often used in copyright law and so on, to balance the interests that different parties had. The Committee dealt with the TK that was held by Indigenous peoples and local communities. He did not see that the interest of third parties would enter into that kind of issue.

210. The Delegation of New Zealand supported the comments made by the Delegation of Australia. It also supported the proposal made by the Delegation of New Zealand on Option 1 of Article 6.2. It wondered what the word "offensive" meant. At the first glance, it seemed like a useful standard to include. But when thinking about it practically, it was difficult to think what "offensive" might mean in terms of knowledge as compared to TCEs.

211. The Delegation of India suggested retaining "shall" and removing "should". Regarding the new article proposed by the Delegation of the USA, it was worried about the implications of the use of the word "independent discovery or independent invention of the same knowledge". If the attempt was to convert TK to private property, it was not in favor of that exception. It undermined the protection. It wished to reserve its comments on that new proposal and suggested bracketing it.

212. The representative of AFN supported Option 2 of Article 6.2. He agreed that "taking into account the legitimate interests of third parties" should be deleted. Regarding Article 6.3, he believed that secret TK should not be subject to exceptions and limitations. He proposed a new article: "6.4 The exception or limitation shall not extinguish, abrogate or derogate the rights of indigenous peoples over their traditional knowledge." There might be some instances where a limitation might be imposed on Indigenous peoples, such as in the area of conservation where a resource became endangered for a period. A periodic limitation for the use of TK should not be viewed as an extinguishment of the right.

213. The Delegation of Norway supported Option 1 of Article 6.2. It supported the proposal made by the Delegation of Australia and supported by the Delegation of New Zealand. It also supported the new article proposed by the Delegation of the USA. But it wondered whether that should be seen as an exception to the rights. It suggested moving that text to Article 3 or Article 1. It believed that the new proposal was more like a delimitation of the scope of protection than an exception.

214. The Delegation of the USA responded to the Delegation of Norway. It welcomed that concept being in the right place in the text. Regarding the comments made by the Delegation of India, it stated that the intent was that genuinely independent discovery or independent invention of the same or equivalent knowledge should not be encumbered. A situation could be imagined in which an Indigenous people discovered that some plant had some pharmacological properties but it was independently discovered by others. It believed that, whatever the regime for the protection of TK was, it should not in any way encumber independent discovery.

215. The Delegation of Zimbabwe believed that the notion of "independent discovery" was inaccurate and misleading. It was incorrect and misleading if it was told that the first person to discover Victoria Falls was Livingston. If it was independently discovered to one's knowledge, it was not, in its opinion TK. If a plant was discovered for medicinal purposes, it was not TK and it was just medicine discovered for using that particular plant. Regarding Option 1 of Article 6.1, the Delegation proposed to add "(c) in the interpretation of this article, the provisions of Article 3.1(e) and (d) with regard to prior informed consent shall apply *mutatis mutandis*." The proposed text would make sure that exceptions and limitations would not be used to the detriment of the rights of the TK holders.

216. The Delegation of the Bolivarian Republic of Venezuela supported the proposal made by the representative of CISA on Option 1 of Article 6.1. Regarding Option 2 of Article 6.1, it suggested replacing “holders” with “owners”. Regarding Option of Article 6.2, it suggested replacing “fair practice” with “free, prior and informed consent”. Regarding Article 6.3, it suggested bracketing “shall”. It supported the Delegation of India to bracket the proposal made by the Delegation of the USA. It believed that the point on discovery was very dangerous. Christopher Columbus discovered the American continent which was a new land for him, but there were many people living there for a long time before it was discovered.

217. The Delegation of Algeria preferred Option 1, as supported by the Delegation of South Africa, speaking on behalf of the African Group. It was in favor of the binding and imperative nature of the provisions so it suggested using “shall”. With regard to “independent discovery”, it agreed with the delegations of the Bolivarian Republic of Venezuela and India. The text should be in brackets because it did not see any particular link between that and TK. Independent discoveries did not really fall under the definition of TK because TK obeyed the principles of intergenerational transmission of knowledge. Independent discoveries were not transmitted from generation to generation.

218. The representative of the ICC was very disturbed that the legitimate interests of third parties should not be recognized. He suggested keeping the text. He strongly supported the proposal made by the Delegation of the USA and others for the introduction of a new element to deal with independent discovery. Clearly, independent discovery was not TK. It was generally recognized that TK was very difficult to define. Those who did not wish to infringe TK rights wanted to be as clear as possible about what those rights were. Therefore, it was vital to have a clear definition. He stated that the interesting intervention of the Delegation of Zimbabwe about Victoria Falls clearly was not the situation the Committee was talking about. Cecil Rhodes did not discover Victoria Falls; and He simply renamed it. That did not involve independent discovery.

219. The Delegation of South Africa, speaking on behalf of the African Group, stated that the independent discovery and independent invention had been an age-long debate around the politics of knowledge production and the politics of conquest. It was not just a question of renaming geographical indicators, and it was also a process of appropriating knowledge of the conquered people. So it had strong objection to the introduction of that and it suggested bracketing it. The definition of TK as set out in the criteria would not allow for such an independent discovery. It supported the proposal made by the Delegation of Zimbabwe. The term “*mutatis mutandis*” may be translated into ordinary English so that it could be understood. It accepted that PIC as defined in Article 3 should be included as a criterion.

220. The Delegation of Sri Lanka preferred Option 1 of Article 6.1 and supported to use “shall” rather than “should”. It proposed alternative text on independent discovery: “If the independent discovery or the independent innovation is based on traditional knowledge, exemptions and limitations should be over traditional knowledge with country of origin.”

221. The representative of CISA, on behalf of IPCB and INCOMINDIOS expressed its concern with the proposal made by the Delegation of the USA. There was nothing in their territory that they did not have a relationship to. There was a spiritual relationship as well as material and they could not see how there could be an independent discovery.

222. The representative of CAPAJ stated that they were having a debate in the UN Permanent Forum on Indigenous Issues on the theory of conquest. It was quite clear that Indigenous peoples were not just conquered but were invaded. Many of their TK from the pre-colonial era fell into the hands of the conquerors, hence the current debate. He called upon the Delegation of the USA to review the issue of conquest and the conquerors’ rights.

223. The Delegation of Zambia supported Option 1 of Article 6.1 as supported by the Delegation of South Africa, speaking on behalf of the African Group. It also supported the proposal made by the Delegation of Zimbabwe on Article 6.1(c).

224. The representative of Tupaj Amaru stated that, according to Article 11.2 of the UNDRIP, “States shall provide redress through effective mechanisms, which may include restitution, developed in

conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." The topic of secret and sacred places had been debated for 20 years. The language had already been adopted and the concept had already been agreed upon. He believed that the proposal made by the Delegation of the USA was quite senseless at that stage of the process. He suggested deleting Option 2 of Article 6.2. The Committee was attempting to provide legal protection to TK and TCEs to the holders which were the local communities. He believed that Option 2 of Article 6.2 was doing the opposite. He stated that third parties were colonizers who had raped their TK and industries which continued to pillage and pirate their resources.

225. The Delegation of Guatemala stated that the customary laws of Indigenous peoples in Guatemala usually required certain knowledge to be disclosed only to particular recipients. In the Maya people, for example, those custodians were known as *chajinel*, which meant guardians or keepers. It therefore wished that Article 6.3 be retained as part of the Article and therefore requested that the brackets therein be deleted. In addition, it suggested replacing "may" with "shall".

226. The Delegation of the USA agreed with the Delegation of South Africa, speaking on behalf of the African Group, that independent discovery or independent invention fell outside the scope of TK. It believed that the delegations of Zimbabwe and of Algeria had shared similar ideas and it wished to work on the wording. There would be circumstances where knowledge was discovered by a tribe, an Indigenous people and a local community. In a quite distant location, another group, another entity, another tribe, another community, a company, a laboratory, and a researcher would discover the same knowledge. It believed that in those circumstances, the system of TK should not encumber that second comer, the second discoverer of the knowledge. It believed that the delegations of Zimbabwe and of South Africa, speaking on behalf of the African Group, probably agreed with the proposal made by the delegations of Canada, of Norway and itself.

227. The Delegation of India stated that the notion of "independent discovery and independent invention" did not exist either in patent law or in any modern IP laws. If TK existed, that meant that it had been practiced by somebody already. If it was practiced by somebody, it could not be argued that it was independently discovered or independently identified. It was against the basic principles.

228. The Delegation of Nigeria supported the statement made by the Delegation of South Africa, speaking on behalf of the African Group. It suggested using "shall" instead of "should". It also supported the proposal made by the Delegation of Zimbabwe. The proposal linked Article 6.1 to the provision on PIC. That was to avoid changing the actual intention of providing exceptions and limitations under Article 6.

229. The Delegation of the USA disagreed with the Delegation of India. Independent discovery was a defense under patent laws in many jurisdictions, including the USA. Independent creation was a defense under copyright law and it was also a defense under trade secret law.

230. At the request of the Chair, the Secretariat introduced Article 7 (Term of Protection), and the Chair invited comments thereon.

231. The Delegation of Brazil supported Option 1.

232. The Delegation of Guatemala supported Option 1, provided that in Article 1 the reference to sub-paragraph (d) was deleted, i.e., it should be stated that as one of the criteria of eligibility, such knowledge was not be broadly disseminated outside that community

233. The Delegation of Sri Lanka preferred Option 1. It suggested adding "and value" after "characteristic" in Option 2.

234. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1.

235. The Delegation of Morocco supported Option1 as indicated by the Delegation of South Africa, speaking on behalf of the African Group.

236. The Delegation of Norway supported Option 1. It suggested moving Option 1 to Article 1 as a new paragraph.

237. The representative of IPCB stated that TK or Indigenous knowledge of Indigenous peoples did not come with an expiration date. To be consistent with the definition of TK and indigenous knowledge as dynamic, evolving and intergenerational in nature with deep historical roots and for the benefit of future generations, she believed that the term of protection should last in perpetuity.

238. The Delegation of Egypt supported Option1 as indicated by the Delegation of South Africa, speaking on behalf of the African Group.

239. The Delegation of El Salvador supported Option 1.

240. The Delegation of Niger supported Option1 as indicated by the Delegation of South Africa, speaking on behalf of the Africa Group. As long as there was a disincentive association between TK and the holders of the TK, the TK was part of their cultural identity.

241. The Delegation of Oman supported Option 1. It took into consideration the comments made by the Delegation of Guatemala on the criteria and agreed with that.

242. The Delegation of Algeria supported Option1 as indicated by the Delegation of South Africa, speaking on behalf of the African Group. It suggested replacing the word “should” with “shall”.

243. The Delegation of Zambia supported the statement that TK did not come with an expiration date and therefore supported Option 1.

244. The Delegation of Nigeria supported the position of the Delegation of South Africa, speaking on behalf of African Group. It also agreed with the Delegation of Algeria that “should” should be replaced by “shall”.

245. The Delegation of Mexico preferred Option 1.

246. The Delegation of Thailand supported Option 1 as it was. It suggested keeping it in Article 7.

247. The representative of CAPAJ preferred Option 1. He suggested adding a new paragraph in Option 1: “An administrative or judicial resolution which specifies a concrete measure for protection of traditional knowledge shall not be subject to prescription for the indigenous people which requests it.”

248. The Delegation of Indonesia supported Option 1.

249. The Delegation of Colombia supported Option 1.

250. The representative of Tupaj Amaru supported Option 1 with the following amendments: “Protection of traditional knowledge should last as long as the indigenous peoples who are holders of the traditional knowledge.”

251. The Delegation of Canada suggested bracketing both options, given that perpetual protection for TK was incompatible with the limited term of IP protection, including copyright, trademarks and patents.

252. The representative of MBOSCUDA supported the statement made by the Delegation of South Africa, speaking on behalf of the African Group. She also supported the amendment made by the Delegation of Algeria.

253. The Delegation of the USA shared the concern of the Delegation of Canada and supported its suggestion. While there were some forms of IP such as trade secret and trademark protection that could be perpetual, it was concerned about the scope of the instrument having perpetual protection.

254. At the request of the Chair, the Secretariat introduced Article 8 (Formalities), and the Chair invited comments thereon.

255. The Delegation of Brazil supported Option 1 of Article 8.1. It believed that Article 8.2 did not refer to the formalities. The issue of databases should not be in that article.

256. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1. It also

supported the comment made by the Delegation of Brazil that the issues of databases did not fit into that article.

257. The Delegation of Guatemala supported the comments made by the Delegation of Brazil. It preferred to move Article 8.2 to another article. It stated that the creation of any register or database should be done in consultation with the relevant communities and with their cooperation.

258. The Delegation of Indonesia supported Option 1. It also echoed and supported the comments made by the previous delegations on the uselessness of Option 2.

259. The Delegation of Egypt supported the statement made by the Delegation of Brazil and supported by the delegations of Guatemala and of South Africa, speaking on behalf of the African Group.

260. The Delegation of the USA agreed with the previous delegations that Article 8.2 was not needed or appropriate in that article.

261. The Delegation of Japan preferred option 1 of Article 8.1. It suggested replacing “shall” with “should”.

262. The Delegation of Niger supported Option 1 as indicated by the Delegation of South Africa, speaking on behalf of the African Group, because that would enable Indigenous peoples who held TK to deal with the matter easily.

263. The Delegation of Canada was concerned that the lack of formalities might make it difficult for TK holders to assert their claims over TK or for a potential user to identify the legitimate holder. Therefore, it preferred Option 2. It suggested replacing “should/shall” with “may” in Article 8.2.

264. The representative of CAPAJ preferred Option 1. He suggested adding “or requirement” after “formality” in Option 1 of Article 8.1.

265. The Delegation of Nigeria supported Option 1, as mentioned by the Delegation of South Africa, speaking on behalf of the African Group. However, for the sake of legal certainty, identification, and documentation, countries should have the option of taking appropriate measures to record TK which existed in their domain.

266. The Delegation of India supported the statement made by the delegations of Brazil and of South Africa, speaking on behalf of African Group. Option 1 was preferred and Option 2 was not needed. It suggested keeping “shall”.

267. The Delegation of the Republic of Korea preferred Option 2. Protection of TK required formalities such as database to avoid legal uncertainty in the process of dispute resolution.

268. At the request of the Chair, the Secretariat introduced Article 9 (Transitional Measures), and the Chair invited comments thereon.

269. The Delegation of Indonesia supported Option 2 of Article 9.2. It could also support Option 1 if deleting “acknowledged by national [or] domestic law,” and adding “in accordance with its national law” at the end.

270. The Delegation of Japan believed that the necessity of that Article depended on the legal nature of the possible legal instrument. In that sense, it suggested putting the whole Article in the brackets.

271. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 2.

272. The Delegation of Mexico supported Option 2 of Article 9.2. It also suggested deleting “, subject to respect for rights previously acquired by third parties in good faith”.

273. The Delegation of El Salvador supported Option 2.

274. The Delegation of Australia had trouble identifying whether Option 1 and Option 2 respected rights previously acquired by third parties through prior use in good faith. It wished to see what happened with the text, before indicating support for any option.

275. The Delegation of the USA agreed with the concerns raised by the Delegation of Australia, and it shared the concerns expressed by the Delegation of Japan. It suggested adding “and its international

legal obligations" at the end of the proposal made by the Delegation of Indonesia in Option 1 of Article 9.2.

276. The representative of the CISA proposed new text: "Indigenous peoples and indigenous nations and local communities and States shall develop international guidelines consistent with the right to self-determination of indigenous peoples and indigenous nations and with international human rights law to address the acquisition of traditional knowledge by third parties, to determine the criteria for resolving the application of rights by indigenous peoples, local communities and third parties."

277. The representative of Tulalip Tribes stated that TK was not stolen in the original sense and it was just allowed to circulate without looking at the customary laws and protocols of Indigenous peoples. Under their laws, there were no barriers for third parties to have access and possess it. Indigenous peoples were trying to right that wrong and that historical problem. The proposal made by the representative of CISA was trying to acknowledge that situation. He did not believe that that historical wrong should be perpetuated in the future. The instrument should envision some form of repatriation reclamation of what had been lost in a fair and equitable way. He stated that there were two ways for third parties to have a claim on TK. One was through an IP right, such as copyright or patent, and the other was through a claim that that was in the public domain. Regarding the IP system, avenues could be found for repatriation over time. Some orphan works were held by third parties and no current holders could be found. He believed that that could be repatriated back and put under the direct control of the TK holders themselves. He believed that Article 9.1 was the clearest.

278. The representative of Tupaj Amaru supported the statement made by the representative of the Tulalip Tribes. He suggested adding "The parties to this instrument shall ensure that necessary measures are taken to guarantee the rights of indigenous peoples are in conformity with national legislation." at the end of Article 9.1.

279. The Delegation of the EU and its Member States supported Option 1 of Article 9.2.

Regarding Option 2 of Article 9.2, there were certain questions regarding the phrasing "within a reasonable period of time".

280. At the request of the Chair, the Secretariat introduced Article 10 (Consistency with the General Legal Framework), and the Chair invited comments thereon.

281. The Delegation of Mexico supported Option 2.

282. The Delegation of Oman supported Option 1 and suggested adding "and national" after "international and regional".

283. The Delegation of Japan considered that Options 1 and 2 of Article 10.1 prejudged the legal nature of that possible instrument. Therefore, it suggested putting Options 1 and 2 of Article 10.1 in the brackets.

284. The Delegation of Guatemala supported Option 2. It suggested making a reference to Article 45 of the UNDRIP. Alternative Article 10.2 was "In accordance with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples, nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future."

285. The Delegation of South Africa, speaking on behalf of the African Group, supported Option 1. Option 2 was phrased in such an inflexible way that the rights of nations and all of that were not taken into consideration. Option 1 was much more flexible and reasonable.

286. The Delegation of El Salvador supported Option 2. It supported due consideration of the UNDRIP.

287. The Delegation of Niger supported Option 1. With regard to Option 2 of Article 10.1, it suggested bracketing "Protection under this instrument should leave intact".

288. The Delegation of Brazil suggested adding ", in particular the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity" in both Option 1 and Option 2.

289. The Delegation of Indonesia supported Option 1. It suggested adding “or local communities or nations” after “indigenous peoples” in Article 10.2.

290. The representative of the CAPAJ believed that Article 45 of the UNDRIP was a safeguard which enabled the Indigenous peoples to be protected so that they were within the framework of legal international framework of protection. He supported Option 2.

291. The Delegation of Thailand supported Option 1 because it was flexible. Regarding Article 10.2, it supported the proposal made by the Delegation of Indonesia.

292. The Delegation of the USA suggested adding “rights or the” before “protection” in Option 2 of Article 10.2. It suggested bracketing the proposal made by the Delegation of Brazil. If one international instrument was listed, there would be many international instruments to be listed, including the Paris Convention, the Universal Declaration of Human Rights (UNDHR) and the United Nations Convention on the Rights of Persons with Disabilities. It would be better not to list any particular instruments.

293. The representative of the IPCB had some concerns on listing just one international instrument, particularly one that had not yet fully ratified. She preferred not to list a whole long list of those. She supported the proposal made by the Delegation of Guatemala.

294. The Delegation of the EU and its Member States supported Option 2 of Article 10.1. With respect to Article 10.2, it recalled the comment made by the Delegation of Barbados on the nature of the discussion in the Committee. That was an instrument on the protection of TK and Article 10.2 went far beyond that. Therefore, it respectfully proposed to delete Article 10.2, as those rights were enshrined elsewhere in the United Nations.

295. The representative of CISA stated that the Nagoya Protocol should not be included not only because it had not been ratified but also because Indigenous peoples disagreed with of those Articles. He suggested not including a list. He disagreed with the Delegation of the EU on the deletion Article 10.2.

296. The Delegation of Sri Lanka supported Option 2. Regarding Article 10.2, it supported the proposal made by the Delegation of Indonesia.

297. The Delegation of the Russian Federation supported Option 2 of Article 10 with the corrections to Article 10.1 made by the Delegation of the USA. It considered that it inappropriate to include a list of international legal documents in Article 10.1. It did not object to adding to the text the words “local communities and nations”.

298. The representative of FAIRA proposed a new article: “10.3 The provisions set forth in this instrument shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” That proposal was consistent with Article 46 of the UNDRIP.

299. The representative of Tulalip Tribes suggested adding “, as appropriate,” after “this instrument” in Option 1. He stated that most of other international and regional instruments were negotiated at a time when the rights of Indigenous peoples and local communities were not addressed. It was important to follow them but they should be taken into account when appropriate.

300. The Delegation of the Islamic Republic of Iran stated that the instrument should be an international legally binding instrument, so it suggested deleting “and regional and national” in Option 1 of Article 10.1. It also suggested deleting “and processes”, because an instrument could not be overshadowed by other process. Regarding Article 10.2, it proposed that “indigenous people or local communities or nations” should be replaced by the word “beneficiaries”.

301. The representative of the Tupaj Amaru proposed alternative Article 10.1: “Protection of the traditional knowledge stipulated in the present instrument shall take into account other international instruments in force and other in the process of being negotiated on the protection of traditional knowledge.” He also supported the proposal made by the Delegation of Guatemala.

302. At the request of the Chair, the Secretariat introduced Article 11 (National Treatment and Other Means of Recognizing Foreign Rights and Interests), and the Chair invited comments thereon.

303. The Delegation of the USA speaking as an expert at IWG 2, there was no text because the experts realized that many Member States who had significant Indigenous peoples populations had already established different sorts of national legislative regimes to protect their interests. Those national legislative regimes were often highly particularized to address the specific needs of their particular Indigenous peoples or specific tribes or a single group. There was a concern that any instrument text which established a broad principle of national treatment could produce more chaos than beneficial effects.

304. The Delegation of Mexico suggested using the wording of Article 11 (National Treatment) in WIPO/GRTKF/IC/18/4: "The rights and benefits arising from the protection of traditional knowledge under national/domestic measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions."

305. The representative of Tupaj Amaru stated that what the Delegation of the USA indicated was that the IP issue related to TK should be dealt with at national level. There were some provisions on the protection of TK in many countries. He thought that there was a contradiction in the statement made by the Delegation of the USA. The Committee was in the process of developing an international mechanism precisely so as to provide the protection to TK, which was part of the cultural heritage of Indigenous peoples. If countries had already developed instruments at national level, it would not have been necessary for the Committee to work on it. He believed that there were no appropriate means in their existing legislation mechanisms in many countries, and sufficient IP rules and regulations, either. Therefore an international instrument was urgently needed to provide legal protection for TK. He fully agreed with the proposal made by the Delegation of Mexico.

306. The Delegation of the USA stated that there was nothing contradictory in what it had said. The USA established many domestic laws for the benefit and protection of its Native American peoples. The Federal Government of the USA recognized over 400 dependent sovereign nations with whom they had a complex legal and statutory relationship. The last sentence as proposed by the Delegation of Mexico meant that, if Mexico had some financial support system which was for the benefit for its own Indigenous people, Mexico would be obliged to provide that same benefit to Indigenous people from Canada, USA and all other areas of the world. It suggested bracketing that proposal. It also suggesting replacing "prescribed country" with "Member State".

307. The Delegation of Australia stated that two fundamental issues identified by IWG 2 were national treatment and reciprocity. There might be other mechanisms required. Those were complex issues, and it wished to reserve the right to come back on those issues. It provided simple textual proposals: "National treatment. Reciprocity. An appropriate means of recognizing foreign rights holders."

308. The representative of CISA suggested that the text should reflect a need for developing an international monitoring or arbitration system in order to give redress for the benefit of Indigenous peoples and local communities. He introduced some cases and pointed out that Mr. Miguel Martinez indicated in his studies on Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations that an international body needed to be created to ensure that Indigenous people received justice. He stated that it could not accept the comments made by the Delegation of the USA.

309. The Delegation of the USA thanked the Delegation of Australia for its thoughtful list. It proposed an addition under "national treatment" which was "[n]ational treatment as to all domestic law or national treatment as to laws specifically identified to fulfill these principles." One issue in the IP contexts was that what laws national treatment was based on. Certainly there had been some distinctions. For example, the EU countries did not extend national treatment to all countries for some of their IP provisions, because they determined that they were not within the ambit of international obligations.

310. The Delegation of the Bolivarian Republic of Venezuela did not understand why the term "foreign" was

referred to in that article. The *Guajiros* were a people living in the northwestern Venezuela and they were constantly crossing the border between the Bolivarian Republic of Venezuela and Colombia. They were recognized by both the Bolivarian Republic of Venezuela and Colombia but they basically identified themselves as *Guajiro*. This was addressed by establishing legislation on the same and customs would be taken into account when it came to dispute settlement. Venezuelan would be foreigners to the *Guajiro* Indigenous peoples. He suggested making it perfectly clear what "foreign" referred to.

311. The Delegation of South Africa, speaking on behalf of the African Group, concurred with the proposal made by the Delegation of Mexico. The proposal aligned with the TCEs text, which had maintained a clear demarcation with the national treatment. The issues of reciprocity and foreign rights holders which had been highlighted by the Delegation of Australia needed special attention.

312. At the request of the Chair, the Secretariat introduced Article 12 (Trans-boundary Cooperation), and the Chair invited comments thereon.

313. The Delegation of Indonesia suggested replacing "and consent" with "and prior informed consent". Most of the TK was shared, however this was unregulated.

314. The Delegation of Japan suggested replacing "contracting Parties" with "States". There were two "shall" and it suggested replacing both of them with "should".

315. The Delegation of Mexico suggested that the brackets around "and consent" be removed.

316. The Delegation of the USA supported the comment made by the Delegation of Japan in terms of changing the references to "contracting Parties" to "Member States" or to "States".

317. The Delegation of the EU and its Member States supported the comments made by the delegations of Japan and of the USA in terms of changing "contracting Parties". It believed that it would be better to change it to "Member States" as that was more in conformity with the previous suggestions relating to "contracting Parties".

318. The Delegation of South Africa, speaking on behalf of the African Group, supported the Article in its entirety as it was originally. It also supported the addition of "and prior informed consent" suggested by the Delegation of Indonesia.

319. The Delegation the Bolivarian Republic of Venezuela supported the proposal made by the Delegation of Indonesia on "and prior informed consent". It suggested replacing "holders" with "owners".

320. The Delegation of Canada supported the comments made by the Delegation of Japan and supported by the delegations of the USA and of the EU. It suggested keeping the brackets around "and consent" and adding brackets around "and prior informed consent".

321. The Delegation of Nigeria supported the statement made by the Delegation of South Africa, speaking on behalf of the African Group. It also aligned itself with the position of the Delegation of Indonesia on the issue of PIC.

322. The Delegation of Niger supported the text as it was, and subsequently amended by the Delegation of Indonesia. In Africa and particularly in Western Africa, most TK was shared among people living on different sides of a national border. It was difficult to look at a specific ethnic group or tribe which was living within the border of just one State.

323. The representative of Tupaj Amaru proposed a new article, which was inspired by the UNDRIP: "Restitution and Reparation. The indigenous peoples and local communities claim the rights to compensation, restitution and restoration of their cultural heritage, in particular their traditional knowledge, traditional cultural expressions usurped without their free and informed consent and, in violation of their traditional customary laws."

324. The Chair proposed the establishment of an informal open-ended drafting group to work further on the text of draft articles as contained in document WIPO/GRTKF/IC/18/5. The informal open-ended drafting group work would have the objective of cleaning the text, as far as possible, by reducing its

length and complexity through reducing the number of options and alternative drafting proposals, especially, where those were clearly issues of drafting. Further, the drafting group should not add any new text or resolve complex policy issues, as these were for the IGC to resolve. It should, however, identify outstanding policy issues. The goal was to have one or two basic options for each article. The Chair emphasized that the drafting group was not a decision making body, and that the text emanating from the drafting group was not binding. He proposed that the drafting group be chaired by Mr. José Ramón López de León Ibarra (Mexico), who was one of the Vice-chairs of the IGC. The drafting group could appoint its own rapporteur(s), and participation was open to all delegations and observers. Observers had the same capacity as they had in the IGC. The drafting group would work on the English version of the text, and the Secretariat could be available to record the changes to the text, if so required. The drafting group's text would be presented by the group's Chair or rapporteur(s) in plenary on Friday morning for noting, and adoption as the next draft text of the eighteenth session of the IGC. The Chair or rapporteur(s) should also report on outstanding policy issues identified, and such report would form part of the report of the eighteenth session.

325. [Following the work of the informal drafting group], its Rapporteur (Ms. Kim Connelly-Stone, New Zealand) presented the following Report to Committee:

"Introduction

1. Following the discussion of the Draft Articles on the Protection of TK [document 18/7] during plenary, an open ended drafting group was formed. The group had two tasks:

   a. to reduce the number of options and alternatives in the text; and

   b. to identify significant, outstanding policy issues.

2. The drafting group was able to clean the text by deleting the following:

   a. the names of Member States or accredited observers that had made proposals;

   b. the proposals of accredited observers that had not been supported by Member States; and

   c. commentary from IWG 2.

3. The group was also able to reduce the number of options and alternatives in some articles. I would like to acknowledge the flexibility and good spirit shown by a number of delegations who withdrew their proposals or agreed to combine them with those of other delegations.

4. This report identifies the outstanding policy issues in each article.

Article 1: Subject matter of protection

5. There are outstanding policy issues in relation to both the definition of TK and the eligibility criteria.

Definition of TK

6. On the definition of TK, we still disagree on whether to have a general and open definition, or a more descriptive definition of the features of TK. The text still contains two similar options for the more general approach (options 1 and 3), and it has been suggested that the proponents of options 1 and 3 work together to condense their options ahead of the next IGC.

Eligibility criteria

7. There are still several options for the eligibility criteria of distinctiveness, the collective nature of TK, and cultural identity. The variants are very similar and in some cases the differences only reflect drafting preferences, which unfortunately we were unable to resolve.

8. There is still substantive disagreement on the inclusion of the following eligibility criteria:

   a. whether TK must be a unique product of a particular indigenous people or local community;

   b. whether to only include TK that has not been made widely known outside the community; and

   c. whether to exclude principles, rules, skills that are normally and generally well known.

9. We also disagree on the following issues:

   a. whether the eligibility criteria should be cumulative or stand alone; and

   b. whether we need a definition of secret TK, and whether the definition should also include sacred TK.

Article 2: Beneficiaries of protection

10. The outstanding policy issues on the question of beneficiaries include:

    a. how to deal with the issue of nations;

    b. whether individuals or families should be included; and

    c. whether we can refer to indigenous peoples (plural) – some states could not support this.

11. Within the options that do not include the concept of nations, the differences are in many cases a matter of drafting preference. As these could not be resolved in the time available, it was suggested that the proponents of the various options work together to combine their texts ahead of the next IGC.

Article 3: Scope of protection

12. On the scope of protection we still have three options which reflect different policy approaches. One approach is to prescribe rights. The other focuses on certain activities which should be regulated or not be permitted and provides States with flexibility to determine how to achieve this.

13. Within both approaches we continue to disagree on the scope of protection, including:

    a. whether protection should be limited to matters such as acknowledgement, attribution and offensive use, or whether it should also extend to commercial use; and

    b. the extent to which protection could apply to TK which is considered, in the legal sense, to be currently in the public domain. For example, should protection only apply where TK is not widely known outside an indigenous people or local community.

Article 4: Sanctions, remedies and exercise of rights

14. There are three options on sanctions, remedies and exercise of rights. The outstanding policy issue is whether we should be prescriptive about sanctions (as in option 2), or provide domestic flexibility (as in options 1 and 3).

Article 5: Administration of rights

15. There is only one option on the management of rights, but with different views on the appropriate functions of competent authorities. Outstanding policy issues include:

    a. the degree to which States should have a role, for example should “consultation” or “authorisation” of indigenous and local communities be the standard;

b. whether the functions of a competent authority are directed to the internal business of an indigenous people or local community – such as negotiating mutually agreed terms, or relate more to administrative or judicial functions that would be carried out by government authorities – such as supervising benefit sharing or determining if certain acts are an infringement.

Article 6: Exceptions and limitations

16. There is general agreement that the article on exceptions and limitations should allow for continued customary use, but disagreement (in the options for paragraph 6.1) on how to reflect this.

17. We also agree that the Article should include a test for the formulation of domestic exceptions (as reflected in paragraph 6.2), but disagree on how this should be formulated. For example should we use a variant of the Berne 3 step test or create a new test that is more tailored to the characteristics of TK.

18. There is not consensus on whether we should prohibit the creation of exceptions dealing with secret or sacred TK.

19. The inclusion of a limitation on the scope of protection, so that it would not hinder or encumber the independent discovery, is contentious for some delegations. There was no agreement on its inclusion so it remains an outstanding policy issue. There was also a question about the placement of such a provision, and whether it might sit in article three on the scope of protection.

Article 7: Term of protection

20. On term of protection we have two options. The outstanding policy issue is whether the term of protection would last as long as TK meets the eligibility under Article 1 (as expressed in option 1), or could be limited in some way (under option 2).

Article 8: Formalities

21. There are two options on the question of formalities. The outstanding policy is whether or not to require formalities.

Article 9: Transitional measures

22. There are two options on transitional measures. The outstanding policy issues include:

a. whether or not the protections for TK would apply to ongoing uses of TK that began before such protections come into force; and

b. whether or not intellectual property rights over TK subject matter previously obtained by third parties should be preserved.

Article 10: Consistency with the general legal framework

23. There are two options on consistency with the general legal framework. One approach is to “take account” and “act consistently” with other international instruments. The other approach is to “leave intact” or “not affect” protection under other instruments. The outstanding issues include whether to:

a. make references to particular instruments, such as the Nagoya Protocol, as this would necessitate the inclusion of a long list of relevant treaties;

b. refer to national and regional as well as international instruments (in paragraph 10.1 option 1);

c. refer to processes as well as instruments (in paragraph 10.1 option 1); and

d. refer to indigenous peoples specifically or beneficiaries generally in the provision dealing with diminishing or extinguishing rights (in paragraph 10.2 option 2).

Article 11: National treatment and other means of recognising foreign rights and interests

24. We have yet to determine the most appropriate way to recognise foreign rights and interests. A number of options have been identified, including national treatment, reciprocity or the development of an alternative means.

25. One of the policy issues we need to consider is the impact that recognition of foreign right holders would have on mechanisms that have been put in place domestically to address the situation of particular indigenous peoples.

Article 12: Transboundary cooperation

26. There is one option on transboundary cooperation. The general approach is that where TK is located in different territories, then States would co-operate. One of the outstanding issues is whether the cooperation is with the “participation” or with the “consent” of TK holders.

[End of the report]”

326. The Delegation of South Africa, speaking on behalf of the African Group, noted that the Rapporteur had identified the key areas where divergence had occurred. In line with the recommendation on the TCEs, it requested that priority at IGC 19 should be given to those areas where divergences still existed.

327. The Delegation of India shared the same concern raised by the Delegation of South Africa, speaking on behalf of the African Group. The outstanding issues needed to be clearly identified and discussed before forming the informal drafting group. It had also noticed that there were some similar issues in both TK and TCEs documents. It suggested identifying such issues and discussing them together, if possible. It requested that there had to be some time be allocated at IGC 19 to look into those issues.

328. The Delegation of Egypt supported the statements made by the delegations of South Africa, speaking on behalf of the African Group, and of India. Since a certain number of issues had been agreed on, it was not necessary to discuss them again. Regarding the issues which were not agreed upon, the drafting group could draw up a list of those issues on the basis of the discussions during the last sessions and the Committee could take a final decision. In that way, the Committee would have achieved its task.

329. The Delegation of Sri Lanka agreed with the delegations of India and of South Africa, speaking on behalf of the African Group. It stated that most of the issues on TK linked with the issues on TCEs, as well as GRs. It would be better to discuss TK associated with TCEs and GR at the next session of the Committee.

330. The Delegation of Guatemala asked whether the wiki procedure which was first applied to TCEs or a similar one would apply to TK.

331. The Chair stated that the wiki procedure had not produced many results, and had not been very productive. Unless the Committee believed that the same procedures were needed with regard to the other items, he did not intend to apply the same procedure to the other topics. He was, however, open to suggestions.

332. The Delegation of the USA stated that the Rapporteur had done an excellent job in summarizing the outstanding issues and the major divergences. Consistency between the TCEs and TK documents was important. The Committee was doing a good job of identifying issues of convergence. But the Committee should not be a slave to consistency because there would be some points where TK protection and TCEs protection diverged. It did not think that any one document of the two should be made a priority and that the other document should conform to the first one. But it believed that everyone should be mindful of trying to maintain as consistent a system as possible with existing concepts and norms in IP and with existing concepts in the world of the rights of Indigenous peoples.

It agreed with the delegations of South Africa, speaking on behalf of the African Group, and of India. The Committee should focus time on outstanding issues. It wondered whether it would be useful for Member States to submit questions on both TK and TCEs documents to the floor. For example, there were some word choices in those documents. One delegation preferred the word “X” and another delegation preferred the word “Y”. But there was no any particular explanation of why that word was not already covered by something else. The Delegation suggested asking questions in a session and it believed that the responses would be helpful.

333. The Delegation of the Bolivarian Republic of Venezuela supported the proposal made by the Delegation of the USA, noting that that would help clarify the use of some terms.

Decision on Agenda Item 7:

334. The Committee took note of the text of the draft articles on traditional knowledge prepared by the open-ended informal drafting group established by the Committee, based on WIPO/GRTKF/IC/18/7. The Committee requested that the text be made available as a working document for the Committee at its next session. The Committee invited the Secretariat to re-publish the glossary on intellectual property and traditional knowledge (WIPO/GRTKF/IC/18/INF/8) as an information document for the next session of the Committee.

AGENDA ITEM 8: GENETIC RESOURCES

335. The Chair recalled that IWG 3 had taken place in February/March of 2011. He proposed that an informal open-ended drafting group work on the objectives and principles in WIPO/GRTKF/IC/18/9, with the objective of cleaning the text as far as possible. The group should try to reduce the text's length and complexity by, for example, reducing the number of options and alternative drafting proposals, especially, where those were clearly issues of drafting. Further, the drafting group should not add any new text or resolve complex policy issues, as these were for the IGC to resolve, but it should identify outstanding policy issues. The rules were basically the same as those of the open-ended drafting groups on TCEs and TK. The goal was to have one or two basic options for each objective and principle. He emphasized that the drafting group was not a decision-making body, and that the text emanating from the drafting group was not binding but could form the basis for further work. It was proposed that the drafting group be chaired by one of the IGC's Vice-Chairs, Mr. Vladimir Yossifov (Bulgaria). The drafting group could appoint its own rapporteur(s), and participation was open to all delegations and observers. Observers had the same capacity as they had in the IGC. The drafting group would work on the English version of the text, and the Secretariat could be available to record changes to the text, if required. The drafting group's text would be presented by the rapporteur(s) in plenary on Friday morning for noting, and adoption as the next draft text of the eighteenth session of the IGC. The rapporteur(s) had also to report on outstanding policy issues identified, and such report would form part of the report of the eighteenth session. The Chair invited Mr. José Ramón López de León Ibarra, who had chaired IWG 3 and was also a Vice-Chair of the IGC, to report on IWG 3.

336. Mr. José Ramón López de León Ibarra reported that IWG 3, in accordance with the mandate given by the IGC, had first discussed objectives and principles in plenary. The text of objectives and principles, as originally proposed by Australia, Canada, New Zealand, Norway and USA (WIPO/GRTKF/IWG/3/7), as amended by the African Group (WIPO/GRTKF/IWG/3/8), had been placed on a screen and experts had made comments and drafting proposals on the text. Those drafting proposals were incorporated in the text. Subsequently, an open-ended drafting group had been established to review and, as far as possible, streamline and clean up the plenary's text. This drafting group had been established in a transparent manner, and had been all inclusive. The drafting group had been chaired by experts from South Africa, Mr. Tom Suchanandan, and from Australia, Mr. Ian Goss. The text was presented to the plenary by the drafting group's rapporteur, Mr. Goss, and all experts had been able to comment thereon. IWG 3 had noted the text of objectives and principles but did not adopt or endorse them. IWG 3 had requested that the text, together with the rapporteur's introduction and comments on the text made during the plenary of IWG 3 on Thursday, March 3, 2011, be compiled and transmitted to the IGC for its consideration at the eighteenth session. This text was presented to the IGC as document WIPO/GRTKF/IC/18/9. Regarding the options for future work relating to IP and GRs, the IWG 3 had considered and extensively discussed the three clusters of options as contained in WIPO/GRTKF/IWG/3/6, with reference to documents WIPO/GRTKF/IWG/3/2, WIPO/GRTKF/IWG/3/3, WIPO/GRTKF/IWG/3/4, WIPO/GRTKF/IWG/3/5, WIPO/GRTKF/IWG/3/11, WIPO/GRTKF/IWG/3/12, WIPO/GRTKF/IWG/3/14 and WIPO/GRTKF/IWG/3/15. IWG 3 had also discussed which options were most likely to achieve the objectives as prepared by the drafting group. The group requested that the summary of the discussion on the options be compiled and transmitted to the IGC for its consideration at its eighteenth session. Such document was to include, if necessary, a matrix, and to take into account a number of suggestions made by experts. That document was presented to the IGC as WIPO/GRTKF/IC/18/10. Based on the discussion of the options, some experts at IWG 3 had suggested that the IGC request the Secretariat to proceed with, and finalize, subject to a need for continued updating where applicable, its work on the practical mechanisms and activities referred to in options C.1, C.2, C.3, as referred to in WIPO/GRTKF/IWG/3/6. In addition, IWG 3 had noted the glossary of key terms related to GRs and IP relating to WIPO/GRTKF/IWG/3/13 on the understanding that it would be re-issued as an information document at the present session of the IGC (WIPO/GRTKF/IC/18/INF/9). IWG 3 had requested that the summary report of the proceedings (WIPO/GRTKF/IWG/3/16), including the list of participants, be submitted to the IGC. The summary report was made available as document WIPO/GRTKF/IC/18/8. On behalf, therefore, of the

experts of the IWG 3, the Chair of IWG 3 presented the following documents for consideration: the summary report of IWG 3, contained in WIPO/GRTKF/IC/18/8; the draft objectives and principles relating to IP and GRs prepared by IWG 3, contained in WIPO/GRTKF/IC/18/9; the options on IP and GRs summary of discussion at IWG 3, contained in WIPO/GRTKF/IC/18/10; and, the glossary of key terms related to IP and GRs, contained in WIPO/GRTKF/IC/18/INF/9. He reiterated that the IGC was the negotiating, and decision-making body. The role of the IWG was only to support, and to facilitate the negotiations of the IGC. Those underlying principles had guided the work of IWG 3. He hoped that the IGC was able to appreciate the comments made by IWG 3, and to accept those documents as the basis of future work, in particular WIPO/GRTKF/IC/18/9. He thanked the experts at IWG 3 for their dedication and invaluable contribution to the lively, and cordial discussion at the session. This was the first time that the IGC had had such an open and technical discussion on this topic, which was very valuable for the work of the IGC.

337. The Delegation of the EU and its Member States thanked WIPO for organizing IWG 3, and for providing the session with a summary report, the draft objectives and principles together with the experts' comments thereon and a summary of the discussions on the options for future work. During IWG 3, experts from EU Member States had actively participated in the informal drafting group on objectives and principles and had been impressed by the excellent organisation and cooperative atmosphere. He believed that significant progress had been made and welcomed continued substantive discussions concerning the draft objectives and principles as contained in WIPO/GRTKF/IC/18/9. He hoped that the various options throughout the text would assist the IGC in its decision-making capacity and would pave the way for reaching consensus on divergent issues. The outcome of IWG 3 was meant to merely assist the IGC in its work. At IWG 3, experts from EU Member States had welcomed substantive discussions on the EU's proposal on a mandatory disclosure requirement. The Delegation, therefore, thanked experts who had expressed support for the EU's proposal, as well as experts who had made detailed comments or raised highly relevant questions. He believed that the proposals on a mandatory disclosure requirement before the Committee could play an important role in supporting ABS, and looked forward to continuing discussions on options likely to achieve those objectives, as prepared at IWG 3.

338. The representative of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of the FAO commended the good progress which the IGC had made on all of the three tracks within its mandate. He provided information on the work ongoing under the aegis of the ITPGRFA relevant to clusters A and B of WIPO/GRTKF/IC/18/10. The ITPGRFA had established the multilateral system (MLS) of ABS over the last three years that had created a global gene pool of the 64 most important food crops for global food security. That gene pool and the MLS of ABS included 1.5 million samples of plant genetic material from 64 crops which together constitute about 80% of the genetic base of the world's food from plants. The ITPGRFA had published a database on its website of genetic material notified to the Secretariat and included in the MLS. Currently, genetic material exchanged under the standard material transfer agreement (SMTA) amounted to 600 to 800 transfers per day. The SMTA was essentially a standardized private contract concluded between provider and recipient of the genetic material within that ABS system. Each SMTA was then reported to the Governing Body of the Treaty via the Secretariat and stored in a Global Data Store hosted at the United Nations Information and Computing Centre (UNICC) in Geneva. The operation of that new ABS system had a direct relationship to clusters A and B, as well as to the objectives and principles. He proposed that the IGC reflect that linkage in the current working text. Option A.2 in cluster A, might be fruitfully linked to the information systems as a backbone of the MLS of ABS because those systems identified the genetic material within the MLS which could not be claimed in patent applications by recipients in the form in which it was received from the system. If work was undertaken by the IGC on disclosure requirements for GRs on any of the options related to cluster B, it was important that the MLS was disclosed as the source of the genetic material in patent applications claiming the invention derived from or incorporating that genetic material. That was consistent with the multilateral approach of ABS adopted by the Contracting Parties to the Treaty. The representative also referred to Agenda Item 7 on TK, in particular to the draft articles which related to the interfaces with other international processes. That provision currently included a reference to the outcomes of

the Tenth Meeting of the Conference of Parties (COP 10) at Nagoya of the CBD which adopted the Nagoya Protocol. The decision of COP 10 identified the core elements on the new regime of ABS and specifically four elements. Those were the CBD, the Bonn Guidelines, the Nagoya Protocol and the ITPGRFA. In light of that decision of COP 10, it might be worth to also consider including in those provisions on TK the ITPGRFA for comprehensiveness and completeness. That would be a way of remembering that Article 9.2 ITPGRFA provided for the protection of TK related to plant GRs for food and agriculture held by farming communities subject to national law and policies for farmers' rights. The Governing Body of the ITPGRFA had just initiated a process with a series of regional workshops and consultations on the national implementation of farmers' rights and, in that process, it would be worthwhile referring to the work of the IGC.

339. The Delegation of the Plurinational State of Bolivia sought clarification on the clusters in WIPO/GRTKF/IC/18/10. It asked whether those were a summary of the clusters in document WIPO/GRTKF/IC/17/6 or whether they were developed by the experts at IWG 3. It had submitted a written proposal at IGC 17, which was not reflected in the said clusters.

340. In response, the Secretariat indicated that the options that were included in WIPO/GRTKF/IC/18/10 in its annex were the original options in the annex to document WIPO/GRTKF/IWG/3/6, exactly as they were presented to IWG 3. Drafting proposals by Member States were also included but without corresponding footnotes, as done previously.

341. The Delegation of Spain indicated that, as of May 6, 2011, the Spanish version of WIPO/GRTKF/IC/18/10 had not yet been published on WIPO's website. It reiterated the importance of having the translated documents available in good time for proper participation in the discussions, and hoped that this would be the case at the next session. It could, therefore, not make any comments on that document due to insufficient time to study the Spanish version.

342. The Secretariat thanked the Delegation of Spain, and fully understood the need to have all of the language versions available as soon as possible. Document WIPO/GRTKF/IC/18/10 was a lengthy and detailed report of the technical discussion at IWG 3 which had taken place only seven or so weeks previously. All other documents had been prepared in time. The Secretariat had done its very best to get all the documents and their translations ready in time, and in this particular case sought participants' indulgence and understanding because of the short length of time between the sessions.

343. With regard to WIPO/GRTKF/IC/18/10, the Delegation of China believed that including the disclosure requirement in patent legislation could improve the current IP system. The disclosure requirement could help to establish a balanced mechanism between the CBD and the IP system so as to promote PIC and ABS. Therefore, the disclosure requirement should be a priority.

344. The Delegation of South Africa, on behalf of the African Group, noted the contribution made to the WIPO/GRTKF/IC/18/10 through the participation of the number of African experts in that process. It reiterated that it had made a presentation on its national recording system in South Africa that especially fitted in with the discussions around the issues on cluster A. It noted that much of the work had been done on cluster C. With respect to cluster B, the African Group noted the progress made in the development of the draft objectives and principles. However, the work on the substantive issue on GRs had not yet received attention. The substantive issues were reflected as options as contained in WIPO/GRTKF/IC/17/6. It reiterated on behalf of the African Group, that the mandate of the IGC was very clear on GRs - to draft an international legal instrument. In this regard, and after the work of IWG 3, it was obvious that the creation of an international legal instrument on effective protection of GRs may not be necessary. Instead, existing pertinent instruments needed to be amended. It was also obvious that the issues listed in clusters A, B and C had to be considered together, and not in isolation, with a view to achieving true protection of GRs as established by the IGC mandate. The analysis of the list of options had highlighted the link between the Nagoya Protocol and WIPO, particularly regarding the means to ensure that GRs associated with TK, and derivative products, had been accessed in accordance with the PIC and other relevant principles. In line with the IGC's mandate which instructed commencement of text-based negotiations, the IGC should start text-based negotiations, not only on objectives and principles, but also on substantive issues. Concerning the

mandatory disclosure of GRs used in patent applications, it was, therefore, proposed that the IGC commence negotiations on the mandatory disclosure requirement as specified in cluster B, which would enable an appropriate way to ensure PIC and fair and equitable benefit-sharing in line with the Nagoya Protocol. The draft text for negotiations should be based on the following: First, the two current proposals on the mandatory disclosure requirement, namely the "Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications: Proposals by Switzerland" (WIPO/GRTKF/IC/11/10), and the proposal of the EU "Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications" (WIPO/GRTKF/IC/8/11). That should ensure the amendment of the Patent Cooperation Treaty (PCT) and the Patent Law Treaty (PLT) reflecting the mandatory disclosure requirement on GRs. Second, the cooperation with the recognized certificate of compliance as stipulated in the Nagoya principles. A workplan and an allocation of sufficient time for the negotiation of the substantive issues at IGC 19, in line with the mandate of the IGC, were necessary.

345. The Delegation of the Bolivarian Republic of Venezuela supported the Delegation of Spain with regard to the publication of Spanish documents in time, but also understood the Secretariat's predicament. It enquired as to the rules of procedure obliging participation of Member States in the working groups. It wanted to know the session at which the said rules had been adopted and where they were written down.

346. The Delegation of Brazil supported the statement made by the Delegation of South Africa, on behalf of the African Group. It believed that clusters A and C had some elements that could only be of interest, if the mandatory disclosure requirement in option B.1 had been achieved. It believed that the IGC should focus on concrete proposals, and wanted them tabled, especially, those regarding the declaration of source as proposed by the African Group and by Switzerland. It believed that that proposal should include the internationally recognized certificate of compliance.

347. The Delegation of Australia took note of WIPO/GRTKF/IC/18/10. Experts at IWG 3 had critically discussed and analyzed existing national systems. It supported the suggestions from experts at IWG 3 for a study of such practical cases. Such a study could include information on the practical and operational context of the existing disclosure mechanisms in national systems. A compilation of practical cases of disclosure could provide an analysis and include the number of cases actually occurred in those systems.

348. The Delegation of Colombia supported the statements made by the delegations of South Africa, speaking on behalf of the African Group, and of Brazil. Progress on the substantive issues was important, and it could be achieved through an additional IWG.

349. The Delegation of the Islamic Republic of Iran fully supported the statements made by the Delegation of South Africa, on behalf of the African Group. On cluster A, it was premature at this stage to discuss ideas such as the invention of information systems, e.g. databases on GRs for defensive protection, without an efficient, and legally binding international instrument in place to protect GRs. Therefore, it could not support such a process. It could create practical difficulties to have an information system on GRs under option A.2, while facing misappropriation and misuse of GRs in the absence of an effective mechanism to protect GRs. A common understanding on the effective protection of GRs through an internationally binding mechanism was required before discussing cluster A.

350. The Delegation of New Zealand reiterated that a number of experts at IWG 3 had identified the options under cluster C as particularly capable of being dealt with by the Secretariat, on the basis that they were practical tasks that were either completed or in the process of being completed. Therefore, it was unnecessary to continue to have them on the list of options that were connected to an outcome of the work of the IGC and an international instrument on the same. Accordingly, the Delegation wanted to put the proposal back on the table, that cluster C did not really fit with the other options. It supported the suggestion made by the Delegation of Australia about a practical study on disclosure. IWG 3 was the first time that there had been a good discussion about the details of disclosure. The issue raised quite a few questions, and could facilitate work under option B.3, enabling the IGC to make recommendations about disclosure.

351. The Delegation of Japan noted the intensive on-going discussion of objectives and principles at the present session of the IGC. The way forward for the options on future work might depend on the selected objectives and principles. Therefore, it would be better to intensify the discussion on objectives and principles. With regard to WIPO/GRTKF/IC/18/10, concerning the biopiracy issues, it insisted that there were two different aspects, namely, erroneously granted patents and CBD compliance issues. Concerning erroneously granted patent issues, it had tabled its proposal on the database. It understood that this database proposal was supported by a wide variety of Member States of WIPO. Therefore, the approach in option A.2 was the appropriate way forward. The CBD compliance issues had to be dealt within the context of the CBD as an organization distinct from WIPO.

352. The Delegation of Australia thanked the Delegation of New Zealand for its support of a study on national disclosure mechanisms currently in place. It offered support for the suggestion of finalizing the work on the options in cluster C. It supported the statement of the Delegation of Japan regarding the utility of databases, acknowledging that those databases were in existence and could be further improved.

353. The Delegation of South Africa reiterated its concern about the prioritization of work on the objectives and principles without having determined what the use and value of those objectives were. It seemed that the IGC was putting the cart before the horse. It did not want to invest any more time in looking at the objectives and principles until the IGC had a clear view as to what the purpose was. The Delegation's presentation had built on the proposals from Switzerland and the EU on disclosure. As those had already been discussed, it assumed that there was a clear intention on the part of Member States from Europe, Asia and Africa to focus on the disclosure issue. It did not see a need for further studies. Any study should focus on the social impact of patents derived from developing countries which paid a high premium for patents introduced in their countries. Regarding a study on the administrative cost of implementing the disclosure requirement, the study had to be conducted in terms of the costs and impacts resulting from the fraudulent and false submissions. It proposed that the two studies be presented before the IGC. Clusters C and A were a means to an end, and could never be an end in themselves. It supported databases, but emphasized that they were not the end point of the process. South Africa was building its own database. It referred to the film on the WIPO-sponsored Maasai project on documentation of TCEs that was launched at the present session. It supported the use of databases, but their purpose needed to be clearly articulated. Therefore, it supported the efforts by Japan and it would work with them in that direction. But the IGC should not lose sight of disclosure and what to do with it as the object to be achieved.

354. The Delegation of India recalled that the issue of mandatory disclosure had been discussed for quite some time. Mandatory disclosure was necessary, and came before everything else. It should not be limited to the country of origin. Even if the IGC were to create a database, it should not be at the cost of mandatory disclosure. This should not be lost at WIPO, WTO and in the Nagoya Protocol which had already shown the way. The plunder of GRs and TK had to stop.

355. The Delegation of the USA had been listening to the previous comments with great interest and some concern. It agreed with the Delegation of South Africa, questioning why the IGC was working on an 'objectives and principles' document if it did not know the purpose of this exercise. In its opinion, working on objectives and principles was intended to establish and to reach agreement on what the purpose was. It highlighted that the purpose of the USA in engaging in that discussion in full and in good faith was to ensure that the patent system did not erroneously grant patents on existing TK, and that the patentee or patent applicant did not attempt to establish exclusive property rights over TK that rightfully belonged to an indigenous people or a local community. It was present at the IGC because the IGC should establish a system that ensured that GRs or associated TK were obtained from indigenous people with proper consent, and benefit-sharing based on MAT. It also believed that the patent system should work normally when GRs were not obtained from the indigenous people, and the technology, the invention or the discovery was developed without the associated TK of indigenous people. Its participation in the IGC was not limited to the mandatory disclosure system. It was, therefore, troubled by the interventions made on that issue by the delegations of India, Brazil, and the

Islamic Republic of Iran, especially the remark by the Delegation of Brazil that it was not interested in working on A or C without a conclusion on B.1. The goal of the USA was not just to amend the patent system for the sake of amending it. It was very concerned with the statements that simply inferred that the amendment of the patent system was the sole purpose of the session. If that was all some delegations were interested in discussing, it suggested that the IGC should take a break.

356. The Delegation of Sri Lanka believed that misappropriation was covered in the Nagoya Protocol. It said that the requirement related to the disclosure of origin of TK or GRs in patent applications, and it was easy to identify the country of origin if the plants were originally related to a particular country.

357. The Delegation of Namibia supported the African Group, and other delegations like Brazil and the Islamic Republic of Iran who had spoken in favor of a mandatory disclosure requirement. In response to the statement by the Delegation of the USA, if the IGC could not agree that a mandatory disclosure requirement, and an amendment of the patent law, were necessary, then maybe the IGC should take a break from that discussion. If the IGC downplayed the stalemate at the Committee on Development and Intellectual Property (CDIP), that had taken place a few days ago, then it would be evident that the IP system was still a rich man's club, for the benefit of a few selected countries, and to the detriment of the rest of the world. Finally, something could be done for developing countries through the disclosure requirement at very little cost to the patent system. The international patent system already kept track of certain uses of GRs and associated TK, through its database and reporting system. The mandatory disclosure requirement would allow developing countries to find out what happened to their resources after it had provided access to them and they had left their jurisdiction. The requirement did not entail amendments to the established patentability criteria. What was required was for the international system to help enforce contracts negotiated with the owners of GRs. If that simple request was being denied to the point that negotiating partners were even not prepared to discuss it, then maybe the IGC should reflect on how far that discussion would take it, no matter how long it would further go on.

358. The representative of the ICC noted that the question of disclosure of origin of GRs in patent specifications was clearly raising strong feelings. At IWG 3, in his capacity as an expert, he had suggested that there should be an option for a provision not to require disclosure of GRs. This was supported by some, but certainly not all. This was a significant topic, worth discussing. Referring to an ICC paper, he summarized two reasons for the ICC’s opposition to the disclosure requirement. First, it was completely unclear what was required, in respect to the nature of the disclosure and the circumstances requiring such disclosure. Second, when the details of the nature of disclosure was clarified, it was clear that the requirement was largely, if not entirely, useless for the purposes sought. He welcomed further investigations of the factual situation. At the moment, the arguments were largely based on assertions. Therefore, he supported the requests for more studies as proposed by the delegations of Australia and South Africa.

359. The Delegation of the Russian Federation supported the statement by the Delegation of Australia on a study on the experience of countries which had introduced disclosure provisions in their national patent legislation. It had spoken about this and given a whole list of specific issues at the tenth session, which was available in the reports. If a decision was made to carry out such a study, due regard should be given to the said list.

360. The Delegation of the EU and its Member States emphasized that it had listened carefully to the discussions in favor of mandatory disclosure, and appreciated some of the arguments supporting mandatory disclosure, and, even more, the reference made by some participants to the EU’s proposal. There were obviously good reasons to look at mandatory disclosure, but it was surprised that those that spoke in favor of option B.1 suggested that that meant that the IGC disregard clusters A and C. It was also surprised at the intervention made by the Delegation of South Africa. Clusters A and C were important and relevant. It definitely agreed that cluster B would be a means and not an end in itself. Therefore, it wondered why the IGC would consider cluster B and B.1 in particular. The EU had a proposal on B.1., and was thrilled to talk about the proposal but could not understand why considering B.1 as an end in itself and without the consideration of clusters A and C on their own merits. It called

for a review of all the proposals on the table, including B.1., and the merits of all of the individual proposals inclusively.

361. The Delegation of Canada echoed some concerns raised by the Delegation of the USA, and also recognized again the intervention by the Delegation of Japan and the proposal on databases made in a previous session. It supported the IGC's mandate with respect to GRs, and still believed that it was the appropriate forum for that discussion. The IGC's goal was to prevent the erroneous granting of patents. The patent system was already equipped, to a very large extent, to do this. It was as concerned that some Member States were suggesting that disclosure was the only solution. This was not the case. The options in clusters A and C provided a number of interesting mechanisms to address the issue at hand. It was also not convinced of the benefits of any potential disclosure requirement and how it would connect with the patent system, and neither with its ability to provide information on prior art, for example, or to assist in benefit-sharing. It welcomed more facts on disclosure in that regard. Because of the multi-facetted ways in which the issue could be viewed, the IGC had to build on the fundamental benefits of the patent system, and prevent the erroneous granting of patents. In that spirit, Canada was participating in the present session. It, therefore, encouraged everyone to look at the options and to make progress on the issue.

362. With respect to its genetic heritage and its traditions and culture as a developing country, the Delegation of Ecuador supported the delegations of Brazil and South Africa on behalf of the African Group.

363. The Delegation of Australia thanked the Delegation of Namibia for raising a substantive issue on GRs, namely the patent disclosure proposal. It was important that those issues concerning the revocation of patents were aired. The Delegation asked whether that particular issue was worth being explored more in the IGC's discussions, and whether there were some differences regarding revocation of patents in the proposals. It noted three separate proposals with perhaps some differences around the substantive issue: the Swiss proposal, the EU proposal and a proposal for disclosure that was in the option 2 for the principles of objective 2. Further, it emphasized the differences between an objective, a principle and an option. In that regard, it supported the Delegation of the USA that disclosure was one mechanism to achieve an objective rather than an objective in itself.

364. The Delegation of South Africa, speaking on behalf of the African Group, appreciated the positive comments on the development of clusters A, B and C as a collective. In terms of time allocation, the current session had focused more on objectives and principles. There was a need to allocate some time to the options in B so as to give it as much substantive discussion as required. To that extent, it hoped to get support for requesting a work plan allocating time for that at IGC 19. During a side event at IGC 17 in December 2010, a group of prominent scholars from leading institutions in the UK, the ESRC Centre for Economic and Social Aspects of Genomics (Cesagen), and also from the United Nations University Institute of Advanced Studies had made a presentation of a study on the use of disclosure in the patents ("Defusing Disclosure in Patent Applications"). It was an excellent and extensive study and the people that had commented on those issues were the same people that were raising questions at the present session. It reiterated that those studies had already been done. There was also an excellent study on the use of disclosure within the American system by using the Bayh-Dole Act. That was a disclosure requirement already in practice in the USA. Therefore, calling for more studies on such cases was unnecessary. Those papers, which were factually sound and proven, could be accessed through the websites. The facts had been proven within WIPO by the same people present at the said side event, where they made contributions to the discussions and complementing the presenters from leading reputable institutions within the western system of innovation. Those two points contributed towards a work plan in order to make that discussion possible within WIPO.

365. The Delegation of the USA responded to the statement of the Delegation of Namibia, agreeing with much of what had been said, but it objected to the characterization of the patent system as a 'rich countries' club'. In 2008, India had 36,000 patent applications, which were more applications than Canada had in 2009. In 2009, China had 314,000 patent applications. In 2009, Guatemala had more

patent applications than Bulgaria. So the IP system was good for innovation in all countries. Nonetheless, it agreed with some points raised by the Delegation of Namibia, and with the characterization of the mandatory disclosure requirement. It also appreciated that the Delegation of South Africa intended to look at A, B and C collectively. That was very different from what had been said earlier about not being interested in working on A and C unless B.1 on mandatory disclosure was discussed and decided. Therefore, it appreciated the recent clarifications.

366. The Delegation of Zimbabwe appreciated the comments made by the delegations of South Africa and Namibia. Its intervention was prompted by the earlier discussion on independent discovery by the ICC. Claiming that facts had not been proven confirmed the fears of developing countries. As the Delegation of South Africa had done, it referred to the studies presented at the IGC 17 side event. It reminded that there was a reason behind the arguments put forward, and due consideration should be given to that. Hence, it would welcome constructive criticism, but not views imposed on others. It seemed that many delegations had made reference to the issue of patentability criteria and the issue of whether the IGC was trying to prevent erroneous granting of patents. It tended to disagree with that assertion because that discussion was currently ongoing and extensively discussed in the Standing Committee on the Law of Patents (SCP). The IGC was trying to prevent misappropriation of GRs and to find ways to ensure that PIC was met. It noted that the refusal to disclose raised the presumption that the object in question had been acquired illicitly. That was a logical request from the owners of GRs. Having followed the discussions on disclosure at the CBD, it had observed that the same delegations which were refusing to discuss the subject at WIPO, had previously said that it was WIPO's business to discuss it. Therefore, it urged that the subject be addressed at WIPO. The proposal by the African Group was inspired by the two proposals of the EU and Switzerland. Those proposals might differ in terms of approaches, but the African Group, Switzerland and the EU had a basis on which to start. While it defended the interests of its government, it wanted to be open to other suggestions made. It hoped that along that spirit the IGC could constructively address the issue.

367. The Delegation of Niger endorsed the statements of the delegations of South Africa, speaking on behalf of the African Group, and of Namibia asking for the disclosure of the origin of GRs. That was not questioning the patent system at all. WIPO was the appropriate forum. With regard to the July package at the WTO, it referred to a communication in which the EU, the African Group and the ACP countries, Brazil and others had requested the disclosure of origin of TK and GRs. That was certainly not calling into question the patent system as argued by some delegations from the western countries.

368. The Delegation of Mexico pointed out that the three options in WIPO/GRTKF/IC/18/10 were complementary. Mexico had extensive cultural heritage of thousands of years, and extensive GRs. The Mexican nation promoted innovation by consolidating a system enhancing research of academic centers and advancing the cultural heritage for the benefit of the whole society. It believed that the two points of view were polarized, and that there was space to accommodate a compromise solution that would benefit all, and achieve proper legal protection through an IP regime that was in harmony with the current patent system.

369. The Delegation of Morocco, in supporting remarks by the Delegation of South Africa speaking on behalf of the African Group, underscored the importance of the current discussions on GRs. Having followed the discussion for the last ten years, it wished to achieve an outcome which was the effective protection of GRs as outlined in the mandate. Effective protection meant equitable benefit-sharing between providers and users of GRs as an ultimate objective. It believed that the proposal of the African Group made it possible to achieve that objective.

370. The Delegation of India, in response to comments by the Delegation of the USA, clarified that 36,812 patents were actually filed in India in 2008 and 2009. This was about 5% more than the previous year, and 80% of those were from overseas.

371. The representative of the ICC noted that the study mentioned by the Delegation of South Africa was extremely interesting but of dubious relevance. It was very good research but it did not answer the questions that needed to be answered. It showed that there was already a considerable body of information about biological materials in patent specifications. Further, the comparison with Bayh-

Dole Act was not satisfactory. If someone got funding, he was required under US law to indicate in an US patent application that funding had been obtained. Certain licensing provisions followed from that. In that case, if someone was funded, he probably knew about that. However, it could not be inferred from this that someone knew the country of origin in accordance with the terms of the CBD, if he used a particular genetic material. In the interest of being constructive, he reminded that one of the researchers to which the Delegation of South Africa was referring to was doing further research on that. They would produce more good information as they were able to search most of the database of worldwide patents. That might assist the objectives that South Africa had in mind. Referring to the presumption that refusal to disclose implied bad motives and hence suspicion, he noted that the IGC was not yet clear on its objectives. It was an objective to prevent the granting of erroneous patents. It was not clear whether that was the only objective. It was not clear whether it was an objective to use the patent system to prevent “biopiracy” unless it was an agreed principle.

372. The Delegation of the USA agreed with the comments by the Delegation of Morocco on the objective of the discussions. As the Delegation of India had pointed out in reference to the large number of foreign applications at India’s patent office, one had to study statistics very carefully. At the USPTO, India's applications had at least doubled in the past four years.

373. The Delegation of Canada supported the proposal of the Delegation of the USA and encouraged the IGC to work with the maximum transparency and fairness as possible.

374. The Delegation of Sri Lanka stated that its country had a rich cultural heritage and indigenous medicine which had been used for more than a thousand years, involving herbal plants and associated TK. In Sri Lanka, the Ministry of Indigenous Medicine had been established, but no protective mechanism for GRs and associated TK was in place. Citing the example where patent rights were obtained by foreign companies for a drug that contained two herbal plants used for making indigenous medicine, it hoped for the development of a fair and reasonable protection mechanism for GRs and associated TK. Those plants were endemic plants and subject to disclosure of the country of origin.

375. [Following the informal, open-ended drafting group] The Rapporteur of the drafting group, Mr. Ian Goss from Australia, presented the results of the work in revising the Draft Objectives and Principles in document WIPO/GRTKF/IC/18/9 for the IGC’s consideration. That work had resulted in a significant reduction in options through deletion and some merging of text, and convergence on the key issues relating to each of the objectives. He provided the Secretariat with an analysis of the remaining options, which indicated common issues raised in similar options, directed at providing further opportunities for merging or deleting options. It also identified areas where there was a lack of convergence reflected in the different options. The analysis also indicated were issues raised may be more appropriately transferred to other topics areas, specifically TK. In addition, the analysis indicated support for different options by Member States who had participated. This might provide an opportunity for Member States between now and the IGC 19 to review their positions. [Note from Secretariat: The analysis provided by the Rapporteur is annexed to this report as Annex II.] In particular, the drafting group had recommended that Member States review the options they had supported. They should determine if their particular issue was relevant to the substantive issue identified in the option and/or was already covered in another option. In relation to the objectives, there was now greater clarity and convergence on the key issues relating to each of the objectives. Objective 1 dealt with complying with laws relating to access, use, PIC, benefit-sharing and disclosure of origin. Objective 2 dealt with preventing IP rights and/or patents being granted in error in relation to: novelty and inventiveness; and not complying with requirements related to PIC, MAT, benefit-sharing and disclosure. An additional issue raised under that objective related to banning patents on life and life forms. Objective 3 related to patent and/or IP offices having available the information required to make informed decisions in granting patents and IP rights, and the recognition that some holders of TK might not want their knowledge documented. Objective 4 dealt with the relationship with international agreements. An additional item raised related to establishing an international dispute mechanism. Objective 5 dealt with the spirit of Article 7 of the WTO TRIPS Agreement and the link between GRs and TK. An additional issue raised in that objective was preventing the adverse effects

of the IP system on indigenous peoples and their rights to use, develop, create and protect their knowledge and innovation in relation to GRs. Additional issues raised in the principles, included: the inclusion or not of the term derivatives; the role of States and indigenous peoples; issues relating to self determination of indigenous peoples and local communities; and, consequences of non-compliance with objective 2.

376. The Delegation of Sri Lanka highlighted that the drafting of the agreement relating to folklore had already been discussed for more time and was at a mature stage. TK and GRs were not like TCEs. Therefore, the IGC had to take more time to discuss those in order to get them to a more mature level. Most of the issues in TK, as well as GRs were common. He reiterated that the IGC's plenary ought to take up TK associated with GRs because there were many issues relevant to both, TK and GRs.

377. The Delegation of South Africa, on behalf of the African Group, reiterated that the three elements of the work were crucial and important. It also noted the progress that was being reported earlier on the objectives and principles and, therefore, more work was needed to be dedicated to the options focusing on mandatory disclosure and other issues.

Decision on Agenda Item 8:

378. The Committee took note of the text of the draft objectives and principles on intellectual property and genetic resources prepared by the open-ended informal drafting group established by the Committee, based on WIPO/GRTKF/IC/18/9. The Committee requested that the text be made available as a working document for the Committee at its next session. The Committee also discussed options for future work on intellectual property and genetic resources, based on WIPO/GRTKF/IC/18/10. The Committee invited the Secretariat to re-publish the glossary on intellectual property and genetic resources (WIPO/GRTKF/IC/18/INF/9) as an information document for the next session of the Committee.

AGENDA ITEM 9: ANY OTHER BUSINESS

379. There was no discussion under this Agenda Item.

AGENDA ITEM 10: CLOSING

380. The representative of COICA, presenting a statement on behalf of the representatives of the Indigenous peoples, raised his discontentment with the lack of due consideration by States of views from representatives of Indigenous peoples, following the elimination of drafting proposals by the drafting group on TK, that had met on Tuesday night, May 10, 2011. He recalled the fundamental principles that had to be embodied in the proposed international legal instrument(s), which included: the protection of Indigenous peoples' rights and interests as the owners/holders of TK, TCEs, and GRs; affirmation of the universal protection of the rights of Indigenous peoples; Conformity with international norms by the adoption of the term "Indigenous Peoples" which respected their lawful status and recognized their rights; Recognition of the principle of free, prior and informed consent (FPIC), and the non-assertion or otherwise inference that States were holders of, or the beneficiaries from the utilization of, Indigenous Peoples' TK, TCEs, and GRs. He also noted that nothing in the

instrument(s) should be construed as diminishing or extinguishing the rights Indigenous peoples had or may acquire in the future. The instrument(s) must recognize Indigenous peoples' right to redress, including repatriation of TK, TCEs, and GRs taken or used without their FPIC. While Indigenous representatives were not disposed to make text proposals, Member States had failed to give due attention to, or support to their text proposals, they were prepared to speak out on matters relating to the rights, freedoms, and interests of indigenous peoples to ensure that the Committee was adequately informed of these issues. However, their continued participation must not be construed as endorsing the drafting proposals or any outcomes for that matter. On future work, he stated that the Committee had to ensure effective and equal participation by Indigenous peoples in the negotiations, at the WIPO General Assembly, and the proposed Diplomatic Conference.

381. The representative of Tupaj Amaru, reporting on the challenges faced by Indigenous peoples with regard to fair and equitable recognition of their cultural heritage by the international community, recalled the mandate given to the IGC. He believed there had been a lack of tangible progress since its establishment over 10 years ago owing to the lack of political will of Member States and the different economic and geopolitical interests on the part of the developed countries from the North. Despite years of general discussions, informal consultations, and the creation of IWGs, the Member States, insensitive to plundering Indigenous peoples' spiritual and material wealth, undermined the legal essence of and limited the scope of the draft instruments under negotiation, on the pretext of "simplifying" the texts. The process suffered from procedural failures in form and substance. Representatives of Indigenous peoples were relegated to being observers, and could not participate in the deliberations on an equal footing with Member States. As such, proposals by Indigenous peoples could not be taken into consideration, without the explicit agreement or support of one or more Member States. He stated that this was not what had happened in the negotiating process that had led to ILO Convention 169 or the UNDRIP, and it was, therefore, in his view contrary to the spirit of the Vienna Convention on the Law of Treaties. He explained the urgent need for an international legal framework with a coherent universal definition, acceptable to all, and in line with other international instruments, providing legal protection in particular to intangible TK and the sacred and secret knowledge of Indigenous peoples and communities. At a time when bioprospecting and biopiracy had reached dramatic proportions, it was disappointing to observe the systematic opposition by developed countries to the harmonization and adoption of standards for the protection of TK. Despite the fact that more than 90% of the patent applicants originated from the developed countries, double standards in policies were evident by the fact that IP law was a Western concept, which, by its very nature and scope, did not recognize the owners of TK as legal subjects, nor was it designed to protect the cultural heritage of ancestral civilizations. According to the report of the CBD concerning access to benefits stemming from the use and misuse of the indigenous cultural heritage, the following 10 huge multinationals were plundering TK, GRs and TCEs: Pfizer (USA), GlaxoSmithKline (UK), Novartis (Switzerland), Sanofi-Aventis (France), Johnson & Johnson (USA), AstraZeneca (UK), Merck & Co (USA), Roche (Switzerland), Abbott (USA) and Amgen (USA). As a result, holders' natural resources and knowledge had been robbed, without prior consent, of their living knowledge and traditions, and were deprived of the right to fair sharing of the benefits derived from the use and misuse of their knowledge.

382. The Chair assured the IGC that the statements made on behalf of Indigenous representatives had been noted and would be reflected in the report of the session. He had heard and appreciated their concerns, which were genuine, legitimate and valid. He informed the session of the meeting that he had met twice with the Indigenous representatives during the week to listen to them and clarify the constraints set by the Rules of Procedure to which the IGC had to abide. He was determined to continue finding ways and constructive means to facilitate participation of Indigenous representatives in sessions of the IGC, as their participation was substantively valuable and gave credibility to the process. Whilst respecting the Rules of Procedure agreed upon, it was important for the IGC to advance without excluding anyone.

383. The Delegation of the Bolivarian Republic of Venezuela shared the same concerns raised by the Indigenous representatives on the elimination of unsupported proposals by the informal drafting group,

emphasizing that the rules of procedure of the working groups should have been elaborated in plenary to ensure transparency. While it understood the need to make progress in the negotiations, due consideration had to be given to the small delegations that could not participate in every informal group working in parallel. Ultimately, consensus from all delegations was necessary, and the Delegation hoped that the issue would be addressed. It underscored the importance of the credibility of the process.

384. The Delegation of the Plurinational State of Bolivia, supporting the concerns expressed by the Indigenous representatives, said due attention had to be given to the proposals of the Indigenous representatives, as these touched on the various issues related to GRs, TK and TCEs. The legitimate nature of the process could be undermined if the IGC did not take into account the interests of Indigenous peoples. Creative ways of accommodating their interests and proposals should be found, so that they would take part of the debate.

385. The Delegation of Ecuador thanked the Indigenous representatives for their valuable contributions in the IGC process. Ecuador was a developing country with great cultural diversity and, therefore, the work of the IGC was a particularly sensitive process, and it wished to produce the best and most effective document for protecting its cultural heritage. The Constitution of Ecuador, as mentioned by the representative of COICA, was the first to recognize Nature as a subject of law. The Constitution, a collaboration with the Indigenous peoples and other communities in Ecuador, contained a whole chapter on the rights of Indigenous peoples.

386. The Delegation of Guatemala noted the importance of progressing towards the adoption of an international legal instrument on the three subjects. However, such progress should not be at the cost of compromising vital interests of States or by limiting active involvement of the Indigenous peoples and local communities. It endorsed statements made by the Indigenous representatives, the delegations of the Bolivarian Republic of Venezuela, the Plurinational State of Bolivia and Ecuador, and expressed its concerns and reservations on the work conducted by the drafting group on TK. The objective of the drafting group was to simplify the text. This could not, however, be achieved by deleting substantive proposals put forward and discussed in plenary. It reserved the right to re-introduce those proposals at an appropriate time.

387. The Delegation of Brazil sought clarity that delegations had the right to make proposals at any time during the process. Therefore, even if the proposals had been deleted in the drafting group, any delegation could re-introduce them. The Delegation might wish at the next meeting to propose some new language.

388. The Chair thanked all delegations for their statements, emphasizing the transparency of the IGC process. He noted that the Rules of Procedure had been established and agreed upon. Proposals of Indigenous representatives should be supported by at least one Member State to be reflected in the documents. The open-ended drafting groups were set up in a transparent manner, and it was unfortunate that on Tuesday evening, the delegations that supported some of the proposed texts had not participated in the drafting group. The Chair of the open-ended drafting group had been constrained to apply the rules.

389. The representative of the Tulalip Tribes understood the rule requiring that proposals by Indigenous representatives be supported by States to remain in the text. The current dispute related to the open-ended drafting group mandated to clean up the text. This exercise required the harmonization of the text by eliminating redundancies, and simplifying the text for further consideration in plenary. The drafting group had over-stepped its mandate by deleting proposals made in plenary. Although States would make the final decision on the text, he believed that they should work with Indigenous peoples.

390. The representative of FAIRA stressed that the situation went beyond procedure. It also concerned the extent to which Member States understood the issues of Indigenous peoples, particularly those rights presently recognized at the international level. He hoped that the participants would take the time to look at the statement made by the Indigenous representatives, copies of which would be made available. Outcomes from the negotiations were critical. For example, if they were not referred to as

Indigenous peoples, it would be a denial that they had the status of peoples with the right of self determination, the right of PIC and rights related to GRs. He recalled that the IGC was still going through the process of identifying what those rights were, particularly in relation to GRs. He also noted his disappointment that the drafting group had not taken due consideration of the principles and rights of Indigenous peoples as recognized in international legal instruments. If participants had followed the discussions at the Indigenous panel, attended the side event on the UNDRIP, and listened to previous IGC panel messages, then maybe those statements would not have been removed.

391. The Delegation of the Bolivarian Republic of Venezuela stressed that no rules of procedure for the open-ended drafting group had been agreed upon, and if they had, they needed to be reviewed to ensure transparency. It reiterated the importance of consensus in the negotiations, and the need for recognition of the different interests of the Member States, and their resources especially with regard to participation at the IGC.

392. The representative of CHIRAPAQ, thanking the Voluntary Fund for funding her participation, requested the IGC to listen to the Indigenous peoples. Many participants had witnessed the adoption of the UNDRIP. For more than 23 years, States and Indigenous peoples had learned to dialogue and negotiate. She requested the IGC to respect the rights of Indigenous peoples as provided for under the UNDRIP and ILO Convention 169. Both States and Indigenous peoples shared the same interests in the rights that had been appropriated by third parties in the absence of any kind of legal framework. Indigenous representatives were there to listen to States and follow the discussions, in good faith and on the basis of respect.

393. The Delegation of the USA appreciated the comment of the representative of the Tulalip Tribes recognizing that the proposals from NGOs needed the support of one State to proceed forward. That perhaps was not the ideal world but the type of world that was the UN. The Delegation noted that the Delegation of Zimbabwe had previously said that it was not in the habit of responding to the comments of NGOs and perhaps the IGC should respond to those comments. The Delegation emphasized that it represented a Government which also represented people. The Delegation did not just represent the Government of the USA but the people of the USA. It appealed to those people who had come to WIPO representing the Indigenous peoples and organizations to learn to dialogue. Dialogue was a two-way street and the Delegation was open to engaging in such dialogue. The Delegation welcomed private and informal conversations, and, in the last two sessions of the IGC, no one from any of the NGOs had approached the USA to have a one-on-one informal conversation. On the issue of the elimination of drafting proposals of Member States that where absent, it noted this information was communicated to participants in advance of the Tuesday evening session. Some had argued that the constitution of the drafting group was just an effort to simplify the text, and did not think anything would be eliminated. However, the process of simplifying complex text also entailed elimination of text where necessary. At the same time, it was very conscious of what the Delegation of the Bolivarian Republic of Venezuela had said and appreciated the constraints on the Geneva representatives from Geneva missions. Those persons coming from capitals also had constraints and while in Geneva were doing business back home. With that in mind, the Delegation suggested that the Committee support the reinstatement of the proposals made by the delegations of the Bolivarian Republic of Venezuela, Guatemala and any other Member State deleted due to their absence on that Tuesday night when the drafting group on TK had met.

394. The Delegation of Zimbabwe clarified that most of the African Group proposals had been inspired by the work of NGOs. The Delegation had always worked well with Indigenous peoples and communities. The Delegation's earlier comment had related to a specific NGO.

395. The Delegation of the Bolivarian Republic of Venezuela thanked the Delegation of the USA and understood that the rules of the informal drafting groups did not exist in written form and only as part of practice. The Delegation noted, with satisfaction, the suggestion that its proposals and those of other affected delegations would be reinstated.

396. The Delegation of the Plurinational State of Bolivia supported the statement made by the Delegation of

the Bolivarian Republic of Venezuela on the reinstatement of proposals of several delegations. On the participation of the representatives of Indigenous peoples, the IGC had to be creative and constructive when facilitating their involvement. It should find some way of accommodating their interests and allowing them to participate effectively. As the Delegation of the Bolivarian Republic of Venezuela had said, the practice had been that if no State supported a proposal from the Indigenous peoples, then the proposal would not go up on the screen. That was very limiting at this stage of the process. It proposed to continue to put proposals from the Indigenous communities on the screen in order to discuss them later and to represent their concerns. They should be given proper attention by States.

397. The Delegation of Ecuador supported the delegations of the Bolivarian Republic of Venezuela and the Plurinational State of Bolivia and all those who had taken the floor on the same issue.

398. The Delegation of Guatemala thanked and supported the delegations of the USA and Canada, and especially the appeal on dialogue from the Delegation of the USA. It had put forward some proposals as a Member State and had supported some proposals from the Indigenous groups. It proposed to submit them in writing to the Secretariat if required.

399. The representative of CAPAJ expressed his gratitude to the delegations supporting the reinstatement of many of the deleted text proposals. There were a number of principles regarding the representation of States at WIPO that were recognized by Indigenous peoples as long as such representation was properly exercised on the basis of the principles of justice and equity. He expressed his respect to those States that respected that. He asked to examine the possibility of asking States to represent Indigenous interests in the best possible manner.

400. The representative of FAIRA thanked Member States for their comments. At Tuesday night's drafting group, there had been a number of pieces of text proposed by Indigenous representative that were indiscriminately eliminated with no attempt to rationalize the text and look to see if it should be supported. Indigenous participants had provided six principles that needed to be met in the outcome document. He asked if there was a way of ensuring that text that had not been supported by a State would be considered. Indigenous peoples had concluded a meeting amongst themselves, and intended to talk to some governments about those principles. He hoped that the review of the document would take into account that other text as well. He thanked States that had made very positive statements recently.

401. The representative of Tupaj Amaru sincerely thanked the delegations of the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela for their support for all of his proposals. He believed that there was nothing in the General Assembly Resolution of WIPO that said that Indigenous peoples were merely observers and that their proposals could not be negotiated upon by States.

402. The representative of CISA supported the statement made by the Delegation of the Bolivarian Republic of Venezuela. There had to be some way of recollecting and putting indigenous issues on the table not only from this meeting but from others. He emphasized that CISA, as well as others, objected to the manner in which the procedure was being carried through. Their issues should not have been removed from the table.

403. The Chair returned to the point raised by the Delegation of the Bolivarian Republic of Venezuela and other delegations regarding the outcome or decisions that were taken at the informal drafting group on the TK text on Tuesday night. He recalled that the outcome of the informal sessions was not binding on the plenary. That was made very clear as part of the ground rules. As the drafting groups were not the decision-making bodies, the text produced by the drafting groups was not binding on the plenary. The plenary was the master of its own procedures. Accordingly and taking into account the points that had been raised and the suggestions made, he confirmed that the textual proposals that had been made in the plenary by States and that had been removed during the informal drafting group on TK on the Tuesday night because those States had been absent would be re-instated. This included drafting proposals made by observers which had been supported by at least one of those States.

404. The Delegation of Australia acknowledged and congratulated Mr. Lesley Malezer, an Australian Indigenous observer, who had recently been elected as the co-chair of the National Congress of

Australia's First Peoples, a body established to assist the Australian government in consulting with Indigenous peoples on policy issues affecting them, including the work of the IGC. The Delegation of Australia recognized that the position he had been appointed to was a very significant position within Australia.

405. The Delegation of Kyrgyzstan congratulated the Chair for his successful chairing of the session. The Delegation presented the Chair with a cultural memento that symbolized the rich and historical culture and folklore of the Kyrgyz people. It had been ten years since the IGC had started its work and the Delegation was certain that the results of this work would be reflected at the General Assembly to take place in September 2011.

406. The Chair conveyed the Committee's congratulations to Mr. Lesley Malezer and expressed his deep gratitude to the Delegation of Kyrgyzstan. He noted that a number of delegations and observers had alluded to the work program for the Committee's next session (IGC 19), which would take place in July 2011. General invitations had already been sent out to all participants. Comments made on the work program for next session were very useful and constructive, and he had taken note of them. Comments particularly useful were on the use of plenary sessions and drafting groups, the amount of time to allocate to each agenda item, and how best to structure and guide the substantive discussions on the three issues, so as to advance the Committee's work on the substance. He remained open to any further proposals or ideas, and planned to hold transparent and inclusive discussions in the period prior to the next session of the Committee. Such discussions would be helpful in preparing the work program for next session, as it was deemed to be an important and critical session. All the participants were thanked, individually and collectively, for their excellent cooperation, participation and commitment. The discipline and the level of resourcefulness and creativity shown by all participants in approaching issues had been admirable, and this would also be needed to make the next Committee session a success. The Chair thanked his Vice-Chairs for their hard work, the interpreters for their flexibility and dedication and the Secretariat for the level of commitment and resourcefulness exercised which had enabled the Committee to conduct its work efficiently and effectively. The Chair also conveyed his appreciation to the Director General for his support.

407. The Chair closed the meeting.

Decision on Agenda Item 10:

408. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7 and 8, on May 13, 2011. 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 before June 17, 2011. 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.

[Annexes follow]

LISTE DES PARTICIPANTS/

LIST OF PARTICIPANTS

I. ÉTATS/STATES

(dans l'ordre alphabétique des noms français des États)
(in the alphabetical order of the names in French of the States)

AFRIQUE DU SUD/SOUTH AFRICA

Yonah Ngalaba SELETI, Chief Director, National Indigenous Knowledge Systems Office, Pretoria

Mandixole MATROOS, Second Secretary, Permanent Mission, Geneva

Nosisi POTELWA (Ms.), Counsellor, Permanent Mission, Geneva

Tshihumbudzo RAVHANDALALA (Ms.), First Secretary, Permanent Mission, Geneva

ALGÉRIE/ALGERIA

Mohamed BOUDRAR, directeur général, Office national des droits d'auteur et droits voisins (ONDA), Ministère de la culture, Alger

Hayet MEHADJI (Mme), premier secrétaire, Mission permanente, Genève

ALLEMAGNE/GERMANY

Tilmann Andreas BUETTNER, Federal Ministry of Justice, Berlin

Alexander WERTH, Sector Advisor, German Development Cooperation, Eschborn

Heinjoerg HERRMANN, Counsellor, Permanent Mission, Geneva

ARABIE SAOUDITE/SAUDI ARABIA

Mohammed MAHZARI, Head, Patent and Intellectual Property Department, King Abdulaziz City for Science and Technology, Riyadh

Munir Mohammed ALRWAILY, Scientific Researcher, Directorate of Industrial Property, King Abdulaziz City for Science and Technology, Riyadh

ARGENTINE/ARGENTINA

Rodrigo BARDONESCHI, Primer Secretario, Misión Permanente, Ginebra

AUSTRALIE/AUSTRALIA

Ian GOSS, General Manager, Business Development and Strategy Group, IP Australia, Canberra

Steven BAILIE, Assistant Director, International Policy and Cooperation Section, IP Australia, Canberra

Edwina LEWIS (Ms.), Assistant Director, International Policy and Cooperation Section, IP Australia, Canberra

Norman BOWMAN, Principal Legal Officer, Business Law Branch, Attorney-General's Department, Canberra

Clinton DENGATE, Executive Officer, Department of Foreign Affairs and Trade, Canberra

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[Annex II follows]

Objectives for Protection of GR from IWG 3 as amended after IGC 18 drafting group

	Objectives and Options	IGC 18 Work Outcome	Analysis of Options after IGC 18 Drafting Group	Remarks
1	Option 1	Option 1 not amended by drafting group.	Option 1 aims at ensuring that those accessing GR and ATK comply with national laws on access, use and benefit sharing without describing the specific conditions.	These options have similar aims (to ensure compliance with laws on GR and ATK) and differ in regard to specifying the content of these laws. Option 3/4 includes 'derivatives' in its scope.
	Option 3 Option 4	Options 3 and 4 consolidated by drafting group.	Option 3/4 aims at ensuring that those accessing GR, derivatives and ATK in particular applicants for IP rights comply with national law and requirements (including customary norms) of the providing country (noting this term is in the CBD) on prior informed consent, mutually agreed terms, fair and equitable benefit sharing and disclosure of origin.	
2	Option 1	Option 1 deleted by drafting group		The five options from the drafting group cover three separate themes i) Options 3, 2/6 and 4 address conditions for patentability. Option 3 addresses conditions of novelty and inventiveness. Option 2/6 addresses conditions of PIC, MAT and benefit sharing. Option 4 does not specify the conditions. ii) Option 5 addresses exclusions from patentability. iii) Option 7 addresses transparency in access and benefit sharing.
	Option 3	Option 3 not amended by drafting group	Option 3 aims at preventing erroneous patents on inventions that are not novel or inventive in light of GR and ATK.	
	Option 2 Option 6	Options 2 and 6 consolidated by drafting group	Option 2/6 aims at preventing grant of IP rights involving the access and utilization of GR, their derivatives and/or ATK where there has not been prior informed consent, mutually agreed terms, fair and equitable benefit sharing and disclosure of origin.	
	Option 4	Option 4 not amended by drafting group	Option 4 aims at preventing the erroneous or bad faith grant of IP rights on applications relating to GR, derivatives and ATK that do not satisfy eligibility conditions.	
	Option 5	Option 5 not amended by drafting group	Option 5 aims to ensure that life and life forms are not patentable.	

Objectives for Protection of GR from IWG 3 as amended after IGC 18 drafting group

	Objectives and Options	IGC 18 Work Outcome	Analysis of Options after IGC 18 Drafting Group	Remarks
	Option 7	Option 7 not amended by drafting group	Option 7 aims to increase transparency in access and benefit-sharing.	
3	Option 1	Option 1 not amended by drafting group	Option 1 aims to ensure patent offices have information needed to make proper decisions in granting patents.	These two options have similar intent, but different scope and content. Option 1 applies specifically to patent rights and does not specify the type of information relevant to the decision to grant a patent. Option 2/4 applies to IP rights generally and specifies that PIC, MAT and mandatory disclosure requirements are relevant to the decision to grant an IP right.
	Option 2 Option 4	Options 2 and 4 consolidated by drafting group	Option 2/4 aims to ensure that IP offices make proper and informed decisions in granting IP rights by having appropriate and available information on GR, their derivatives and/or ATK, including an internationally recognised certificate of compliance confirming prior informed consent and mutually agreed terms, with mandatory disclosure requirements.	
4	Option 1	Option 1 not amended by drafting group	Option1 aims to promote a mutually supportive relationship between relevant international agreements and processes and the protection of GR.	These Options have the common aim of addressing the relationship between international platforms. The Options have different scope. Option 1 addresses protection of GR. Option 2/3 addresses IP rights for GR, derivatives, and ATK. Option 4 addresses collective rights of indigenous peoples to their GR and/or ATK.
	Option 2 Option 3	Options 2 and 3 consolidated by drafting group	Option 2/3 aims to establish both a coherent system and a mutually supportive relationship between existing international and regional agreements and treaties and IP rights involving the utilization of GRs, their derivatives and/or ATK.	

Objectives for Protection of GR from IWG 3 as amended after IGC 18 drafting group

	Objectives and Options	**IGC 18 Work Outcome**	**Analysis of Options after IGC 18 Drafting Group**	**Remarks**
	Option 4	Option 4 not amended by drafting group	Option 4 aims to ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples to their genetic resources and/or associated traditional knowledge by establishing a transparent, independent, accessible mechanism for oversight and dispute resolution, with associated rights to local communities.	Both Options 1 and 4 do not refer to IP. Both Options 2/3 and 4 establish a way of implementing the Objective. Option 2/3 establishes 'a coherent system'. Option 4 establishes 'a mechanism for oversight and dispute resolution'. Option 4 promotes and protects collective rights of indigenous peoples to their GR and/or ATK.
5	Option 1 Option 10	Options 1 and 10 merged by drafting group	Option 1/10 aims to prevent adverse effects of the IP system on the customs, beliefs and rights of indigenous peoples with the aim of recognizing and protecting their rights to use, develop, create and protect their knowledge and innovation in relation to GRs.	These options all concern the role of the IP system. Options 2, 3 and 6 all refer to the role of the IP system in promoting innovation as in TRIPS Article 7. Options 3 and 6 also recognise other roles of the IP system, again in similar terms to Article 7 of TRIPS. Options 2, 3 and 6 differ in their scope. Option 2 does not refer to GR. Option 3 notes there is a relationship between the IP system and GR, derivatives and ATK and does not specify what this relationship is.
	Option 2	Option 2 not amended by drafting group	Option 2 aims to maintain the role of the IP system in promoting innovation	
	Option 3	Option 3 not amended by drafting group	Option 3 aims to recognize and maintain the role of the IP system in promoting innovation and transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, noting the relationship with GR, their derivatives and/or ATK.	
	Option 4	Option 4 not amended by drafting group	Option 4 aims to recognize the role of the IP system in the protection of TK, GR and TCEs.	

Objectives for Protection of GR from IWG 3 as amended after IGC 18 drafting group

Objectives and Options	IGC 18 Work Outcome	Analysis of Options after IGC 18 Drafting Group	Remarks
Option 6	Option 6 amended by drafting group	Option 6 aims to recognize and maintain the role of the IP system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of GR, their derivatives and/or ATK in a manner conducive to social and economic welfare, while contributing to the protection of GR, their derivatives and/or ATK.	Option 6 aims for the IP system to contribute to the protection of GR, their derivatives and ATK. Both Options 3 and 6 specify beneficiaries of the IP system. Option 3 aims for mutual advantage of producers and users of technical knowledge, as in TRIPS Article 7. Option 6 aims for mutual advantage of holders and users of GR, their derivatives and ATK. Both Options 1/10 and 4 have a role for the IP system beyond the terms of TRIPS Article 7. Option 1/10 refers to the adverse effect of the IP system on indigenous peoples. Option 4 refers to the role of the IP system in protecting TK, GR and TCEs. Option 1/10 aims to recognise and protect indigenous peoples rights in their knowledge in relation to GRs.

[End of Annex and of document]