

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

Twenty-Fourth Session
Geneva, April 22 to 26, 2013

REPORT

Adopted by the Committee

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Twenty-Fourth session (“IGC 24”) in Geneva, from April 22 to 26, 2013.

2. The following States were represented: Afghanistan, Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Bolivia (Plurinational State of), Botswana, Brazil, Brunei Darussalam, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Czech Republic, Democratic People’s Republic of Korea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Malaysia, Mali, Mexico, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Panama, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Sudan, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Togo, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Venezuela (Bolivarian Republic of), Viet Nam, Yemen and Zambia (102).

The European Union (“the EU”) and its 27 Member States were also represented as a member of the Committee.

3. The following intergovernmental organizations (“IGOs”) took part as observers: African Regional Intellectual Property Organization (ARIPO), African Union (AU), Eurasian Patent Organization, International Organization of La Francophonie (OIF), Food and Agriculture Organization of the United Nations (FAO), International Union for the Protection of new Varieties of Plants (UPOV), Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office), United Nations Conference on Trade and Development (UNCTAD), United Nations Environment Program (UNEP), United Nations University (UNU), World Trade Organization (WTO) and South Centre (11).

4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Adjmor; African Indigenous Women Organization; *Agence pour la protection des programmes* (APP); Assembly of First Nations (AFN); *Asociación Kunas unidos por Napguana/Association of Kunas United for Mother Earth* (KUNA); *Centrale sanitaire Suisse Romande* (CSSR); Chamber of Commerce of the United States of America (CCUSA); Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos* (CAPAJ); Coordination of African Human Rights NGOs (CONGAF); CropLife International; European Law Students’ Association (ELSA International); Foundation for Aboriginal and Islander Research Action (FAIRA); Foundation of Research and Support of Indigenous Peoples of Crimea; Genetic Resources, Traditional Knowledge and Folklore (GRTKF Int.); Graduate Institute for Development Studies (GREG); Health and Environment Program (HEP); *Incomindios* Switzerland; Indian Council of South America (CISA); Indian Movement “*Tupaj Amaru*”; Indigenous Peoples’ Center for Documentation, Research and Information (doCip); *Instituto Indígena Brasileiro para Propriedade Intelectual* (InBraPI); International Association for the Protection of Intellectual Property (AIPPI); International Center for Trade and Sustainable Development (ICTSD); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Publishers Association (IPA); International Society for Ethnology and Folklore (SIEF); International Trademark Association (INTA); Kanuri Development Association; Knowledge Ecology International (KEI); Maasai Experience; Pacific Island Forum Secretariat (PIFS); Pacific Island Museums Association (PIMA); Research Group on Cultural Property (RGCP); Tebtebba Foundation – Indigenous Peoples’ International Centre of Policy Research and Education; The London School of Economics and Political Science (LSE); Tin-Hinane; Tulalip Tribes of Washington; Traditions for Tomorrow (39).

5. The list of participants is annexed to this report.
6. Document WIPO/GRTKF/IC/24/INF/2 Rev. provided an overview of the documents distributed for the Twenty-Fourth session.
7. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. 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 Twenty-Fourth session of the Committee.

AGENDA ITEM 1: OPENING OF THE SESSION

9. The Director General, Mr. Francis Gurry, opened the session and welcomed the participants. He took note of the extensive participation at the session. He recalled that the Committee's mandate for the 2012-2013 biennium was to expedite its work on text-based negotiations with the objective of reaching agreement on a text or texts of an international legal instrument or instruments which would ensure the effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs). The General Assembly had decided in October 2012 that three negotiating IGC sessions would take place in 2013. The first one had already taken place from February 4 to 8, 2013 on the subject matter of GRs. The Director General noted that the Committee had had a very good result and had produced a "Consolidated Document Relating to Intellectual Property and Genetic Resources." He expressed the hope that that would give the impetus to the present session on TK. A third eight-day thematic session on TCEs would be held from July 15 to 24, 2013. The last three days of that session (IGC 25) would be devoted to a review and stock-taking of the texts which had been developed throughout the three thematic sessions. Regarding the present session, he noted that the document entitled "The Protection of Traditional Knowledge: Draft Articles" (document WIPO/GRTKF/IC/24/4), that had been developed at IGC 21, held from April 16 to 20, 2012, would be the basis of the discussion. As that text stated, it was clearly a work in progress. The Director General hoped that much progress would be made in the present session, particularly in relation to four questions that were raised by the text, namely the subject matter of protection, the beneficiaries, the scope of protection and exceptions and limitations. He referred to three additional documents: a "Joint Recommendation on Intellectual Property and Genetic Resources and Associated Traditional Knowledge", submitted as document WIPO/GRTKF/IC/24/5 by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America; a "Proposal for the Terms of Reference for the Study by the WIPO Secretariat of Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems" (document WIPO/GRTKF/IC/24/6 Rev.), submitted by the Delegations of Canada, Japan, the Republic of Korea, the Russian Federation and the United States of America; and a "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (document WIPO/GRTKF/IC/24/7), submitted by the Delegations of Canada, Japan, the Republic of Korea and the United States of America. He welcomed the representatives of indigenous and local communities and acknowledged the participation of the United Nations Permanent Forum on Indigenous Issues (the Permanent Forum). He referred to the WIPO Voluntary Fund which had been created to facilitate the participation of indigenous and local community representatives in the IGC. He noted that the Fund was regrettably out of funds to support any representative beyond the present session. While he acknowledged the generous contributions that had been made in the past by various donors, the Fund had run out of money despite a fund-raising drive initiated by the Secretariat. He urged delegations to consider ways of assisting the Voluntary Fund, particularly at that critical stage of the IGC negotiations. He

welcomed the presence of the panelists for the session's Indigenous Panel, in particular, its keynote speaker, Mr. Les Malezer, co-chair of the National Congress of Australia's First Peoples, Ms. Lucy Mulenkei from Kenya and Mr. Preston Dana Hardison from the United States of America. He expressed his gratitude to the Bureau of the IGC and in particular to its Chair, His Excellency Ambassador Wayne McCook from Jamaica. He informed the Committee that Ambassador McCook, who would be unable to open the session, had asked the Vice-Chair, Ms. Alexandra Grazioli from Switzerland, to replace him in doing so.

10. The Vice-Chair, Ms. Alexandra Grazioli from Switzerland, thanked the Director General and made some comments on behalf of the Chair regarding the organization of the present session, based on the consultations that the Chair had held with Regional Coordinators on the work program and the working methodology. The Chair thanked them for their constructive guidance. The Vice-Chair informed that the Indigenous Caucus had met with the Chair and thanked the Caucus for its useful inputs and suggestions. As at the last session, the Chair would meet on a regular basis with the Chairs of the Indigenous Caucus. The Vice-Chair was advised that from April 19 to 21, 2013, the WIPO Secretariat, in cooperation with the Secretariat of the Permanent Forum, had organized an "Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", following the IGC's support for such an activity as expressed at IGC 20 (see document WIPO/GRTKF/IC/20/10, paragraph 801(d)). All Member States and accredited observers had been invited to attend this workshop as observers. The Vice-Chair advised that the Secretariat had provided a briefing for Member States on the IGC documents and logistical arrangements for the session on April 9, 2013 and that the Secretariat would offer a similar briefing for all observers on the first day of the present session. She informed the IGC that the present session would be accessible on live webcast on the WIPO website for openness and inclusiveness. She called on delegations, individually and in their various groupings, to discuss substantive issues with each other, especially inter-regionally. She encouraged the observers, especially the custodians of TK, the indigenous and local communities, and the Member States to engage with each other. She reminded the participants that the session was a negotiation and that only through discussion, mutual respect and constructive pragmatism on all sides could agreement be reached. As for the proposed working methodology and program for the present session, especially for Agenda Item 5, she recalled that the Chair had held consultations with the Regional Coordinators and had met formally with them on April 5, 2013. She described what had been agreed upon as follows. For Agenda Item 5, a twin approach, combining, in a complementary manner, the plenary (formal) and an expert group (informal) would be employed. Facilitators would also be used. The plenary would be intended for the formal presentation of views, positions and drafting proposals and be led by the IGC Chair with the assistance of facilitators. Discussions in the plenary would be reported on as usual. The Secretariat would be on hand to assist the facilitators in keeping note of the discussions. The plenary would review the text three times, but without live drafting, and could, on the third occasion, be invited to correct any obvious errors in the text, and make other comments on the text which would be recorded as usual in the full report of the session, note the text and transmit it to the General Assembly scheduled for September 23 to October 2, 2013. The expert group process would be to facilitate, in a smaller and informal setting, the reaching of compromises and the reduction in number of options. It would be structured and led by the IGC Chair, with the assistance of the facilitators. The Secretariat could be on hand to assist the facilitators in keeping note of the discussions within the expert group. Each regional group would be represented by six experts, one of whom should preferably be the Regional Coordinator. The presence of the Regional Coordinators in the expert group process would be important. A Regional Coordinator might elect to exchange his or her presence in the expert group for an alternative regional expert but in that case, the Regional Coordinator should, to the extent possible, nevertheless be in the room at all times. A regional group could, however, decide to nominate a lesser number of experts, and this would be welcomed so as to keep the expert group as small as possible. In order to increase transparency, other Member State representatives would be permitted to sit in on the meetings of the expert group. These representatives would observe only and not have direct speaking rights, but should seek

instead to channel observations, if necessary, through relevant experts. The indigenous representatives would be invited to nominate two experts representatives to participate in the expert group as observers and an additional two representatives to sit on the meetings without speaking rights. A regional group could change the composition of its experts, as it wishes, depending on the article or issue being worked on. To facilitate this, the Chair would endeavor to make available a tentative schedule for the expert group discussions prior to the commencement of each discussion. The experts forming the expert group would be able to take the floor and make drafting proposals during meetings of the expert group. The text would be up on a screen for ease of reference and drafting proposals would be entered on the screen. However, the editing and final preparation of the text to be considered by the plenary would be done by the facilitators on the basis of these inputs. The text would be addressed by issue, rather than in a sequential, article-by-article manner. The expert group would meet in Room B, where interpretation into and from English, French and Spanish would be available. In the interests of transparency, there would also be an English audio feed of the proceedings of the expert group into Room A, a French audio feed into the J. Bilger Room and a Spanish audio feed into the U. Uchtenhagen Room. The text would be on the screen in those three rooms. To ensure that the informality of the expert group was maintained, delegations and observers were requested to refrain from communicating to the public, whether live or at any future time, the content or the nature of the discussions taking place in the smaller group, whether in general terms or by way of quoting specific individuals or delegations. This included tweeting, blog posts, news stories and list serves. In the event that this request would not be observed, the Chair would reserve the right to seek the consent of the Committee to take such action as may be necessary to preserve the integrity of the process. Participants would also be encouraged to respect the security notices, especially regarding the maximum number of persons permitted in the rooms at any given time. In view of this, the Vice-Chair was also advised by the Secretariat that, should the capacity of the J. Bilger and U. Uchtenhagen rooms prove insufficient, additional rooms for French and Spanish live transmissions would be made available for delegations and observers who wish to follow the proceedings of the expert group. Three facilitators would help to guide and moderate the plenary and expert group. They would undertake drafting so as to record views, positions and drafting proposals made in the plenary, make proposals and implement any compromises and reductions in options reached by the expert group. At that juncture, the Vice-Chair informed the IGC that Mr. Nicolas Lesieur from Canada and Mrs. Andrea Bonnet López from Colombia would be appointed as facilitators and that consultations were taking place regarding a third facilitator. She recalled that Mr. Lesieur and Mrs. Bonnet López had been facilitators at the last session that dealt with TK, namely IGC 21. The facilitators' work would be based upon discussions both in plenary and in the expert group. Notwithstanding the above, the Chair would retain the discretion to break the plenary for informal consultations at any time. The Vice-Chair recalled that the Chair had warned, however, against excessive fragmentation of the process. As to the sequence of the work, the Vice-Chair proposed an initial discussion in plenary, followed by the expert group process and then back to plenary. The plenary would be involved throughout and the expert group would report to the plenary. The plenary would have the time to review the text and make decisions as to the statutes of the text and its treatment by the IGC in view of the upcoming WIPO General Assembly in September 2013. As for a program for the week, the Vice-Chair recalled the consultations the Chair had had with the Regional Coordinators and other delegations. She announced that a draft program would be available shortly in hard copy. She added that the program as envisaged was a roadmap, but that the process was dynamic, and could be revisited and adjusted as the session would progress. Regarding the session as a whole, the Vice-Chair, on behalf of the Chair, expected the same constructive working atmosphere that had prevailed in IGC 23 and other past sessions. She recalled that no opening statements were provided for in the Agenda. She offered the possibility for regional groups or Member States wishing to make general opening statements to hand such statements to the Secretariat in order to have them reflected in the report as was the case in previous sessions. She recalled that the present session was a five-day session as mandated by the WIPO General Assembly. She said that the Committee, as it went along, should reach an agreed

decision on those agenda items which required a decision and that the decisions, as already agreed, would be circulated for formal confirmation by the IGC on April 26, 2013. The report of the session would be prepared after the session and circulated in all six languages of the UN to all delegations for comment and adoption at IGC 25. She reminded that the IGC documents were made available in all six languages of the UN.

11. The representative of Tupaj Amaru said that in his view the working methods had not succeeded over the past years and lacked transparency as the texts had been redrafted behind closed doors. He added that switches between the plenary and the group of experts led to contradictions in the draft texts. He urged Member States to change the working methods in order to make them more transparent and democratic.

12. The Vice-Chair responded that, based on previous consultations, the working methodology had been found agreeable to Member States. She reminded the representative of Tupaj Amaru that audio feeds of the proceedings of the group of experts would be provided in Spanish, French and English for all participants in the IGC.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

Decision on Agenda Item 2:

13. The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/24/1 Prov. 2 for adoption and it was adopted.

AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS

14. The Vice-Chair opened the floor on the requests for accreditation submitted by the organizations listed in the Annex to document WIPO/GRTKF/IC/24/2.

15. The representative of the Health and Environment Program (HEP) objected to the request for accreditation that had been submitted by SELARL Smeth & Younes (*Cabinet d'avocats*) on pages 27 and 28 of the Annex to this document. She said that the admission criteria that were spelled out on the WIPO web site (<http://www.wipo.int/members/en/admission/observers.html>) were not met by this organization, as the applicant had not provided the required information. She noted as well that this was the first time that a law firm had applied for *ad hoc* accreditation to the IGC. She considered that a law firm was not an NGO or a governmental organization, but a business company set up for profit, and that it should therefore be denied accreditation. Agreeing with this request would constitute an unwelcomed precedent.

16. The Vice-Chair asked Member States whether they supported the granting of the status of *ad hoc* observer to the organizations listed in the Annex to document WIPO/GRTKF/IC/24/2. She noted that no Member State took the floor to object.

17. The Delegation of the Bolivarian Republic of Venezuela commented that, at the Inter-sessional Meeting on the Protection of Broadcasting Organizations of the Standing Committee on Copyright and Related Rights (SCCR), which had taken place from April 10 to 12, 2013, a similar request to the one referred to by the representative of HEP had been submitted by CARACOL S.A., a television station from Colombia, which had requested the granting of the status of observer at the sessions of the SCCR (see Annex to document WIPO/IS/BC/GE/13/2). At that time, the Delegation observed, while noting that Member States wished to be very open regarding the participation of observers at WIPO, clarification had been needed regarding the accreditation of business companies as observers

and what it meant to be an observer in this case. Similarly, the Delegation agreed with the representative of HEP that a law firm could not be assimilated with an NGO and added that accrediting law firms as observers should not lead to such assimilation. It stated that an NGO was meant to be an organization that had non-lucrative aims and reiterated, therefore, that clarification was needed.

18. The Vice-Chair, echoing the reference made by the Delegation of the Bolivarian Republic of Venezuela to the discussion that had taken place at the Inter-sessional Meeting mentioned, recalled that the Director General had, for the sake of transparency, committed to providing more information on the website regarding the accreditation of observers.

19. The Delegation of Belgium, speaking on behalf of Group B, supported the granting of the status of observers to the organizations that were listed in the Annex to document WIPO/GRTKF/IC/24/2.

Decision on Agenda Item 3:

20. *The Committee unanimously approved the accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/24/2 as ad hoc observers, namely: African Cultural Center INC (ACC); Centro de Estudios Multidisciplinarios Aymara (CEM-Aymara) (Center for Multidisciplinary Studies Aymara) (CEM-Aymara); Centro de Promoción y Desarrollo Rural Amazónico – (CEPODRA) (Center for Promotion and Rural Development of the Amazon) (CEPODRA); Coordinadora Andina de Organizaciones Indígenas (CAOI) (Andean Coordinating Body for Indigenous Organizations); EcoLomics International; German Research Foundation Graduate School “Intellectual Property and Public Domain” at the University of Bayreuth; Initiative for the Development of Africa (IDA); and, SELARL Smeth and Younes.*

**AGENDA ITEM 4: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES:
VOLUNTARY FUND**

21. The Vice-Chair introduced documents WIPO/GRTKF/IC/24/3 and WIPO/GRTKF/IC/24/INF/4. The Vice-Chair recalled that the General Assembly had decided in 2005 to create a Voluntary Fund to support the participation in the IGC of indigenous and local community representatives of accredited NGOs. Since its establishment, the Fund had benefited from different contributors: SwedBio, France, the Christensen Fund, Switzerland, South Africa, Norway, and Australia. Most agreed that the Fund had operated successfully, as it had been widely regarded as transparent, independent and efficient. As repeatedly stated at previous IGC sessions, the Fund would basically run short of funds after IGC 24. She recalled that the available funds were insufficient to cover the participation of any indigenous

representative in any of the future IGC sessions beyond IGC 24. This regrettable situation was described by the Vice-Chair as a great shame and would attract attention from indigenous observers. It could have the effect of harming the credibility of the IGC which had repeatedly committed itself to supporting indigenous participation. The Secretariat had initiated a fund-raising drive, as letters with a "Case for Support" sent out to Member States and foundations had illustrated. Other options, such as inviting Member States who have Funds-in-Trust with WIPO to divert some of these funds to the Voluntary Fund, as well as seeking the assistance of prominent indigenous representatives in interceding with their governments for funds, had also been pursued. Unfortunately, despite these efforts of the Secretariat, no additional funds had been pledged so far. The Vice-Chair recalled that the Voluntary Fund had been created by Member States as a voluntary contribution fund that could not draw on the WIPO budget, on the understanding that Member States would voluntarily and in a timely manner contribute to it and keep it afloat. Member States had been repeatedly urged therefore to contribute to the Fund. She reminded the IGC that the Fund did not need vast sums of money: the financing of five applicants at the IGC 25 this year would require an amount of approximately 17,500 Swiss francs in total. Should Member States not be ready to contribute voluntarily, alternate financing solutions should be envisaged. The IGC might have to reflect on the possibility of inviting the WIPO General Assembly to amend the rules of the Fund in order to enable the regular WIPO budget to make a contribution to the Fund under conditions to be defined. She invited delegations to consult quickly and seriously about this regrettable situation with their capitals and among the groups. She drew the Committee's attention to document WIPO/GRTKF/IC/24/INF/4, which provided information on the current state of contributions and applications for support as well as on document WIPO/GRTKF/IC/24/3 which concerned the appointment of members of the Advisory Board. The IGC would be invited to elect the members of the Advisory Board. She informed the IGC Chair that she had been requested by the Chair to chair the Advisory Board. The outcome of the Advisory Board's deliberations would be reported later in the current session of the Committee in document WIPO/GRTKF/IC/24/INF/6.

22. In accordance with the decision of the IGC at its Seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), the Twenty-Fourth session was preceded by a half-day panel of presentations (see WIPO/GRTKF/IC/24/INF/5). The indigenous panel was chaired by Mr. Nelson De León Kantule, member of *Asociación Kunas Unidos por Napguana* (KUNA), Panama. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is contained below as edited:

The Indigenous Panel was held on April 22, 2013. The theme of the Indigenous Panel was: "Indigenous Peoples' Perspectives on the right to maintain, control, protect and develop their intellectual property over traditional knowledge (Article 31 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP))".

The keynote speaker of the Indigenous Panel was Mr. Robert Les Malezer, co-Chair of the National Congress of Australia's First Peoples. The central theme of Mr. Malezer's presentation was the importance of the UNDRIP. He stated that the UNDRIP reflected a general global consensus on the rights of indigenous peoples, a consensus which, together with the UNDRIP, must be included in the implementation process and the negotiations taking place at the IGC. Mr. Malezer highlighted that the first paragraph of Article 31 of the UNDRIP guaranteed the right of indigenous peoples to maintain, control, protect and develop their IP over TK, while it was stressed in the second paragraph of that article that States should take effective measures to uphold those rights. Mr. Malezer concluded by calling for efforts to ensure the full and effective participation of indigenous peoples, for whom the process might otherwise have tragic consequences.

The second speaker was Ms. Lucy Mullenkei, member of the Maasai people in Kenya and Executive Director of the Indigenous Information Network (IIN) in Kenya. Ms. Mullenkei was nominated as the focal point in the International Indigenous Forum on Biodiversity

(IIFB) representing Africa. She referred to the efforts made in support of respect for, preservation and protection of TK under the auspices of the UNDRIP and the CBD (Article 8(j) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biodiversity), stating that there was a distinctive relationship between rich biological diversity and TK. She reminded that this relationship was key to the preservation of a way of life that ensured the conservation and sustainable use of biological diversity. In her final recommendations, Ms. Mulenkei emphasized the need for the IGC negotiation process to take into account and reconcile its objectives and principles with other forums and instruments that served to protect TK, such as the CBD and the UNDRIP.

Mr. Preston Hardison, policy analyst for the Tulalip Tribes of Washington and participant in the CBD process, had been one of the chief negotiators for the Nagoya Protocol. He has been participating in the IGC as an observer on a regular base. His presentation focused on key issues for indigenous peoples in the IGC context: limitation to the right to self-determination and control over IP of indigenous peoples as an effect of the so-called “public domain”; risks involved in creating TK database in the absence of IP-protection systems in place relating to that collective knowledge; and, the need to incorporate the principal of free, prior and informed consent (PIC). Mr. Hardison ended his presentation by calling on Member States to take into account TK in all its features. He pointed out that, in developing IP protection instrument or instruments relating to TK, the IGC needed to bear in mind the fact that TK was linked to a range of other issues relating to indigenous peoples, such as cultural and social identity, health and nutrition; thus, IP should not be the only focus of the IGC.

Ms. Florina López, a member of the indigenous *Kuna* peoples in Panama, had been unable to attend the Panel.

Mr. De León Kantule closed the Indigenous Panel, urging Member States to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, in order to ensure the participation of indigenous peoples in the IGC process.

Decision on Agenda Item 4:

23. *The Committee took note of documents WIPO/GRTKF/IC/24/3, WIPO/GRTKF/IC/24/INF/4 and WIPO/GRTKF/IC/24/INF/6.*

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

25. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Babagana ABUBAKAR, representative, Kanuri Development Association, Nigeria; Mr. Steven BAILIE, Assistant Director,*

International Policy and Cooperation Section, IP Australia, Canberra, Australia; Mr. Arsen BOGATYREV, Attaché, Permanent Mission of the Russian Federation, Geneva; Mr. Nelson DE LEÓN KANTULE, representative, Asociación Kunas unidos por Napguana/Association of Kunas United for Mother Earth (KUNA), Panama; Mrs. Natasha GOONERATNE, Second Secretary, Permanent Mission of Sri Lanka, Geneva; Mr. Mandixole MATROOS, First Secretary, Permanent Mission of the Republic of South Africa, Geneva; Mr. Justin SOBION, First Secretary, Permanent Mission of Trinidad and Tobago, Geneva; and, Mr. Jim WALKER, representative, Foundation for Aboriginal and Islander Research Action (FAIRA), Brisbane, Australia. The Chair of the Committee nominated Ms. Alexandra Grazioli, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.

AGENDA ITEM 5: TRADITIONAL KNOWLEDGE

26. [Note from the Secretariat: The Chair was chairing the session at this point]. The Chair recalled that the Vice-Chair had laid out the methodology and work program agreed for the week. He reminded the Committee that these were flexible and could be adjusted, if needed, in the course of the session. On the question of facilitators, the Committee would once again benefit from the assistance of Mr. Nicholas Lesieur from Canada and Ms. Andrea Bonnet López from Colombia. Mr. Emmanuel Sackey from ARIPO would replace, as a third facilitator, Mr. Walid Taha from Egypt who was not present at this session. The facilitators would play a key role in trying to pull together the inputs made by the Committee into the revisions of text that would guide the Committee's work. The Chair called on delegations, individually and in their various groupings, to discuss substantive issues with each other inter-regionally. He encouraged the observers to engage with the Member States and the Member States to engage with the observers. He reminded the participants that the session was a negotiation and that only through discussion, mutual respect and constructive pragmatism on all sides could agreement be reached. In this regard, he thanked the Government of South Africa for having convened an informal meeting on the IGC in Pretoria the previous week, and for having kindly invited him to be present, consistent with his undertaking to engage as far as possible in any informal consultations in whatever configurations Member States wished to undertake them. He believed that these kinds of Member State-led, cross-regional and informal discussions could only further help the Committee's efforts and hoped that there would be follow-up meetings of a similar nature in various quarters. He could not initiate these processes, but remained available to assist and engage if so desired. He also remained available to consult with Member States and would seek to meet with regional coordinators and other groupings from time to time. He would also meet with the Chairs of the Indigenous Caucus during the session as and when required. The Chair drew the attention of delegations to the working documents which were available for discussion under Agenda item 5: "The Protection of Traditional Knowledge: Draft Articles" (document WIPO/GRTKF/IC/24/4), a "Joint

Recommendation on Genetic Resources and Associated Traditional Knowledge” (document WIPO/GRTKF/IC/24/5), a “Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems” (document WIPO/GRTKF/IC/24/6), and a “Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources” (document WIPO/GRTKF/IC/24/7). There would be an opportunity to discuss the latter three documents in the plenary on Friday after work on the Draft Articles had been completed. He observed that the revisions of the Draft Articles during the week would be available in English only as far as the print versions were concerned. He also referred delegations to the two information documents available: the “Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural expressions” (document WIPO/GRTKF/IC/24/INF/7), and the “Resources Available on the WIPO Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources Website” (WIPO/GRTKF/IC/24/INF/8). These were simply information resources and they were not intended to be adopted in any form. The Chair introduced an informal non-paper he had prepared on the key issues for negotiation. He clarified that this was not a working document but rather simply an informal paper for reflection on the issues as he saw them. In addition to having been circulated in advance, hard copies of the informal non-paper were available outside the room. Summarizing the paper, the Chair explained that, in line with the mandate of the IGC for the 2012-2013 biennium, as he saw it, the goal of these TK negotiations was to find an appropriate IP-based agreement for the protection of TK. Taking into account existing international declarations and agreements outside of WIPO, the IGC should seek to determine which rights, measures and mechanisms for the IP-like protection of TK might be necessary and appropriate, and ensure the development of the mandated IP-like instrument(s) to address them. The IGC should consider which IP-related objectives would be appropriate for such an instrument as well as what was the harm that such an IP instrument would seek to address in relation to the protection of TK. The IGC should seek to find clarity on how the instrument should deal with the core issues of defining subject matter, identifying the beneficiaries, framing the scope of rights, and delimiting those rights through appropriate exceptions and limitations. In seeking solutions, it could be beneficial to identify, in a cost-cutting way, the issues that could and should be addressed at a national level, *vis-à-vis* those that needed to be addressed at an international level. For the latter, aspects which might better be addressed by existing international agreements or rightly belonged in other international fora should be taken into account. The IGC should remain focused on IP-related aspects of the subject matter. It should also consider whether the level of access to, or spread of specific TK, should inform the kind of treatment to be given. For example, a standard of treatment for secret TK could be envisaged, that was distinct from TK that, while not secret, was limited in terms of its spread or access. The IGC should also define what would be the appropriate way in which to deal with “diffused” or “widely available” TK. The Chair opened the floor for interventions and proposed that interventions be on issues raised in the Draft Articles in document WIPO/GRTKF/IC/24/4 as a whole, rather than article-by-article. He urged delegations to identify the articles that they would be commenting on in order to assist the facilitators in taking account of the points they made. He asked for any new insights into, and perspectives on, the issues raised in the document. Further, he requested delegations, while making their interventions, to endeavor to link their comments on any issues or articles to the relevant policy objectives or general guiding principles which were related to the issues raised and which supported their interventions. This would assist the facilitators to begin the process of identifying which objectives and guiding principles were of specific interest to delegations as well as identifying those that bore direct relevance to the text.

27. The Delegation of the EU, speaking on behalf of the EU and its Member States, looked forward to making progress under the Chair’s guidance. The Delegation also thanked the facilitators at IGC 21 and the WIPO Secretariat for their hard work in preparing document WIPO/GRTKF/IC/24/4. The text under the discussion was one of considerable complexity with a large number of policy options, alternatives, and terms in brackets. It

therefore welcomed the continued involvement of the facilitators and hoped they might clarify the different policy options and alternatives in the text in order to help advance discussions and enable convergence. It also hoped that delegations could continue to engage positively in a spirit of compromise and that real progress could be achieved on a broad range of outstanding issues. The nature of the instrument that would emerge remained undecided at that point. With this in mind, the Delegation considered it in the best interests of advancing discussions at IGC 24 if the primary focus continued to remain clarifying and refining the objectives and principles of the text and the policy options contained therein. The Delegation reiterated the need for balanced and equitable provisions in the TK document. It acknowledged the IGC mandate for this session on TK, with a focus on the four articles dealing with subject matter of protection, beneficiaries, scope of protection and limitations and exceptions. In particular, it attached great importance to reaching an agreement on the definition of TK in Article 1 and on beneficiaries in Article 2. Without prior agreement on a definition of TK and on beneficiaries, it would be extremely difficult to finalize the other draft articles. The Delegation reiterated its position with regard to bringing forward the discussion on the policy objectives and general guiding principles which stood at the forefront of the annex to document WIPO/GRTKF/IC/24/4. These constituted the foundation of any instrument on TK so that such discussion was necessary in order to set out the content of the substantive articles. Although it would have preferred to have discussed objectives and principles before a discussion on the articles, it was pleased to have assurance from the Chair that time had been set aside to do so later in the week.

28. The representative of the HEP stated that there had been a procedural problem in her view under Agenda item 3 as a decision had been taken on the accreditation of observers despite the fact that she had objected. Regarding the Draft Articles, she reiterated that the main objectives mentioned in the draft text should be respected and that the square brackets around the words “traditional communities” and “nations” in Article 2 should be taken away. She believed that these communities did exist, and if they existed, it was because they were nations. Any African could consider oneself indigenous. She added that each African person came from a specific ethnic group and the square brackets should therefore be taken away from the text.

29. The Delegation of the Plurinational State of Bolivia noted that the protection of TK was an important challenge for its country and for the international community because of its complexity and the very nature of the subject matter. It wished to avoid situations where TK was being used and registered without the consent of the right-holders. This was not a subject that should be dealt with in an approximate way. The Delegation had been reading through the Draft Articles and shared many of the Chair’s ideas expressed in his informal note. It believed that beneficiaries should benefit from simple protection but that there should be a minimum agreement as to who the beneficiaries of protection were. It was of high importance that indigenous peoples be recognized as the main rights-holders. It hoped that all parties would show political will so that the Committee could move forward and come to an agreement on this subject at this session.

30. The representative of Tupaj Amaru recalled that he had drafted and submitted a definition of TK at a previous session of the IGC. The representative had just come back from Peru and Bolivia after lengthy consultations with the indigenous communities there and what he was going to propose had met with their approval and had the free consent of the indigenous and local communities of those countries. It was important to know what was being protected. His proposed definition, for the purpose of this international instrument, was: “[t]raditional knowledge refers to the cumulative body of age-old knowledge or wisdom that constitutes traditional knowledge and collective knowledge systems that are in a constant process of development, innovations, experiences and creative practices, traditional technologies, and environmental knowledge that are closely linked to the language, social relations, spirituality, natural cycles, the conservation and sustainable development of biological diversity. The deep relationship between Indigenous Peoples and nature and the

vision of the world that is possessed and upheld and has been so since immemorial times by Indigenous Peoples and local communities and has been transmitted from generation to generation. Traditional knowledge is the product of the collective intellectual activity, creations of the talent and ingeniousness of people and they are an intrinsic part of the immaterial cultural heritage of Indigenous Peoples and local communities and are irrefutable proofs of human history through point in time and space."

31. The Chair took note of the statement made by the representative of Tupaj Amaru. He reminded participants that the IGC was mandated to develop an international legal instrument or instruments. He invited proponents to reflect on whether their proposals would suit or not such instrument. If there were declaratory statements to be made, these should be put in their appropriate place. But for issues of legal certainty, a definition had to present a certain degree of precision.

32. The Delegation of Mexico supported the statement made by the Delegation of the EU, speaking on behalf of the EU and its Member States. The Delegation was convinced that it was extremely important to find a consensus on Articles 1 and 2 because that was the cornerstone of the whole negotiation. The Delegation wished to announce that after three years of broad national consultations, Mexico had managed to adopt a public policy, under constitutional mandate, on mechanisms for protecting the TK and the natural biological and GRs of the peoples of Mexico. The Delegation wished to share elements of the policy which would underpin its positions during this session and made those available in print form outside the plenary room. It believed that those policy principles could help other delegations.

33. The Delegation of Canada thanked the Chair for the useful informal issues paper on TK. The Delegation wished to make a number of comments on issues raised by the text. On objectives and principles, it noted that several paragraphs contained multiple ideas and that these ideas were often found in multiple paragraphs. It preferred, as much as possible, that any given paragraph focus on a single, specific objective or principle, and that this objective or principle be addressed once. This also applied to the draft articles in general. The Delegation also noted that a number of objectives or principles contained operative, substantial language that went beyond objectives and principles. It preferred that, without prejudice, those elements be addressed in the substantive provisions. This was the case, for example, in paragraphs (iv), (xi *bis*), (xii) and (xiv) of the objectives, and paragraph (e) of the principles. The Delegation further noted that the text made frequent reference to "traditional knowledge associated with genetic resources". This overlap with the GRs text could lead to legal uncertainty and inconsistent interpretation. It thus invited the Committee to keep this in mind so that coherence between the texts would be ensured. On the subject matter of protection, the Delegation believed that Member States needed a common understanding of what was meant by "traditional knowledge", which it believed had to be defined clearly and objectively, so as to allow for consistency and certainty in the interpretation and implementation of the instrument. Any definition also had to take into account the necessity of preserving a strong and robust public domain, including through a clear set of criteria for eligibility. On beneficiaries, the Delegation believed that any instrument had to provide for both indigenous and local communities to constitute beneficiaries. It noted though that the Committee did not have a clear understanding of what these terms, and particularly the term "local communities" meant: hence, the need for a clear understanding that could provide legal certainty. On the scope of protection, it noted that while the term "protection" was used throughout the text, Member States had different approaches as to how to achieve that protection. It did believe, however, that the use of the term "protection" was not incompatible with the non-binding, measured approach that it had been advocating in the Committee. As illustrated by its support for the proposed "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge" (document WIPO/GRTKF/IC/24/5), it believed that defensive protection was the most achievable path forward. The Delegation also noted that certain draft provisions, such as Article 6 on "exceptions and limitations" and Article 9 on "transitional measures" prejudged the outcome of the negotiations. It looked forward to discussing these issues in the expert group

and would propose alternative language in order to try to address some of them in a constructive manner.

34. The Delegation of Algeria, speaking on behalf of the African Group, drew the attention of facilitators and delegations to the fact that the Draft Articles appeared, in their present state, to create confusion between the substance itself, including, for example, the subject matter or beneficiaries, and the measures, mechanisms or best ways of implementing the forthcoming treaty, for example, administrative clauses and sanctions. It believed that the text could be better structured if, for example, Article 6 on “exceptions and limitations” were to be placed before the “administrative measures” in Article 4. The Delegation restated the position of the African Group that the work of this session should enable the Committee to submit a text to the General Assembly that was substantially ready, so that a Diplomatic Conference could be convened, preferably in 2014. Second, it considered that discussions had to concentrate on the main purpose of the treaty, *i.e.* the protection of TK against misappropriation and misuse, and the best way of achieving that, was to have a definition of TK that was as inclusive as possible. Some of the elements in Article 1 were a good basis for achieving that definition. Furthermore, the protection given to the beneficiaries should be effective and enable those beneficiaries to fully enjoy their TK. Third, it was of the view that discussions should concentrate on Articles 1 and 3. It considered that once consensus had been reached on the subject matter and scope of protection, delegations would be in a position to talk about the implementation of the treaty and therefore identify the beneficiaries and mechanisms for application such as sanctions and exceptions and limitations. The Delegation was prepared to discuss the objectives and principles once the provisions of the treaty had been properly examined.

35. The Delegation of Australia considered that the instrument should address the TK of indigenous peoples and local communities. It would be interested to hear the views of others on the use of the term “*inter alia*” in Article 1.1, Alternative. This appeared to broaden the scope of the definition of TK beyond the know-how, skills, innovations, practices and teachings of indigenous peoples and local communities. If this was the case, the Committee needed to consider the consequences of such a broadening, for the instrument generally, and, more in particular, for the criteria for eligibility, the beneficiaries and the scope of protection.

36. The Delegation of the United States of America thanked the Secretariat for its work on the revised Draft Articles contained in document WIPO/GRTKF/IC/24/4. It welcomed the opportunity for further work on Articles 1 to 4. It supported much of the text of Article 1.1. In addition, it believed that TK, which was protected under national law, should be the focus of this negotiation. The Delegation suggested a definition for “Traditional Knowledge associated with Genetic Resources” as a new Article 1.1(g) that read: “[t]raditional knowledge associated with genetic resources means substantive knowledge of the properties, and uses of genetic resources held by indigenous peoples or local communities and which directly leads to a claimed invention”. It looked forward to deepening its understanding of the policy objectives and core principles related to these articles. These objectives and principles were an important basis for the Committee’s work. The Delegation continued to support the following policy objectives: safeguard and promote innovation, creativity and the progress of science and promote the transfer of technology on mutually agreed terms, promote access to knowledge and safeguard the public domain, and prevent the private appropriation of knowledge in the public domain. It supported the notion of balance and equity. However, it was increasingly concerned that the text did not convey the critical importance of a vibrant public domain to the needs of society. To improve balance in the text in a manner that was consistent with recommendations 16 and 20 of the WIPO Development Agenda, it continued to support the following core principles: the recognition that knowledge in the public domain was the common heritage of mankind; protection, preservation and expansion of the public domain as the public domain was essential for creativity and innovation; and protecting and supporting the interests of creators. Under Policy Objectives, it suggested a new paragraph (x) entitled “innovation and creativity” that read: “the protection of traditional knowledge should contribute

towards the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional knowledge and in a manner conducive to social and economic welfare as well as to a balance of rights and obligations". This new addition highlighted the fact that the protection and enforcement of TK should reflect a balance of interests and a balance of rights and obligations similar to that of traditional IP rights (IPRs). The Delegation looked forward to a constructive negotiation.

37. [Note from the Secretariat: The Vice-Chair, Ms. Alexandra Grazioli, was chairing the session at this point]. The Delegation of Brazil supported the statement made by the Chair regarding the importance of having an instrument that was in accordance with other international instruments and, in particular, the Convention on Biodiversity (the CBD). In regard to the general guiding principles, special attention had to be given to mutually agreed terms (MATs) and prior informed consent (PIC). The Delegation also supported the position as expressed by the Delegation of Algeria on behalf of the African Group regarding the importance of Articles 1 and 4 on subject matter of protection and on sanctions, remedies and exercise of rights. It underlined the importance of the work that was currently under discussion in the CBD, within the Working Group on Article 8(j) that discussed the constitutional elements of a *sui generis* system for the protection, preservation and promotion of TK related to biological diversity. It also considered that the work that had been done in UNESCO regarding cultural diversity had to be taken into account. It noted that ICG 24 should specifically address the subject of TK. Other topics, such as GRs, were not the main focus of this meeting. The Delegation would provide further comments in the expert group.

38. The Delegation of Japan welcomed the informal issues paper prepared by Chair. It highlighted the importance of the "core issues of defining the subject matter, identifying the beneficiaries, framing the scope of rights and delimiting those rights through appropriate exceptions and limitations" and mentioned that "[t]here should be a direct correlation between the objectives and the substantive provisions." Those core issues were the foundation upon which substantive articles were built. It was not possible to build a stable construction without laying its firm foundations. Therefore, in terms of what to focus on at IGC 24, it emphasized that it was vital to reach a common recognition on the fundamental issues, especially the "policy objectives", the "general guiding principles", the "definition of traditional knowledge" in Article 1, and the "beneficiaries of protection" in Article 2. The Delegation believed that the depth of consideration among Member States on these issues, even with its long history, was still insufficient for any kind of agreement at the international level to be reached. Therefore, it strongly believed that intensive discussions on these fundamental issues were necessary. Reaching to a shared understanding on them would enable the IGC to reach a fruitful outcome. In this sense, the "policy objectives" and "general guiding principles", needed to be clearer and duplications within them had to be eliminated. The Delegation noted that in order to construct some legal frameworks, an appropriate logic to support the substantive aspect of the structure had to be fully elaborated. With regard to the specific items in the current text, it first wished to point to some items that it considered being important. These were paragraphs (x) "promote innovation and creativity" alternative, paragraph (xvii) "utilization of Traditional Knowledge by third parties", and paragraph (xviii) "promote access to knowledge and safeguard the public domain". Therefore, although it did not intend to exclude the possibility of improving these options further, these items had to be the basis for further work. In this regard, the text proposed by the Delegation of the United States of America under paragraph (x) of the "policy objectives" was a good proposal that deserved further deliberation by the Committee. On the other hand, the Delegation could not support those paragraphs which were based on introducing a mandatory disclosure requirement such as paragraph (x *bis*), "promote mandatory disclosure requirement", the last part of paragraph (xiv), as well as paragraph (e) alternative of the general guiding principles. Since its position was well known, it would not repeat its reasons at this time. With regard to the definition of TK, it was of the view that the scope of TK was still too vague, according to the current text, to afford proper protection of TK to be established at an international level. As the Delegation of Japan had been reiterating, the criteria for "traditional" needed clarity. For

instance, it wondered whether the term “traditional” did refer to time elements, such as how many generations were needed to be considered as “traditional”, or whether there were any other characteristics or features necessary, such as geographical aspects or background as to how the knowledge concerned had been developed. Each Member State might define “traditional” in a very different way so that it might well lead to confusion, in which case proper protection of TK at an international level would not be achieved as intended. The Delegation was ready to engage in a constructive spirit towards finding common recognition on the fundamental issues. This was an essential and appropriate way to achieve concrete outcomes.

39. The Delegation of Peru believed that the focus that was being given to the procedures and the way in which the Committee was working were the right ones. It believed that if clarity could be achieved on articles such as the “subject matter of protection” and “beneficiaries of protection”, there would be clarity on the balance of the entire text that needed to be struck. It believed that the first four articles were going to be the crux of the document that the Committee was trying to draft. It hoped that consensus would also be achieved on the policy objectives and general guiding principles. Once that was done, it would be possible to move further on in the document and remove square brackets. It recalled the words of the Chair at the beginning of these negotiations, namely that delegations had to work in a spirit of dialogue in trying to understand other delegations that had diverging views. It was certain that other delegations would also try to remain open. The positions of most delegations were well-known and it was now time to achieve the agreement that was required to have an instrument on TK which could be taken to the General Assembly and be used as a basis for convening a Diplomatic Conference in 2014. The Delegation wished to address two questions that had been raised by the Delegations of Canada and the United States of America. With regard to the question of the Delegation of Canada, referring to the relationship of this document with GRs and TK associated to GRs, the only answer it had at that stage was that it was important to set out what the parameters of this document were and to run through a coherency exercise at a later stage and ensure that the document was in line with other international instruments, as had been pointed out by the Delegation of Brazil. With respect to the issue raised by the Delegation of the United States of America, on issues of innovation and technology, the Delegation believed that one of the challenges before the Committee was to protect TK in the most simple, direct and efficient way possible. At the same time, it wished to ensure that innovation and technology were promoted and not hindered. The Delegation believed that it could work alongside the Delegation of the United States of America to find language that would be able to strike the balance between those two concepts.

40. The Delegation of Switzerland provided comments on Articles 1 to 4. With respect to Article 1.1, regarding the text options “refers to” and “includes”, it favored the wording “refers to” since this would render the definition more specific. In contrast, the wording “includes” would imply that there were other forms of knowledge than those explicitly listed in the definition which would unnecessarily render the definition less precise. It believed that any definition that the Committee would eventually agree upon should be as specific as possible since this would be crucial for the application of the instrument. As regarded the other text options contained in Article 1.1, it had a preference for the wordings “developed within a traditional context” and “intergenerational”. The latter could be combined with “or from generation to generation” as was contained in the alternative text proposal for Article 1.1. The definition contained in the facilitators’ option as it currently stood was quite general. It could thus be helpful to include in this definition some of the elements contained in the optional additions such as sub-paragraphs (c) and (d). This was particularly the case if there should be no Article 1.2 on “criteria for eligibility”. If, however, there was such an Article 1.2, the “definition of traditional knowledge” in Article 1.1 could remain more general, since a more specific definition of what TK was protectable would then follow in Article 1.2. Concerning Article 1.2, it believed that any text elements that should either belong in the general definition of TK as was contained in Article 1.1 or that were in contradiction with this definition should be avoided. Moreover, some of the optional additions were mutually exclusive. This was

particularly true for sub-paragraphs (d) and (e). Thus, it considered the question raised in sub-paragraph (g) to be very relevant for clarifying the contents of Article 1.2. On Article 2, it supported the text as contained in the facilitators' option. Among others, this definition would be in line with the terminology used in the Nagoya Protocol. As stated previously the term "local communities" was to be understood broadly so that it covered a wide range of communities holding TK. The Delegation did not support the elements listed in the "optional additions to the facilitators' text" in Article 2. This applied particularly to the term "nations" as a potential beneficiary of protection. Furthermore, it questioned the inclusion of "families" and "individuals". On Article 3, it supported Option 1 for Article 3.1 as this option provided adequate flexibility to the national implementation. It noted, however, that this option was based on a differentiated treatment of secret and other TK. Therefore the square brackets around the word "secret" would have to be deleted. The Delegation recalled that its proposals on the disclosure of the source presented previously to the IGC also covered TK. This notwithstanding it felt that the issue of disclosure requirement should not be dealt with in Article 3 as was proposed in Option 2. Furthermore, regarding the specific text proposed in sub-paragraph (g) of Article 3.1 in Option 2, it wondered what the "country of origin" of TK would be, since in its view this knowledge was held by indigenous peoples and local communities. As regards the proposed definition of the term "utilization" in Article 3.2, Option 2, it was important to note the definition of the same term contained in Article 2 of the Nagoya Protocol and the fact that the two definitions differed considerably from each other. The Delegation would be very hesitant to include a definition in the international instrument that was being elaborated in the IGC which differed from the definition of the same term in another related international instrument. Turning to Article 4, the Delegation supported Article 4.1. Moreover, it was in favor of limiting the title of Article 4 to "application" and thus of deleting the remaining words "sanctions, remedies, and exercise of rights". The Delegation reserved the right to make additional comments on document WIPO/GRTKF/IC/24/4 or the revised versions of that document at a later stage.

41. The Delegation of the Republic of Korea noted that IGC 24 was the only dedicated session on TK before the 2013 General Assembly. The method of work for that session should therefore be conducive to fulfilling the IGC mandate. For the sake of clarifying its position at that stage, the Delegation highlighted some key issues and concerns. First, the definition of TK was fundamental to the work of the IGC. It was important to have clear and concise text, especially in defining the subject matter of protection of TK. Second, it believed that the indigenous peoples and local communities were the most appropriate beneficiaries of TK protection. Including families, nations and individuals as beneficiaries was very problematic. Lastly, regarding exceptions and limitations, the Delegation believed that it was necessary to achieve a balance between the need to protect the interests of beneficiaries of TK, on the one hand, and the need to properly utilize public domain, on the other hand. It would state its positions in detail as the draft articles were being examined in the expert group.

42. The Delegation of South Africa supported the statement made by the Delegation of Algeria, speaking on behalf of the African Group. It was disappointed by the restatement of positions that were well-known around the issues. It was time to level out the ground for consensus building. The Delegation wished to report on some aspects of the informal meeting that took place in Pretoria the week before, in particular on the spirit of the meeting, as a contribution to the session. The meeting was attended by ten Member States, and discussions were held in a friendly and mutually respecting environment. The purpose of the meeting was not to discuss the text in front of the IGC but, rather, to explore the concepts around the issues and to look at whether the activities taking place within the WIPO process reflected the mandate of the IGC. In order to promote and foster transparency, the Government of South Africa had hoped to extend this invitation to as many as it could, but decided to invite participants that had attended a previous similar meeting in India. The Delegation further raised some of the issues that had been pertinent to the Pretoria meeting. The first one was the need to build consensus and to look for what brought delegations together. The Committee tended to focus on what divided delegations. Participants raised the question

whether there was anything in the text that could assist delegations to have a common goal and common purpose as they met at IGC 24 or whether they would want to continue to speak in parallel lines. Participants addressed the following issues: what did protection of IP mean in WIPO generally and what delegations were seeking to achieve by coming to the IGC. They discussed the issue of WIPO being a forum for national laws or for international norms and standards. It had to be clear to all why the issues at hand were discussed in WIPO and not elsewhere. The second issue was to understand how IP protection applied to TK and in particular whether IP protection was relevant or not to TK, what a *sui generis* protection of TK did mean. Other issues which had been debated by the Member States that attended the Pretoria meeting included those around the concepts of the “public domain”, “widely available TK”, “publicly available TK”, and that of “diffused TK”. The issue of ownership of TK was also discussed and in particular what were the conditions of transfer of TK when it was transferred from one community to the user, what were the entitlements of the user of the transferred TK, what were the conditions of transfer. These kinds of questions were not threatening to anybody and participants felt free to discuss them. The Delegation informed the Committee that the participants in the Pretoria meeting were not associated to a particular text. It emphasized that the Committee had to keep focusing on why it was here. Otherwise delegations would be speaking past each other.

43. The Delegation of Nigeria strongly supported the statement made by the Delegation of Algeria, speaking on behalf of the Africa Group, and in particular the suggestions for ways to move forward in terms of improving the current text. The IGC had to accomplish something meaningful, credible, and effective for the protection of TK. The Delegation believed that this was doable and necessary for science, human rights, innovation and for the IP system as a whole. The state of the current Draft Articles was a challenge. The Delegation believed that at a minimum, the session should produce a leaner, meaner, and cleaner document. None of the questions or challenges before the Committee was new and for those delegations who were students of the great treaties administered by WIPO, they already knew that these questions were only reformulations of questions that had been looked at back in 1883 and 1886. It believed that just as WIPO Member States had found a way forward, in those other treaty contexts, so could the Committee find a way forward for an international legal instrument for the protection of TK. First, the Delegation believed that work had to be carried out on a minimum standards basis. This was a long-standing tradition in WIPO, and the Delegation expected it to continue in this context. Second, it believed that national concepts, such as the public domain, should not be elevated to an international concept. Public domain, what it constituted, how it was constructed, what it meant, what fell in it, what fell out of it, was not part of the international IP *acquis*, since that notion was not a transnational notion but a national notion. It believed that in this session, one of the great contributions would be to distinguish the international and national levels. Third, the Delegation believed that the importance of TK was already evident in the systems of industrial property and copyright. The main purpose of the instrument would be to determine how to appropriately and effectively protect, promote, and facilitate the use of TK in the global innovation system. The Delegation believed that this was important and that time had come to act. Fourth, the goal was not to create a perfect system, but a system that ensured that human creativity, no matter where it was expressed or from where it originated, no matter how it was used, remained a vital legal object for IP protection. The absence of TK protection in the international system undermined the legitimacy of the entire IP system. The Delegation looked forward to a session in which the Committee would produce a text that started with a minimum basis for the protection of TK, that identified clearly what would be protected, even if not completely, that identified “beneficiary” in a sufficient manner, that provided legal certainty, even if it was not with a great deal of detail, and that indicated what Member States were willing to accommodate TK protection within their own national IP systems. It believed that political commitment needed to be explicitly stated by Member States and looked forward to a constructive session in which the Committee could begin, at least in some way, to respond to the needs and interests of those who were represented in the Committee.

44. The representative of CAPAJ expressed his gratitude for the joint initiative taken this year by WIPO and the Permanent Forum by organizing an Indigenous Expert Workshop. This joint initiative had brought together indigenous experts from around the world to contribute in an important way. All of this encouraged indigenous peoples to continue working in the IGC. The representative was very pleased with the indigenous panel. He was confident that it would have an impact on Member States. Referring to the policy objectives and general guiding principles, he believed that paragraph (x) of the policy objectives should refer to the collective nature of rights-holders. TK had to empower the rights-holders, stewards, custodians and creators of TK. However, as it was written, paragraph (x) privileged individual right-holders. Indigenous peoples wanted a complementary system encompassing the idea that they were the custodians and creators of TK. The representative therefore proposed that in the paragraphs on policy objectives, the interests of the creators, and rights-holders but also those of the custodians, had to take precedence over any individual right, since collective interactivity was what generated the TK that was under consideration in the IGC.

45. The representative of the Assembly of First Nations noted that they were a number of elements that were missing in the policy objectives and general guiding principles as drafted. These missing elements included the fact that Member States had to comply with obligations as they related to indigenous peoples under international instruments, particularly human rights instruments. Second, indigenous peoples' control had to be exercised over their lands, territories and resources, including GRs. Indigenous people's laws and protocols, customary decision-making procedures and institutions regarding TCEs, TK and GRs had to be recognized and respected. In no way should TCEs, TK and GRs be accessed without the PIC of indigenous peoples. Indigenous peoples' TCEs, TK and GRs were closely connected to the distinct characteristics of indigenous peoples and were integral features of their culture, traditions, histories, languages and identity. In particular TCE, TK and GRs had intrinsic roles to play in the unity and harmony of indigenous societies. He stated that indigenous peoples had the rights to maintain, control, protect, and develop their IP interests over TCEs, TK and GRs. Wherever TK had been placed in the public domain without their proper authorization, indigenous peoples retained rights over that TK and remained entitled to remedies. Indigenous people's knowledge, cultures and traditional practices significantly contributed to the sustainable development and effective management of a natural environment. A fair and equitable benefit-sharing system where TCEs, TK and GRs were utilized had to be implemented. The ongoing cultural diversity that should be ensured through the survival and well-being of indigenous peoples was of interest to everybody. With respect to the instrument, the representative indicated that financial and technical assistance for indigenous peoples to maintain, control, protect, and develop their TK, TCEs and GRs had to be guaranteed and enhanced. Finally, indigenous peoples had the right to economic development and without impairing their permanent sovereignty over their resources had the right to utilize their TCEs, TK and GRs to further this objective. The representative was of the view that the inclusion of these principles into the text would facilitate consensus and assist in moving the discussion forward.

46. The representative of FAIRA wished to draw attention of Member States who he said were not present during the Indigenous Panel to the presentations that had been made at this event. He asked the Secretariat if those could be posted on the WIPO website for reference.

47. The Vice-Chair confirmed that the presentations would be posted on the WIPO website by the Secretariat.

48. The Delegation of Egypt hoped that an agreeable text could be successfully produced at this session. It emphasized the need for a binding international instrument that would serve the interests of everyone and protect TK as well as TK associated with GRs. The Delegation supported the statement made by the Delegation of Algeria, speaking on behalf of the African Group, as well as the statement made by the Delegation of Brazil, particularly in respect of Articles 1 to 4. It hoped that the international instrument under discussion would be consistent

with other international conventions, for example, the CBD, and would ensure the greatest degree of transparency in accessing TK in accordance with PIC and agreed Access and Benefit Sharing (ABS) mechanisms. The Delegation had a number of comments, on the form and content of the text, and would express them at the appropriate time. It added that the text would have to be reformatted as some draft articles were not well organized.

49. The Delegation of Norway supported Article 3*bis* and Article 4*bis*. It understood those articles as alternatives to Articles 3 and 4 and not as additional articles. Regarding Article 4*bis*, it preferred the first Alternative. It stated that the disclosure requirement should apply to patents only and not to other sorts of IPRs.

50. The Delegation of the Russian Federation acknowledged that the attention of the Committee should focus on the subject matter of protection, the beneficiaries, the scope of protection and the exceptions and limitations. In the Delegation's opinion, there was also a need to make progress concerning the issues linked to the policy objectives and the general guiding principles at that stage. With regard to the policy objectives, the Delegation had expressed a preference for the option that appeared on pages 7 and 8 of the Annex to the Russian-language version of the annex to document WIPO/GRTKF/IC/24/4 (pages 6 and 7 of the Annex to the English-language version of the annex to document WIPO/GRTKF/IC/24/4). As to the objectives focused on in points (vi) and (viii) of that option, the Delegation had made clear its preference for the provision entitled: "Promote community development through the supporting of traditional knowledge systems and the prevention of misappropriation." Regarding Article 1, it was advisable to use the Optional Additions to the Facilitators' Text in a way that accorded with the principle that protection should not be extended to matters that were public property, were widely known or used outside the communities, or to instances of the application of normal and widely known principles, rules or practices. Regarding the beneficiaries under Article 2, it was advisable and more acceptable to work on the option. The Delegation preferred not to include most of the Optional Additions, particularly the one that concerned individuals, which required further discussion. On the scope of protection under Article 3, it noted a typo in the Russian-language version of Option 1, 3.1(b)(ii) and requested that the Russian-language text must be reproduced in accordance with the English-language version, where the following should be stated in Russian «поощрения использования традиционных знаний с уважением культурных норм и практики их носителей». As a basis for further discussion on Article 3, it would be advisable to use Option 1.

51. The Delegation of Ukraine saw the Committee's work as a proof of the greater attention that protection of TK was getting in the international arena. Its country was holding internal discussions regarding this issue. It referred to the roundtables that were organized in Ukraine last year and in April this year, where representatives of communities or societies dealing with folklore and TK put forward their ideas about the prospects for developing legislation for protecting TK and TCEs, including at the international level. Participants observed that the most urgent issue was to protect the access to TK and TCEs and develop mechanisms of rights management. As TK was transmitted from generation to generation as a cultural heritage, its protection should be recognized as a natural right for each people to protect its own creativity. In drafting the negotiating text, the Delegation felt that it would be appropriate to pay attention to the numerous correspondences between the Draft Articles on TK and the Draft Articles on TCEs, bearing in mind the specific nature of the norms in each of those two areas, as well as to the connections between the key articles, such as beneficiaries, scope of protection and sanctions.

52. The Delegation of Belgium, speaking on behalf of Group B, noted that the IGC had already accomplished substantial progress in exploring national practices and clarifying differences in positions. However, it was also convinced that further work was needed in order to bridge divergences and, sometimes, conflicting views between policy objectives and general guiding principles in the TK text in accordance with the IGC mandate for 2012 and 2013 and the IGC work plan for 2013. It stated that further IGC work should remain inclusive,

member-driven and participatory. The IGC should strive therefore for a balanced outcome that provided sufficient certainty and flexibility in the field of TK. In this context, Group B stood ready to undertake further work towards concluding the text of an international instrument or instruments pursuant to the General Assembly mandate. In this regard, Group B strongly believed that the IGC would benefit from the stock-taking discussion during IGC 25. This discussion should enable the IGC to determine the status of the draft texts and to reflect further on the way forward. The Delegation said that Group B stood ready to contribute constructively in order to achieve a mutually acceptable result.

53. The Delegation of Sri Lanka emphasized the high importance of the present session, as TK was very important to its country. It said that the definition of the subject matter should be consensual. It acknowledged that IGC 21 had contributed greatly in developing the present Draft Articles. However, there was still disagreement on the definition of the subject matter. It suggested therefore spending enough time to achieve an agreement, or at least a revised version, that would address this issue. Regarding Article 1.1(c), it proposed to insert "traditional and indigenous" before "medical knowledge". The Delegation expressed support for the statements made by the Delegations of South Africa and Peru. It considered the statement made by the representative of Tupaj Amaru as particularly valuable as well. It acknowledged the contribution made by indigenous peoples and communities in developing TK generation after generation. It was for this reason that the IGC should protect TK for the benefit of future generations.

54. The representative of Tupaj Amaru thanked the Delegation of Sri Lanka for the support it had expressed. He also supported the statements made respectively by the Delegation of Algeria on behalf of the African Group and the Delegation of South Africa, as it reminded the IGC that the objective was to develop a legally binding international agreement. He disagreed with the Delegation of the United States of America regarding the public domain in the field of TK. He wondered what could be the purpose of drafting an international instrument should TK pertain to the public domain. He said that the stance of the Delegation of the United States of America supported the interests of the pharmaceutical companies to benefit freely from TK, but not the interests of society in general. He noted that until now most Member States had made general statements, mixing up general principles and objectives with references to articles, instead of discussing the substance of the text article-by-article. He urged delegations to express their precise views on the text in order to make genuine progress. By contrast, he referred to a suggested text he already made several years ago in this regard. He reserved his right to participate in the group of experts, as a mandate to contribute to the negotiations had been given to him by the indigenous peoples in Peru and Bolivia, from where he had just returned. He said that he could not give up his mandate to the Indigenous Caucus which was merely a consultative group. He added that the Indigenous Caucus was looking for support from the WIPO Voluntary Fund, while not supporting his suggestions. He wondered whether the Indigenous Caucus pursued other interests than the substance of the text. He said that the Delegations of Sri Lanka, Cuba and the Bolivarian Republic of Venezuela instead showed interest for the substance of the text by supporting his suggestions.

55. The Delegation of China expressed its readiness to participate in the present session in a constructive manner and urged the IGC to achieve its mandate by focusing on the substantive provisions. Regarding Article 1 on the definition of TK, the Delegation considered that this Article should comprehensively summarize the different manifestation of TK. This would make the scope of the subject matter for protection much clearer. It added that the subsisted forms of TK, including oral forms, varied a lot, as well as codified forms that had been widely disseminated. In this regard, the Delegation believed that "and which may subsist in codified, oral or other forms" should be included in the definition of TK. The Delegation would put forward more specific proposals in this regard at the appropriate time.

56. The Delegation of Indonesia extended its support to the Committee's unremitting efforts to continue intensive negotiation and engagement towards concluding the text or texts of an

international legally binding instrument or instruments which would ensure the effective protection of GR, TK and TCEs. It wished to reassert its well-known position on the importance of expediting the work of the Committee. The Committee needed to work on an accelerated text-based negotiation with the objective of reaching common ground for preparing a draft text of the international legal instrument or instruments that were ripe for being negotiated in a diplomatic conference. It acknowledged though that after many IGC meetings, the challenges still remained. It urged Member States to do their best to make progress at the present session and not waste any opportunity by delaying and prolonging its exercise in preparing the international legally binding instruments. The Committee needed to narrow down divergences on TK by simplifying the working documents into a single consolidated option, make real progress, reach compromise, so that the Diplomatic Conference could be convened shortly. Regarding the Draft Articles and the issue of the subject matter definition in particular, it stated that TK was a wide-ranging knowledge that was wider than purely intellectual in nature. It also included knowledge which was associated with biodiversity and natural resources that spread through generations. Subsequently, TK was a dynamic and evolving knowledge that represented collective creativity. With respect to the criteria for eligibility, it found that the formulation enshrined in Article 1.2 of the Draft Articles seemed to offer a convergent view on the matter. In this regard, it suggested that the formulation avoid some qualifications that might obscure the provision. References to terms like “integral” or “closely linked” as operative qualifications for the criteria for eligibility as provided for in Article 1.2 might create difficulties in implementing them. It requested that those references be deleted. Regarding the beneficiaries, it was of the view that they should be indigenous and local communities. Yet, in certain circumstances where TK was not specifically attributable to or confined to an indigenous and local community or where it was not possible to identify the community that had generated it, the beneficiaries should be a national entity as determined by national law. On the scope of protection, it reemphasized its preference for Option 2. This provision should include the “exclusive” rights of the beneficiaries to protect TK. Finally, concerning the exceptions and limitations under Article 6, the Delegation noted that there were some elements of convergence in the former Options 1 and 2. The Committee needed to focus on how to find a more acceptable alternative formulation on this particular issue. It also wished to underline its concern regarding the Alternatives proposed for Article 6.3 and 6.6. With respect to secret and sacred knowledge, it agreed that they should not be subject to exceptions and limitations. The Delegation reasserted its strong commitment to move forward the process.

57. The Delegation of the United States of America understood policy objectives to reflect the desired outcome of the Committee’s work. In this regard, it proposed several amendments as follows. In paragraph (ii) of policy objectives, it proposed inserting “awareness and” in the title and the first sentence after “promote.” It also proposed bracketing “integrity,” and replacing it with “heritage,” as this might be a more appropriate term in that context. It proposed the following alternative text in paragraph (iii): “Be guided by the rights and needs of the holders of traditional knowledge and society.” This reflected that the outcome must be beneficial to all. Under policy objective paragraph (iv), it proposed inserting “of” after “conservation”; inserting “and respect for” before “traditional knowledge” in the first line. It proposed bracketing the remainder beginning at “by”. These changes were intended to eliminate circular language and to simplify. Regarding paragraph (vii) of policy objectives, it proposed combining it with paragraph (iv) or (vi) in order to simplify. In paragraph (viii), it proposed inserting “protected” in the third line before “traditional knowledge”. In paragraph (x), first line, it proposed adding “and” after “encourage”, and bracketing “and protect.” It also proposed bracketing from “including” in the third line until the end of the paragraph. In the alternative paragraph (x), it proposed bracketing “safeguard and”, as the Delegation was unclear of the use of the term in the context of this objective. It also suggested a new objective to follow paragraph (x) as follows: “Contribute to the documentation and conservation of traditional knowledge, by encouraging traditional knowledge to be disclosed, learned and used in accordance with relevant customary practices, norms, laws, and understandings of traditional knowledge holders, including those customary practices, norms laws and

understandings that require prior informed consent and mutually agreed terms before the traditional knowledge can be disclosed, learned or used by others.” In paragraph (xi), it proposed new language at the beginning of the paragraph as follows: “promote the use of contractual arrangements between the holders of protected traditional knowledge and those who obtain protected TK from such holders in order to [etc...]”. In paragraph (xi bis), it proposed an alternative, as follows: “ensure that traditional knowledge is compiled in databases that are available to patent examiners, except when the traditional knowledge is secret traditional knowledge, and when a holder of secret traditional knowledge makes such knowledge available to another, promote the use of contracts so that the permitted uses and further disclosure of the TK is understood by the parties to the contract”. Regarding the title of paragraph (xvii), it proposed inserting “on mutually agreed terms” at the end, after “parties”. Finally, it preferred to bracket guiding principle (m), as the Delegation did not have a good understanding of the incentives contained in the principle.

58. The representative of CISA supported the statement that had been made by the representative of Tupaj Amaru, who urged the IGC to concentrate on the substantive work. In addition, he invited the IGC to study the UNDRIP where all the principles and objectives needed were included, instead of repeating the same statements endlessly.

59. The Delegation of India thanked the Chair for the informal issues paper he had circulated which clearly identified the core issues to be addressed in the present session. It felt saddened by the interventions made by some delegations which made it worry about the progress of the IGC work. It shared the concerns expressed by the Delegation of South Africa regarding the purpose of its presence at the IGC sessions. It concurred with its urge to find solutions regarding the areas on which convergence was needed. It reminded the Committee that its main purpose was to address the issue of misappropriation and misuse of TK. In this context, it referred to the note of the Chair and quoted the following: “One of the other gaps identified refers to the fact that TK “as such” remains mainly unprotected, while TK-based innovations and creations can be covered, to some degree at least, by existing IP protection. Therefore, there is a call for an international instrument to provide for the effective protection of TK “as such” (positive and/or defensive protection), as well as for the protection of community interests in respect of TK-based innovations (defensive protection).” Article 1 that dealt with the subject matter for protection was of utmost importance to fill this gap. The Delegation was mainly concerned with the language of Article 1.2. The trend it noted in the interventions of some of the delegations was to exclude substantive parts of TK from the subject matter of protection, while they disregarded that those parts of TK were subjected to misappropriation. The use of words like “collective”, “integral”, “closely held” along with “cultural identity of the beneficiaries” in Article 1.2 enabled countries to exclude most of the TK that was subjected to misappropriation. That exclusion denied the practical reality of how TK was generated, maintained and passed on from generation to generation. It was the interaction of TK with the various communities involved in its maintenance that made TK dynamic and evolving. It was therefore important to reflect the cultural diversity of the communities in the criteria for eligibility in order to cover the gap that the IGC was requested to address to prevent misappropriation and misuse. In this context, the Delegation proposed deleting the words “collective”, “integral” and “closely linked” from Article 1.1 and adding “associated with cultural diversity of the beneficiaries” as part of Article 1.2 in order to cover valuable TK that was subjected to misappropriation and misuse. The Delegation refrained from adding new texts in plenary, since that would have made the text more complex, but intended to introduce the element of cultural diversity involved in TK protection in the criteria for eligibility in the group of experts. Regarding Article 2 that dealt with beneficiaries, it requested that the reference to “defined in Article 1” in the Facilitators’ Option (Convergent Text) be replaced by “defined in Article 1.1”. It proposed adding the Optional Addition (e) to the end of the Facilitators’ Option. This would enable the IGC to link Article 1.2 on the subject matter with Article 2 on the beneficiaries and address some of the important questions raised by the Chair in his note regarding ownership. It believed that the finalization of the Articles that dealt with subject matter and beneficiaries would enable the IGC to reflect on the scope of protection as well on limitations and

exceptions. It reserved its right to come back on these articles with changes if needed at the appropriate time.

60. The representative of INBRAPI expressed the hope that the IGC would move forward in the present session and that future generations would be able to benefit from the efforts the IGC was making. She thanked the Swiss foundation and *Incomindios* which had enabled her to attend the session and recalled that her organization had been trying alternatively to participate with its own means as well. She recalled that she came from Brazil, a country with 240 different indigenous peoples who spoke 183 languages, comprising 871,000 individuals and 63 voluntarily isolated groups. Dealing with TK meant for the indigenous peoples of Brazil to deal with the very survival of their cultures. She referred to the presentations made by the panelists the morning before. The panelists reminded the Committee of rights that already existed for indigenous peoples, including the right to self-determination. This right encompassed the right for indigenous peoples to decide on their own priorities and to submit to their free PIC what would be a fair and equitable sharing of the benefits accruing from the use of their TK. Member States were discussing the TK of indigenous peoples at the IGC. The least that was expected from them was therefore to enable indigenous peoples to exercise their right to express themselves on the matter. She recommended in this regard that the discussions at the IGC be based on mutual respect for the diversity of cultures and opinions. She requested that statements that were not relevant to the IGC work or violate ethical limits, like the ones, in her view, that the representative of Tupaj Amaru had been making at IGC sessions, be not permitted. In this regard, she asked the representative of Tupaj Amaru to exhibit more respect to his colleagues and brothers of other indigenous peoples' organizations. Regarding the Draft Articles, the representative of INBRAPI referred to international treaties and instruments which already existed and supported their being mentioned under the General Guiding Principle (b) of the Draft Articles, like the UNDRIP and the International Labour Organization (ILO) 169 Convention. These instruments constituted frameworks which should be taken on board if the IGC wished to move forward in a coherent manner in relationship with other international instruments dealing with TK. As stated by the Delegation of Brazil, reference should also be made to UNESCO treaties as well as the CBD and the Nagoya Protocol. She supported as well the statement made by the representative of the Assembly of First Nations with regard to the Indigenous Expert Workshop that was held from April 19 to 21, 2013. On the subject matter, it was important that Member States recognize the collective nature of TK. Although TK could be maintained by one individual, the rights involved should be, because of the shared nature of TK, also shared and exercised collectively. She noted that the collective nature of TK was mentioned by the law of Brazil, in the 2001 Provisional Measure nr. 2.186, under Article 9 (III)(b) and that this principle was reflected in Article 2 (g) of the Draft Articles in its present state. As to the criteria for eligibility, she could not accept letters (d) regarding public domain and (e) that dealt with TK allegedly protected by an IPR. She said that the implementation of the concept of public domain and the granting of IPRs on TK that disregarded the principles of PIC and fair and equitable benefit sharing with the beneficiaries, had to be assimilated with misappropriation. The representative added that the wording of Article 2 on the beneficiaries needed to be improved so as to ensure consistency with the international treaties already mentioned. She reserved the right to make suggestions in this regard in the group of experts.

61. The Delegation of Australia observed that the Optional Additions (c) and (f) under Article 1.2 were very similar and could therefore be combined. Alternatively, one of the Optional Additions could be dispensed with.

62. The representative of Tupaj Amaru requested that the Secretariat made available the amendments proposed by the Delegation of the United States of America in. He said that he could not hear or understand them when they were read out. The representative asked the representative of INBRAPI to refrain from making criticisms about Tupaj Amaru. He said that Tupaj Amaru was one of the drafters of the UNDRIP and that it had been represented at the UN for 20 years. He said he used his right to express his opinion in relation to the sponsorship

received by other observers from the WIPO Voluntary Fund. He recalled that his participation at the IGC had been sponsored by his own funds without the assistance of the WIPO Voluntary Fund.

63. The Delegation of Côte d'Ivoire said that TK was not old-fashioned or out-of-date. The Delegation hoped that the instrument would provide effective protection to TK. It expected that the Committee achieve a satisfactory outcome for the benefit of everyone. It supported the statement made by the Delegation of Algeria on behalf of the African Group.

64. The Chair urged participants to comment exclusively on the text of the Draft Articles. He requested the Delegation of the United States of America to send by e-mail its proposed amendments to the Secretariat as suggested by the representative of Tupaj Amaru. He asked the Secretariat to make copies of the proposed amendments and make them available. The Chair closed the floor on the Annex to document WIPO/GRTKF/IC/24/4 and suspended the plenary. He called upon the expert group and the facilitators to meet in order to produce a revised version of the Draft Articles based on the statements made.

65. [Note from the Secretariat: this part of the session took place after the expert group had met for the first time] The Chair reopened the floor on Agenda Item 5 and introduced Rev. 1 of the text "The Protection of Traditional Knowledge: Draft Articles" (Rev. 1). He informed the plenary, as a matter of transparency, that Mr. Ian Goss from Australia, upon the request of the facilitators in preparing Rev. 1. He added that the regional coordinators had been informally informed already. He reminded the Committee that Mr. Goss, who worked on the revision of the GRs-related text as a facilitator at IGC23, would not be a facilitator at this session but would remain at the disposal of the Chair and the present facilitators in the effort to move forward at this session.

66. Upon invitation by the Chair, one of the facilitators, Mr. Nicolas Lesieur from Canada, speaking on behalf of the three facilitators, presented Rev. 1 to the plenary of the IGC. He said that the facilitators had tried to capture the main key concepts of Article 1, noting that not all of those had enjoyed consensus. An indicative paragraph which was in brackets included elements such as cultural, environmental and healthcare-related elements. He noted that the term "resources" would be added after "natural" in Rev. 2 of the Draft Articles. The term "traditional knowledge associated with genetic resources" raised the issue as to whether the TK text needed a definition of "traditional knowledge associated with genetic resources". One delegation had proposed to include Article 1.2 as a definition. He observed that the term "intergenerational" introduced a duplication of one key element between Articles 1.1 and 1.3, but that term appeared to be a substantive criterion for a number of delegations. The facilitators had wondered whether it would not be better if the term had been only mentioned in one of those paragraphs. He drew attention to the so-called "deleted text" at the end of Rev. 1, but he said that this did not mean that this "deleted text" was gone for good. This annex was only a "parking spot" for the text which had been removed. Articles 1.2(c) to (f) in the "deleted text" were inadvertently not included in Article 1, and they would be reflected in Rev. 2. The other elements, such as "unique product", "integral" and "generation to generation" had been reflected in either the definition or the criteria. Regarding Article 2, the facilitators had tried to capture the views of the expert group and tried to address cases where TK could not be specifically attributed to a specific people or community. A reference to Article 1 had been included to address certain concerns expressed by delegations. In Article 2.1, "and/" should be added before "or" and before "develop", which would be reflected in Rev. 2. Article 2.3 had been proposed by one delegation. The facilitators had had some difficulty understanding its relationship with Article 1 and needed clarification from the proponent. Regarding Article 3, delegations would notice that the order of the two options had been switched: Option 1 was a right-based approach while Option 2 was a measure-based approach. For clarification, Option 1 was an option in which the instrument would confer by itself certain rights to the beneficiaries; whereas Option 2 would be an option in which the Member States would have the flexibility to implement their own measures domestically to achieve the objectives of the

instrument. As noted in footnote 2, Article 3.2 was a definition and the facilitators wondered whether it could be included as a footnote or in a set of definitions. In Article 3.1(a) of Option 1, “[secret]” and “[protected]” should be added after “misappropriation of”. As suggested in footnote 1, the facilitators had bracketed the references to “prior informed consent” and “mutually agreed terms” to indicate that those could be considered mechanisms that could be better addressed elsewhere in the text. In Option 2 of Article 3.1, the facilitators had used the word “alternative” to reflect suggestions made by one delegation. They felt that those were probably more additional options to Option 2 than an alternative. He noted that there was still no consensus on the issue of diffused TK, secret TK and protected TK, which were cross-cutting issues throughout the text. The facilitator emphasized that any omissions were involuntary. Any Member State that believed that there was an omission or misunderstanding could bring the facilitators’ attention. In such case, the facilitators would reflect the omitted elements in Rev. 2.

67. The Chair, before opening the floor on Rev. 1, proposed that comments from participants should focus on whether the text had captured all the proposals or whether there were additions and omissions on which the delegations would wish to pronounce to give further guidance to the facilitators. If there were helpful comments which could bridge gaps, those should also be offered. He hoped that there would be no interventions which took the negotiation back. The Chair opened the floor for comments on Article 1 in Rev.1.

68. [Note from the Secretariat: all delegations that made a statement thanked the facilitators for preparing Rev. 1.]

69. The Delegation of the Dominican Republic, speaking on behalf of GRULAC, proposed to delete the bracketed phrase “resulting from intellectual activity” in Article 1.1. It proposed to remove the indicative paragraph of different TK, which would need a definition containing all kinds and parts of TK. It would be counterproductive to include Article 1.2 in the text. The definition of TK associated with GRs must be harmonized with all the existing regulations. It suggested removing Article 1.2.

70. The Delegation of Australia stated that it was agreed by the expert group to move Articles 1.2(c) to (f) in the “deleted text” to either Article 3 or Article 6. It believed that they could be put for the moment in Article 6 which dealt with exceptions and limitations. It thought that the proponents had also agreed, with a *caveat*, that exceptions were not always obligatory and had a permissive component. It wondered whether those articles could be considered when Article 6 was to be discussed.

71. The Delegation of the EU, speaking on behalf of the EU and its Member States, noted that a number of points that it had raised in the expert group were not reflected in the text. Regarding Article 1, it attached great importance to criteria for eligibility. It noted that previous Articles 1.2(c) to (f), excluding TK in the public domain from protection, did not appear. While the expert group had agreed to explore the relationship with the public domain in Articles 3 and 6, it had understood that those points would remain in brackets pending further discussion. It would therefore request the facilitators to reinstate Articles 1.2(c) to (f) in Rev. 2. The Delegation noted that there was an overlap between Articles 1.1 and 1.3. The relationship between the two was not clear and there was potential confusion between what was protected TK and what was not. It suggested adding “only” between “extends” and “to” in Article 1.3. It also suggested bracketing the second paragraph of Article 1.1, because it would be more appropriate to deal with the reference to agriculture, environment and other aspect of TK in a preamble. It suggested bracketing “recognizing the cultural diversity of the beneficiaries” in Article 1.3 as it was not sure how that related to criteria for eligibility. As a general comment, it suggested bracketing “peoples” throughout the text, including Article 1.2.

72. The representative of the HEP preferred the terms “refers to” and “includes” in Article 1.1 to be replaced with a legal term. She proposed to remove the brackets around “resulting from

intellectual activities”. She proposed to delete “and are inalienable, indivisible and imprescriptible”, which required much more details regarding the nature of TK. She preferred to keep the word “associated” rather than “linked” in Article 1.3 as TK was associated with cultural identity. Every indigenous people in Africa had their own histories due to their colonial history. She hoped that everyone would respect another’s traditions and cultures. The representative supported the comments made by the Delegation of the EU, on behalf of the EU and its Member States, on Articles 1.2(c) to (f).

73. The Delegation of Thailand was very happy with the new draft. It felt that it was an improved text and much easier to understand; however, it indicated its strong preference to the word “includes” in Article 1.1, as it allowed the flexibility that was needed by various countries with various situations. Article 1 dealt with subject matter, therefore, the references to “peoples” and “communities” in Article 1.1 should not be included. Those words would be dealt with in Article 2. The Delegation could not accept the term “resulting from intellectual activity” for various reasons which had been lengthy discussed in the expert group. It supported the comment made by the Delegation of the Dominican Republic, on behalf of GRULAC, regarding the deletion of Article 1.2.

74. The representative of Tupaj Amaru believed that the brackets showed that there had not been any significant progress. He said that there was much confusion on the vocabulary and legal concepts as well as a mixture of *sui generis* concepts and IP concepts in the text without consistency between them. Regarding the objectives, there should be two or three objectives as it was standard for any international instrument in his view. He recalled that he had submitted specific amendments the day before. References to subject matter of protection could be found in the CBD and UNESCO Conventions. He noted as well that there was confusion between the subject matter of protection and the definition in the facilitators’ text. He proposed to have a separate article on subject matter of protection. The representative urged the Delegation of the EU, on behalf of the EU and its Member States, not to further oppose or put brackets around the word “peoples”. He said that indigenous peoples were recognized in many international instruments, such as the UNDRIP.

75. The Chair advised to keep brackets around “peoples” for further deliberation as it was a cross-cutting issue.

76. The Delegation of Algeria, speaking on behalf of the African Group, stated that the definition of TK included the elements which the African Group had considered to be important. It supported the delegations who had proposed to delete “resulting from intellectual activity” and “and are inalienable, indivisible and imprescriptible”. It suggested removing Article 1.2 simply because it was entirely new. It did not appear anywhere else in the core document which was the basis of the negotiation. It believed that any new element which was not in the core document must be removed from the text. It was flexible to put it into an annex, but, in any case, new elements must not be included in the text along with the other elements that had been on the table for two years.

77. The Delegation of Japan believed that a higher degree of precision in the definition of TK was essential to ensure legal certainty. It could not approve such vague description of TK as presently drafted. Article 1.1 included vague wordings, such as “dynamic and evolving”, “intergenerational” and “from generation to generation”, which did not add definite characteristics to the definition of TK. An enhanced clarity was needed to make sure that protection was afforded to TK at the international level. As it had proposed in the expert group, the Delegation proposed to add a time component “and has been used for a term as may be determined by each Member State in accordance with its national law but no less than 50 years” after “from generation to generation” in Article 1.3.

78. The representative of FAIRA disagreed with the Delegation of the EU on bracketing “recognizing the cultural diversity of the beneficiaries” in Article 1.3. Indigenous peoples

spread all over the world in a rich diversity. Regarding Article 1.2, he proposed to add “indigenous and traditional”.

79. The Delegation of Australia supported the insertion of “indigenous and traditional” before “medical knowledge” as proposed by the representative of FAIRA.

80. The Delegation of Indonesia shared the view as expressed by the Delegation of Algeria, on behalf of the African Group, that new proposals should not be included so as to expedite the work of the IGC. The Delegation supported the comments made by the Delegation of Thailand. Regarding Article 1.3, it suggested deleting “distinctively” because such qualification was not necessary. It preferred the use of “linked with” rather than “associated with”. It found that the references to “cultural and social identity” and “cultural heritage” created some impression that the definition of TK was cumulative in nature. It proposed therefore to replace “and” between “cultural” and “social” with a comma, and to replace “and” before “cultural heritage” with “or”.

81. The Delegation of Peru believed that important progress had been made in Rev. 1. It supported the removal of the phrase “resulting from intellectual activity”. It proposed to delete Article 1.2 because the IGC should not define one type of TK, while not defining the other ones. Since the list might be extremely long, it advised that deletion. Regarding Article 2, it supported Article 2.1 with the amendments made by the facilitators.

82. The Delegation of Brazil supported the comments made by the Delegation of the Dominican Republic, on behalf of GRULAC, and the Delegation of Peru, regarding the deletion of “resulting from intellectual activity”. It believed that “inalienable, indivisible and imprescriptible” was important for the definition of TK, and it proposed to keep it. The Delegation would discuss more directly with the African Group to find out a solution on that.

83. The Delegation of Switzerland stated that the revised Article 1.1 was much more substantial than the previous version as contained in document WIPO/GRTKF/IC/24/4, and thus defined TK more clearly. The Delegation maintained its preference for “refers to” over “includes”. It believed that the text in brackets listing the fields that TK might be associated with helped for a better understanding of the term “traditional knowledge”. As there might be other fields, it suggested including “in particular” or alternatively “fields such as” to more clearly indicate that the list that followed was indicative in nature. The Delegation believed that it was helpful to include in that instrument a definition of the term “traditional knowledge associated with genetic resources”. That might be helpful in light of other international instruments using the same term, in particular the Nagoya Protocol. The current version of the definition only applied to TK “which directly leads to a claimed invention”. The Delegation thought that the wording would render the definition too limitative. The Delegation noted that Article 1.3 contained the notion of “intergenerational and/or passed on from generation to generation” which was also contained in Article 1.1. In order to avoid unnecessary duplication, that notion should be deleted either in Article 1.1 or Article 1.3. Article 1.3 referred to “beneficiaries as defined in Article 2” in the context of the criterion for eligibility requiring that the protected TK be “distinctly associated/linked with the cultural and social identity and cultural heritage” of those beneficiaries. That raised the question of whether that criterion also referred to Article 2.2, which allowed for the establishment of a national entity as a beneficiary in certain circumstances. The same question arose with regard to the notion of “society at large” as contained in Article 2.3. If that question was answered affirmatively, it wondered what the “cultural and social identity and cultural heritage” of the national entity and the society at large would comprise.

84. The representative of Tulalip Tribes recalled the discussion in the expert group that it was agreed to add “resources” after “natural” in the second paragraph of Article 1.1.

85. The Delegation of the United States of America disagreed with the suggestion made by the Delegation of Algeria on behalf of the African Group to remove the text of Article 1.2 from Rev. 1 on the grounds that it was not previously contained in document WIPO/GRTKF/IC/24/4. It also rejected the suggestion that the new language introduced be removed to an annex. It pointed out that the mandate of the Committee was to build upon the existing text rather than to merely consider existing language and noted that the language referred to in Article 1.2 had been introduced in the plenary on the first day of the session. The Delegation noted that it had proposed the introduction of a new paragraph 1.4, “traditional knowledge that is contained within databases may be used to prevent the erroneous grant of patents”, which had not been reflected within the revised document. It explained that while it remained flexible with respect to the exact placement of the proposed paragraph 1.4, its preference would be to retain it within Article 1 until a more appropriate location was agreed on.

86. The representative of the African Indigenous Women Organization (AIWO), speaking on behalf of the Indigenous Caucus, believed that the revised text contained elements that addressed some of the concerns and rights of indigenous peoples. She reiterated the support of the Indigenous Caucus for the inclusion of “indigenous people” within the definition of TK, and noted that the definitions of “indigenous people” and “TK” should be guided by the UNDRIP. She was of the view that the TK of indigenous peoples could be oral or codified and was dynamic, evolving and intergenerational, and formed a part of their collective ancestral, cultural, intellectual and material heritage.

87. The Delegation of Egypt expressed its support for the intervention made by the Delegation of Algeria on behalf of the African Group. It observed that the definition of TK in Article 1 was very limited and believed that this could pose dangers in the drafting of domestic legislation. It suggested, in this regard, the insertion of the word “particularly” in order to make sure that the definition would not be too restrictive.

88. The Chair closed the floor to discussions on Article 1 and opened the floor on Article 2.

89. The representative of AIWO, speaking on behalf of the Indigenous Caucus, noted that the beneficiaries of protection were those who created, held, maintained, used and developed TK. She noted that Member States, such as Mexico, based on extensive consultations among its communities in the development of its policies, had also confirmed her view that the beneficiaries were the indigenous peoples and local communities. She noted that States could not be the beneficiaries. She, however, explained that, in certain situations, States, through a national entity, could administer TK on behalf of the beneficiaries. This could be in instances, such as where TK was diffused and it was not possible, despite earnest and good faith efforts, to identify the particular people or community that generated the knowledge. She explained that the creation of any national entity for this purpose should be upon request of the indigenous people, with their PIC and in full partnership with them for their benefit. She reiterated the view that indigenous and local communities had exclusive and collective rights as beneficiaries of the TK to maintain, control, protect and develop their TK; to authorize or deny the access to the utilization of their TK; to have a fair and equitable share of the benefits arising from the utilization of their TK on the basis of PIC and MATs; and, to ensure that the users of TK respected the cultural norms and practices of the TK holders and owners. She highlighted that Member States needed to provide legislative, administrative and policy measures for the protection of TK which encouraged TK users to disclose the source as well as to respect the cultural norms and practices of indigenous people and local communities. She pointed out that it was important to ensure indigenous peoples’ rights, especially their rights to control, maintain, protect and develop their IP over TK, before establishing TK databases.

90. The Delegation of Egypt noted, with respect to Article 2, that every society had its specificities regarding beneficiaries and pointed out that Egypt, for instance, did not have indigenous peoples. It expressed its support for the alternative in Article 2 and proposed the

insertion of a reference to “any entity delimited by national law”. This was to cater for instances where TK could not be attributed to an indigenous people or a local community, or where such knowledge was not limited to such a group, or where it was impossible to delineate the origin of such knowledge.

91. The Delegation of the Islamic Republic of Iran was pleased with the clearer text in Article 2. It, however, noted that there were references contained in Article 2 which it could not support. It suggested the deletion of the phrase “who hold, maintain, use or develop” in paragraph 2.1, and the deletion of the entire paragraph 2.3.

92. The representative of the HEP was of the view that recognition for protection should be accorded to Article 2.1. She expressed her full support for the intervention made by the Delegation of Egypt and noted that the national legislation should be left to define which entity could be the beneficiary. She expressed her support for Article 2.2 and proposed that the word “or” between “local community” and “it is not possible to identify”, be replaced with “and”. She further proposed that the phrase “it is not possible to identify the [people or] community that generated it”, be replaced with “it is not possible to identify any entity defined by national legislation that generated it”. The representative requested the removal of the brackets around “[Member States]/[Contracting Parties]” as well as “may define a national entity as a beneficiary”.

93. The representative of ADJMOR aligned himself with the intervention made by the representative of AIWO on behalf of the Indigenous Caucus. He was of the view that the definition of TK, beneficiaries of protection and the extent of protection, were all subjects that should be approached carefully. He noted that it would be wrong to reduce the scope of protection with respect to indigenous peoples and local communities in some parts of the world by leaving it up to the exclusive right of States to regulate the question of beneficiaries in their national legislation. He reminded delegations of the concern expressed by a participant during the expert group, who indicated that there was a need for the international instrument to serve as a guideline in implementing international norms for the protection of TK domestically.

94. The Delegation of Bangladesh noted that though it was interested in having the rights of indigenous people strengthened over their rightful TK, in several countries like Bangladesh, there was no specific segment of the population which could be identified or defined as “indigenous people”. It opined that, for countries such as Bangladesh, there had to be a policy margin as to whom the benefits of the TK would need to be ascribed. For this reason, the Delegation noted that it had previously supported the term “nations” which had now been removed from the revised text. It therefore proposed the insertion of “a/any” within the phrase “[Member States]/[Contracting Parties] may define a/any national entity” in Article 2.2.

95. The Delegation of the EU, speaking on behalf of the EU and its Member States, recognized the efforts of the Chair and facilitators in seeking out a compromise between delegations which were against a reference to national law and those which preferred this approach. It expressed, however, its reservations regarding the language used in paragraph 2.2, and believed that this language could be contradictory of Article 1, in that it seemed to define TK that was not related to an indigenous or local community. It also viewed the language as appearing to extend protection to any type of knowledge, including that in the public domain as well as such knowledge that was not traditional. It viewed this language as being legally unclear. The Delegation noted the importance of further discussions on the issue of TK that was held by more than one indigenous or local community and how this related to the public domain. Such further discussion would better be dealt with under a discussion on Article 12. It requested the removal, or placing in brackets, of Article 2.2.

96. The representative of Tupaj Amaru proposed a revised version of Article 2 as follows: “Beneficiaries of legal protection of traditional knowledge, defined in Article 1 are the indigenous peoples and local communities and their descendants: (a) to whom have been

traditionally entrusted the custodianship and safeguarding of TK in line with customary practices, (b) who maintain, develop and transmit TK from generation to generation as authentic and genuine characteristics of their social and cultural identity and their cultural heritage, and (c) the holders or owners are entitled to the just and equitable distribution of benefits derived from the use of this TK, and the relevant innovations and practices for conservation of biodiversity and sustainable use of its components". He also indicated that customary practices that dated back several centuries should be included in the text.

97. The Delegation of the Republic of Korea pointed out that the revised version of Article 2.1 read "indigenous people or local communities" instead of "indigenous people and local communities" as it had earlier proposed. It also requested that Article 2.3 be placed within brackets, as the meaning of "society at large" was very ambiguous and had not been agreed to by all Member States.

98. The Delegation of Peru, taking into account the correction made by the facilitator who introduced Article 2.1, expressed its support for Article 2.1 as revised. The Delegation, however, was of the view that Article 2.2 had not been able to cover all the difficulties and specificities of countries and would therefore require further discussions. It requested the deletion of Article 2.3 on the ground that it led to more confusion and was not very helpful in its view. It noted that this article also introduced new language which reduced the scope of protection and, at the same time, expanded protection regarding the number of beneficiaries to each and every member of society, whether or not they were holders or creators of TK.

99. The representative of CAPAJ aligned himself with the statement made by the representative of AIWO on behalf of the Indigenous Caucus. He requested, with respect to Article 2.1, that the word "or" be replaced with "and" in the phrase "beneficiaries of protection are indigenous [peoples] or local communities". He also suggested the insertion, in Article 2.1, of the word "generate" before the phrase "...maintain, use or develop", in place of "hold". Regarding Article 2.2, the representative proposed that the definition of a national entity, where required, should be made in accordance with the principles of the UNDRIP.

100. The Delegation of Japan aligned itself with the intervention made by the Delegation of the European Union on behalf of the EU and its Member States, regarding Article 2.2. The Delegation believed that "beneficiaries" should be defined in relation to individual TK, otherwise it could encompass almost anyone. In this regard, it suggested the removal of the brackets around "who hold, maintain, use, or develop" in Article 2.1, provided that "or" was replaced with "and" in order to avoid possible conflict.

101. The Delegation of the United States of America suggested that the references to Article 1 in both Articles 2.1 and 2.2 be amended in order to reflect a reference to Article 1.3. It further suggested the insertion of the word "protected" before "traditional knowledge" in Articles 2.1 and 2.2.

102. The Delegation of Switzerland welcomed the text of Article 2.1 in the revised document and the deletion of additional possible beneficiaries which were previously contained in document WIPO/GRTKF/IC/24/4. It expressed its concern with Articles 2.2 and 2.3 based on its understanding that indigenous peoples and local communities were the beneficiaries of TK protection. It sought clarification on what the specific role of the national entity, according to Article 2.2, would be, and what was meant by "society at large" in Article 2.3. It further noted, with respect to Article 2.2, that the establishment and working of a national entity should only occur with the direct involvement of the indigenous peoples and local communities concerned. It requested that Articles 2.2 and 2.3 be placed in square brackets.

103. The Delegation of Algeria, speaking on behalf of the African Group, noted that Article 2.3 raised concerns and confusion for the African Group. The Delegation explained that it did not entirely understand the significance of Article 2.3 as its inclusion posed problems with respect

to the definition of the protection of TK. The Delegation noted that the Article 2.3 sought to expand the scope of beneficiaries and contained some elements that were problematic, both for Article 2 and for the entire treaty. It aligned itself with the Delegation of Peru in requesting that Article 2.3 be deleted.

104. The Delegation of Algeria, speaking in its national capacity, expressed its support for the proposals made by the Delegations of Bangladesh and Egypt. It proposed the insertion of the phrase “or other entity defined in national law” after “local communities” in Article 2.1. It also requested the insertion of “may define any national entity” in place of “may define a national entity” in Article 2.2.

105. The Chair, with respect to the issue of “national entity”, sought to clarify whether there was a way to cure what was an obvious problem with the broad right to designate a national entity without qualification. He queried whether there was any way for delegations to reflect on qualifying language for the national entity that would meet the standard of legal certainty that was required.

106. The Delegation of South Africa aligned itself with the statement made by the Delegation of Algeria on behalf of the African Group. It noted that, with regard to Articles 2.1 and 2.2, South African law had attempted to grant rights to the beneficiaries as seen in Article 2.1, and in some instances where there was TK involved, to provide a national entity for this purpose. It noted that these two paragraphs could, therefore, be viewed as complementary, and not contradictory. The Delegation further noted, with respect to Article 2.3, that the purpose for inserting Article 2.3 was not clear. It was of the view that it created uncertainty. The Delegation pointed out that “defensive protection” had not been a part of any of the discussions of the instrument hitherto, and agreed with the Delegation of the Peru, that it constituted both a new and a limiting concept. It expressed the view that this concept would not provide effective protection and requested that it be deleted.

107. The Delegation of China believed that the beneficiaries and the holders of TK were diverse in different locations and at different times. Some of them belonged to indigenous peoples and local communities while others belonged to nations. It was of the view that Article 2 should be in line with the diverse characteristics of beneficiaries of protection, which satisfied the legitimate concerns of local communities and indigenous peoples but also enabled Member States to identify the beneficiaries of TK according to their national situations. It recommended the insertion of “nations” in Article 2.1 to give space for national legislation.

108. The representative of ADJMOR stressed that there were situations that needed to be addressed, as decolonization had created new borders dividing many indigenous peoples, like nomads who shared the same language, culture or activity. Those peoples did not distinguish between borders.

109. The Delegation of United States of America noted that the Delegation of Algeria on behalf of the African Group and the Delegation of South Africa suggested deleting the text of Article 2.3. The Delegation provided an explanation of that text: the text reflected the broad scope of beneficiaries that the Delegation envisioned in WIPO/GRTKF/IC/24/4 and in Rev. 1. The defensive protection would help to eliminate the erroneous grant of patents. The beneficiaries of the protection of TK included those who used, held, and maintained the protection of TK, all beneficiaries from the valid grant of patents. The beneficiaries of the IP system included society at large, because society benefited from a system that effectively promoted creativity and innovation. To address the concerns of the African Group, the Delegation suggested eliminating the title “Alternative” as it could be misleading. Article 2.3 might be considered as an addition rather than a replacement for the preceding articles. The Delegation of United States of America stood by the text of Article 2.3.

110. The Delegation of Nigeria expressed openness regarding the suggestion made by the

Delegation of United States of America. But it considered that the text belonged to the preamble because it was referring to society at large. It noted that there was not a single IP instrument that claimed society as an identified beneficiary. The Delegation considered that it was implicit in the very notion of IP protection that everyone benefited from innovation and new knowledge. The Delegation suggested reflecting that text in the preamble. The Delegation pointed out a structural problem with Article 2.3: “Beneficiaries from defensive protection of traditional knowledge is defined in Article 1”; however, it indicated that Article 1 did not define defensive protection of TK. The Delegation suggested bracketing “defensive protection of traditional knowledge”. Regarding Article 2.3 and its location, the Delegation had always assumed that the IGC was talking about legal beneficiaries, people who could assert rights, while society at large could not assert rights in that sense. The Delegation encouraged the IGC to be clear about the kinds of benefits or beneficiaries that the IGC was referring to.

111. The Chair closed the floor for discussion on Article 2 and opened the floor on Article 3.

112. The Delegation of India noted that there had been a lot of improvement on Article 3. It stated that though much clarity had been brought about, problems still remained with respect to the options that had just been created. With regard to Option 1, Article 3.1, the Delegation requested the removal of the square bracket in paragraph (a), around the word “protect”. In paragraph (b), the Delegation requested that the word “use” be retained, while “secret” and “protected” be deleted, as they went against the revised Article 1, particularly Article 1.2. In paragraph (c), it requested the deletion of the words “commercial” and “protected” based on the new definition in Article 1.2. It requested the retention of the word “use”. It acknowledged the footnote of the facilitators but expressed its preference to retain the phrase “on the basis of prior informed consent and mutually agreed terms”, until a solution was identified for the mechanisms being addressed. It also requested that paragraph (g) which dealt with disclosure be brought back to Article 3.1 till a solution was identified. With respect to paragraph (d), the Delegation suggested that “holders” and “owners” be replaced with “beneficiaries”.

113. The Delegation of Cameroon expressed its support for the African Group position as expressed by the Delegation of Algeria with respect to Articles 1 and 2. It was concerned about the negative approach employed in Option 2 of Article 3. It explained that this option did not sufficiently recognize the rights of beneficiaries and was a poor approach from the point of view of legislative policy, as it confined the beneficiaries to defensive protection only. It was of the view that this went to the root of possible remedies in the case where these rights were violated as it failed to enshrine the rights within their broader dimension, especially since the scope of the rights corresponded to the rights to property uses and abuses. The Delegation was of the view that this option could be included elsewhere within recourses or sanctions, instead of being deleted all together.

114. The Delegation of Peru expressed its full support to the intervention made by the Delegation of India. It suggested, contrary to the suggestion made by the facilitators, that Article 3.2 be rather retained as an integral part of the text and not moved to a footnote. It alternatively suggested that delegations could consider creating an article for definitions and Article 3.2 could be placed there under.

115. The representative of the HEP aligned herself with the interventions of delegations which had recommended the removal of brackets from “Member States” and “Contracting Parties”. She also proposed the deletion of the word “should” and its replacement with “shall”, as this would reflect the binding character of the instrument. She noted that the two options within the article referred to national legislation and suggested that these should designate entities other than the entities mentioned within the article.

116. The Delegation of Brazil noted that its positions had not been properly reflected within Article 3. It requested harmonization regarding the use of the words “use” and “utilization”. It suggested the use of the term “utilization” based on the fact that the term “utilization” was

precisely defined in the CBD. The Delegation alluded to the earlier interventions by the Delegations of India and Peru regarding a paragraph on disclosure, and proposed the insertion of a paragraph (e) in Option 1 of Article 3, which would have a close relation to the *4bis* as follows: “to be informed of access to their traditional knowledge through a disclosure mechanism in patent applications”.

117. The Delegation of the EU, speaking on behalf of the EU and its Member States, was unsure as to why the options in Article 3 had been switched by the facilitators. However, the Delegation noted that while Option 2 most closely resembled the previous Option 1, it was not reflective of the latter, while it was considered preferable though by the Delegation of the EU. The Delegation requested that the following text, based on the previous Option 1, be reinstated: “Member States may provide adequate and effective legal policy or administrative measures as appropriate and in accordance with national law to; (a) prevent the unauthorized disclosure, use or other exploitation of protected traditional knowledge, and (b) where protected traditional knowledge is used outside the context, acknowledge the source of the TK owners or holders where known unless they decide otherwise”. It noted that the suggested formulation afforded flexibility to Member States to define the measures needed to achieve the objective under their national law and represented a similar approach to references to national law under the Nagoya Protocol. The Delegation requested the deletion of Article 3.1 (a) of Option 2 which dealt with the misappropriation of TK.

118. The Delegation of Algeria, speaking on behalf of the African Group, believed that a constructive analysis of Article 3 would promote a complementary reading of the two options contained therein. It explained that while Option 1, as a first paragraph, would serve to guarantee the rights of beneficiaries, Option 2, as a second paragraph, would serve to establish the measures that States could take to guarantee these rights. The Delegation noted that such an analysis would be helpful in ensuring that Article 3, which was the key article of the forthcoming instrument, took the two existing options into account, in a complementary fashion. With respect to the Alternative, the Delegation was of the view that it had no place in Article 3. Referring to the Alternative in paragraph (g), the Delegation proposed the insertion of the phrase: “...by submitting evidence on traditional knowledge” in place of “...by submitting prior art”.

119. The Delegation of the Plurinational State of Bolivia pointed out that it would like to see reflected the fact that TK as such could not be patented. The Delegation clarified that it was not referring to inventions or products which could be derived from TK, but rather to TK as such. It noted that this concept could be reflected in Article 3 or Article *4bis*.

120. The representative of Tupaj Amaru informed the plenary that he would submit a suggestion based on Article 3 later on during the session.

121. The Delegation of Japan expressed its preference for the previous order of options in Article 3. It pointed out that the ordering of the options did not represent a prioritizing of the options throughout the text. It was of the view that the approach to be taken within the instrument which would ensure the effective protection of TK at the international level depended on the core issues of what was TK, what TK was eligible for protection, and who the beneficiaries of such protection were. In its view, common understanding of those core issues had not been achieved by the IGC. It believed that the core issues of definition, eligibility, and beneficiaries were presently still too vague as far as a rights-based approach was concerned. It therefore expressed its preference for a measures-based approach, as contained in the current Option 2, which, it noted, would leave each Member State with flexibility on how to implement the instrument.

122. The Delegation of the United States of America suggested the insertion of the word "protected" before "traditional knowledge" in Option 1, Article 3.1 (a). It also requested that Option 1, Article 3.1(d) be placed in brackets. It further proposed the insertion of a new

paragraph on secret TK that would read; “holders of protected traditional knowledge shall have the right to prevent information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information, (a) is secret, (b) has been subject to reasonable steps under the circumstances to prevent unauthorized disclosure, and (c) has value.” The Delegation requested that Article 3.2 be placed in brackets, as it did not understand that TK could be a “product”.

123. The Delegation of Nigeria aligned itself with the interventions made by the Delegation of Algeria on behalf of the African Group and noted that both Options 1 and 2 of Article 3 were complementary. It noted that Option 1 dealt with beneficiaries and their rights, while Option 2 dealt with the States and what they would be bound to do with regard to TK. The Delegation was of the view that Article 3.2 did not belong to Article 3 and suggested that it be removed, as it principally constituted a definition. It noted that a discussion could be held at a later stage on what Article 3.2 meant and what it was intended for. The definition of trade secrets as suggested by the Delegation of the United States of America could be considered in conjunction with the limitations to trade secret law, which, the Delegation of Nigeria noted, was also part of the domestic law of the United States of America, and could probably offer a balanced approach to the matter. Finally, the Delegation of Nigeria observed that the alternative text focused on facilitating and providing national law mechanisms to deal with TK and suggested that it be moved to another Article.

124. The Delegation of South Africa aligned itself with the interventions made by the Delegation of Algeria, on behalf of the African Group, and the Delegation of Nigeria. It also requested that the inclusion of “protected” in Option 1, Article 3.1(a), as proposed by the Delegation of the United States of America, be placed in brackets. The Delegation also requested that the proposed Article 3.1(e) in Option 1, as proposed by the Delegation of the United States of America, be bracketed as it introduced an uncertainty that could not be defined. It finally proposed that Article 3*bis* be deleted from the text, since no one had made any reference to it.

125. The representative of the Assembly of First Nations, with respect to Option 2 in Article 3, was of the view that the issue of databases might be better placed elsewhere in the document. He however noted that databases would have to be studied further before that model be adopted by the IGC. He explained that the holistic nature of customary law, cultural norms and spiritual values made it difficult to compartmentalize indigenous peoples’ knowledge into codified data for storage in international databases. He further pointed out that there were many unresolved issues with respect to the use of databases, such as, security of the database, hacking, misuse of data by officials, and accidental leaks, all of which could inadvertently place TK in the public domain. He expressed concerns over issues such as who would have access to the information in the database, and the possible requirements that would compel indigenous peoples to put their TK into databases as a prerequisite for protection. He expressed the view that disclosure of source could be more effective than a national database and noted that a requirement for disclosure, which would include information on the use of the TK, source of the TK, as well as proof of PIC, MAT and ABS, was a preferred approach to complement the scope of protection. He noted that disclosure would place a minimal burden on those applying for an IP right and that where an IP applicant was found to have misled or lied on an application, this would provide a trigger for indigenous peoples to seek appropriate remedies. He conceded that databases could play a role in the overall IP system; however, databases would need to be maintained and controlled by indigenous peoples at a national or regional level. He noted that the procedure of how patent offices and indigenous peoples interacted would have to be worked out by states and indigenous peoples based on consultation and free PIC. He finally requested Member States to consider removing, or placing elsewhere in the text, Option 2, Articles 3.1(e), (f), (g) and (h).

126. The Chair closed the floor for interventions on Article 3, suspended the plenary and

called upon the expert group and facilitators to meet with the view to further revise the Draft Articles based on the comments made on Rev. 1.

127. [Note from the Secretariat: this part of the session took place after the expert group had completed its work] The Chair reopened the floor on Agenda item 5. He noted that Rev. 2 of the document “The Protection of Traditional Knowledge: Draft Articles” (Rev. 2), as prepared by the facilitators, had been emailed to the Regional Coordinators early in the morning and that it had been made available in hard copy as from 8.40 am that day, the last day of the session. He proposed to turn to Rev. 2 and conclude on it. He recalled that the work on the Draft Articles had been carried out through an initial discussion on Monday April 22 afternoon in the plenary, followed by informal discussions in the expert group on Tuesday April 23. The plenary had reconvened on Wednesday April 24 morning to review Rev. 1 as produced by the facilitators on Tuesday night. The expert group had resumed its work on Wednesday afternoon and continued to work on Rev 1. The expert group concluded its work on Thursday April 25 evening, and then the facilitators, based on the comments as received, had produced Rev. 2. Given the complexities of the issues, the expert group had worked on the key articles only, those being the articles dealing with the four core issues as laid out in the work program of the IGC for 2013, namely Articles 1, 2, 3 and 6. Some discussions had also taken place on the Objectives and Principles. The Chair recalled that, as per the methodology and work program agreed on, the plenary would be invited to point out and correct any obvious errors in the text. He was referring to proposals that were made by the Member States in plenary or in the expert group, that were not opposed, and which should, therefore, be reflected in Rev. 2. Those also referred to proposals by observers that had received Member States’ support and were, however, not reflected. Those errors would be noted and corrected. The corrections would be physically entered into Rev. 2 by the facilitators after the conclusion of the session, and the text would then be carefully checked and formatted. Rev. 2 that the IGC would transmit to the General Assembly for its consideration was understood, therefore, to be that corrected and checked version. The session would be fully reported on in the usual way, so that delegations would be able to check that Rev. 2 as transmitted was indeed a proper reflection of the discussion. Any new proposals and other substantive comments, including drafting improvements and other textual proposals, would be recorded, as usual, in the full report of the session. At the end of the discussion, the text, as corrected, would be noted and transmitted to the General Assembly taking place from September 23 to October 2, 2013. The Chair noted that Rev. 2 would not be adopted, but simply noted by the IGC and transmitted. He invited the facilitators to introduce Rev. 2.

128. Mr. Nicolas Lesieur from Canada, speaking as a facilitator on behalf of the facilitators, pointed out that, as noted in page 2 of the document, Rev. 2 included changes to the policy objectives and the guiding principles, as suggested early in the week, as well as to Articles 1, 2, 3 and 6, as per comments and inputs made by Member States both in plenary and in the expert group. All other provisions were unchanged from document WIPO/GRTKF/IC/24/4. He explained that, where facilitators had removed text, that text had been placed in an annex at the end of the document for reference. Regarding the Alternative to paragraph (iii) in the Policy Objectives, the facilitators would welcome clarification from the proponents of that alternative, as indicated by the question mark that had been inserted. In paragraph (viii), the record indicated that one delegation had suggested the introduction of the word “protected” before TK on the third line, so it would instead read “misappropriation of [protected] Traditional Knowledge.” He also noted that one delegation had proposed that paragraph (vii) be combined with paragraphs (iv) or (vi) for simplification. The facilitators would also welcome clarification from the proponents of the Alternative to paragraph (xi), as indicated by the question mark there. The facilitator recalled that one delegation had suggested placing paragraphs (xix) and (xx) earlier in the text. He pointed out that that could be changed, but that the facilitators left it there for their own convenience and to avoid renumbering the text late in the night. The facilitators noted that page 7 seemed slightly disconnected from the rest of the text. It would be most welcome if the various proponents of

the proposals that were on that page could clarify the intent. A number of slight changes had been made to reflect discussions in the expert group. An inadvertent mistake had been made in Article 2: in 2.1, instead of “as defined in 1.3”, it should read “Article 1”, as far as the facilitators understood from the record. In Article 3, the rights-based approach was found in Option 1 and the measures-based approach was found in Option 2. In footnote 4, it had been noted that while two options were represented, a number of delegations had indicated their belief that those two options were complementary and could be combined into a single option. The facilitator noted that the definition of “use” or “utilization” was an outstanding issue. A footnote would be inserted to reflect that a definition could be placed either where it was or elsewhere, as in a list of terms, as proposed by at least one delegation. He apologized for omitting footnotes that could have provided some clarification before Member States received the text and pointed out that the facilitators would add a footnote indicating that there was an ongoing discussion as to where paragraph 6.1 should be placed. It had been brought to his attention that paragraphs 6.4 and 6.11 were the same, so one of those could be removed.

129. The Chair, noting that there had been two informal working groups or “informal informals” that had considered aspects of Article 6, namely paragraphs 6.2 to 6.5, on the one hand, and paragraphs 6.6 to 6.10, on the other hand, invited spokespersons for those groups to speak after the facilitators, as to any output that had come from those consultations. He acknowledged that the output of the first group had actually been taken by the facilitators in the text and was reflected in paragraphs 6.2 to 6.5. However, the second group had not been able to bring its work to a point in which it could have gone into the text. He said that the report that was going to be made on behalf of the second group would go to the record, so that the IGC had the benefit of reflection on the valuable work done by the second informal working group as well.

130. Mr. Steven Bailie from Australia pointed out that the first informal working group had decided to cluster the provisions according to general and specific exceptions, which was reflected in the text. General exceptions were those that did not address a specific purpose for the exception, but provided criteria for a limit on the establishment of an exception. Specific exceptions were those that envisaged a specific purpose for the exception, for example, teaching purposes. The other text changes that had been made were that the alternatives for the former paragraph 6.3 subheadings (a), (b) and (c) and Alternative (a) and (b) had been combined and incorporated into the one listed in paragraph 6.2. There was also a decision made to combine some of the specific exceptions concerning national emergencies, which was reflected in paragraph 6.5. He noted that the group had also discussed a number of concepts and ideas that were not reflected in the text. Further classifications had been discussed, which concerned the concept of permanent exceptions, for example, an exception for teaching purposes, and the concept of temporary exceptions, for example, during a health emergency. Once the health emergency had ceased, the exception would expire. A classification of exceptions in terms of those that could be compensated for and those that could not be compensated had also been discussed. An example of a “compensable” exception would be during a natural disaster response; a “non-compensable” exception would be, for example, an exception that resulted in spiritual harm to the indigenous holders of the TK, such as sacrilegious use of a plant medicine that caused a “non-compensable” harm.

131. Mr. Ian Goss of Australia informed that the second informal working group had had a conceptual discussion, which did not result in any textual suggestions, but provided some clarification on different positions and issues. He invited any other members of the group to make comments after his report. There was general agreement that TK that met the criteria for eligibility could be publicly available and that its availability or dispersion and use would vary. However, there was no consensus regarding the level of protection, if any, which should be afforded to publicly available TK. The issues around which the discussion developed were whether publicly available TK was to be afforded some form of protection, moral or economic, and how would the level be determined, connoting the wide spectrum of availability and use. Discussion also took place on the consequences of any protection on the transfer of

knowledge in support of innovation and certainty within the IP system and on extended uses of that knowledge. It was generally agreed that moral rights were less of a concern; the key issue was how to deal with economic rights. In discussing how to deal with those issues, it was proposed by one delegation that there needed to be a set of criteria and threshold tests to guide decisions in relation to the level of protection and any benefits which might flow based on the TK's availability and use, to provide legal certainty and to deal with the wide variability in availability and use. For example, the first test would be that TK had to meet the criteria for eligibility; in other words, there had to be a link established between a particular TK and indigenous peoples or local community, which had to continue using and maintaining the TK. Secondly, there should be a test to look at how widely used or dispersed TK was. Another test could be to consider its use, and whether it should be regulated or not regulated. For example, if it was being used for learning, it probably should not be regulated. It was suggested that there should be uses which should be exempted. Once those uses that should be exempted were determined, one might, as a further test, consider looking at identifying uses which would produce some form of benefit to flow to communities or indigenous peoples. There was general agreement that, due to different environments within which TK operated within countries, Member States had to have flexibility in determining the measures in relation to TK which was publicly available. He pointed out that key concerns regarding TK which was publicly available were: preventing excessive demands for protection, particularly in relation to TK widely known; addressing the consequences on innovation and on current users of TK of any resulting loss of access to TK currently publicly available; addressing the impact on innovation and certainty within the IP system. Mr. Ian Goss noted that the variability of availability and use of publicly available TK could suggest that the term "public domain" might not accurately reflect that variability.

132. The Chair asked whether there were any other members of the second group who had inputs to make supplementary to those offered by the note taker. There were none. The Chair indicated that the statements of Mr. Bailie and Mr. Goss would go into the record. He requested the facilitators to complete their comments on Rev. 2.

133. Mr. Nicolas Lesieur of Canada, speaking as a facilitator on behalf of the facilitators, explained that the facilitators had worked on the text based on the report that was forwarded to them from the first informal working group, though the facilitators were not actually in the room. Therefore, there might be differences between the work of the first informal working group and Rev. 2. He also mentioned that the facilitators had attempted simplification in certain instances. They were flexible as to indicating any modifications to be made to reflect the work of the informal working group.

134. The Chair reminded that the IGC had found three layers for its work at the present session: the plenary, the informal Chair-led and facilitated expert group, and informal working groups (or "informal informals") within that expert group process, which were directly led by key proponents or stakeholders on issues that those groups intended to take forward. The Chair thus noted that a more creative use of informal discussions that went beyond the informal expert group had been made at the session with some results. The very informal and improvised nature of the discussions within the informal working groups should allow them to continue without a fixed architecture. He invited both informal working groups, and, in particular, the second group, which had been dealing with one of the most sensitive issues, to find ways of continuing the discussions and bridging gaps between clearly different positions. The Chair recalled that he had suggested in the expert group that some creative solutions imported from legal principles of a general nature might be needed. He invited the stakeholders who were leading those informal discussions to look for ways in which the core of the problems could be addressed, perhaps by approaches that had not been proffered yet, using principles that ought to be applicable within the anticipated legal framework that the mandate suggested the IGC should seek to create. The Chair recommended that those informal discussions continue, perhaps over lunches, perhaps by email. In order to make progress, stakeholders would have to use all kinds of configurations. On other issues

stakeholders should feel free to self-initiate some informal activities to bridge gaps with those who did not share their positions. It was necessary to try to make the best use of time, not just in the IGC itself in terms of the formal meetings, but between them. He recalled that Members-driven informal meetings had taken place in the recent past. For instance, the Government of India had hosted one such in New Delhi last February, which he said had been quite helpful in terms of fleshing out among a number of interested members some of the ideas and issues that needed to be considered. The Government of South Africa had also organized one similar meeting just before the present session. The Chair said that he was aware that other governments were considering doing the same. He stressed that after 12 years of successive sessions, too much had been invested in the IGC process to falter now. The IGC should meet the expectations of all stakeholders, indigenous peoples, local communities and society at large, because all of them used, benefitted from and had an interest in TK. There were those who had a particular stake in it by virtue of developing it, maintaining it, keeping it, for the benefit, first, of its originators, and beyond that, for the communities and eventually society at large. Since a balance was needed, the IGC would not be successful by imposing one view over another, but by blending the views that were compatible into something that all stakeholders could live with. He suggested withdrawing from an adversarial approach to the issues. The IGC was requested not to litigate or fight, but negotiate and find middle ground between different interests that were worth defending. That was the only way in which the investment made in the IGC could be validated. Returning to Rev. 2, he invited the floor to raise omissions or additions that ought to be reflected in the text. He reminded that Rev. 2 was the reflection of what the Committee had been able to produce at that juncture and that more work would have to be done at a future time and place. He invited the IGC to keep focusing during the present session on the four main articles and on the elements of guiding principles and objectives on which comments had been offered and on which textual changes had been made.

135. [Note from the Secretariat: all participants that took the floor regarding Rev. 2 thanked the Chair and the facilitators for their work in preparing Rev. 2.]

136. The Delegation of Cameroon noted that the mistake pointed out by the facilitator concerning paragraph 2.1 concerned paragraph 2.2 as well.

137. The Delegation of Peru strongly supported the statement made by the Chair regarding the modalities of negotiations and informal discussions, especially with the view to the next General Assembly, where the progress made in the three areas of competence of the IGC would be reviewed. It was satisfied with Rev. 2 and considered that this revision had been very fruitful. The text as revised was fairly complex, not only because of the depth and complexity of the terms, but also because of the different positions that the facilitators often had to cope with. The Delegation acknowledged the strict, impartial and fair way in which the facilitators had worked. It noted that, in the “informal informals”, it had proposed that paragraph 1.2 would be better placed in the draft text relating to GRs. If that was not possible, should any delegation insist keeping it the TK-related text, the Delegation of Peru would then wish, as it already proposed, to ensure consistency between both texts by including “and derivatives” after “genetic resources” and before “held by” in paragraph 1.2 of the TK text. The Delegation congratulated the Chair on the very efficient way in which he had conducted the work of the IGC, and hoped that he would continue to conduct its work until the IGC finally produced a text or text(s) that would be legally binding on the three issues.

138. The representative of Tupaj Amaru noted that translation of Rev. 2 into French and Spanish was missing. He stated that the facilitators had taken on the responsibility of asserting that TK was a “product”, while it was not. Comparing TK with financial products was arbitrary in his view. He noted that facilitators took over what was said in informal meetings but not in plenary. Beside the representative claimed that the facilitators had not taken over his suggestions, although they had been supported by the Delegation of Sri Lanka and others. The representative of Tupaj Amaru pointed out that he had submitted a suggestion to the IGC

on all the articles and that he would submit it again. [Note from the Secretariat: the suggestion made by the representative of Tupaj Amaru would be posted on the observers' webpage on the TK web site.].

139. The Delegation of the Bolivarian Republic of Venezuela was supportive of the approach as described by the Chair. It agreed that the process should not be a fight between losers and winners. It was necessary to find situations appropriate to the majority of countries. It recalled that it had many times expressed its concern regarding the term "misappropriation" and its translation to Spanish as "*apropiación indebida*". In the countries of civil law tradition, "*apropiación indebida*" was a term used in the criminal code with specific characteristics relating to criminal procedure: for those countries, misappropriation under the criminal legislation supposed an act of confidence. In other words, misappropriation would result from not returning a loan that had been made. Misconception of that term would raise problems for countries following the Roman tradition of law. Lawyers, especially Spanish speaking lawyers from the Roman law tradition, had to try and find a term that would be adapted to that law system.

140. The Chair, referring to the statement made by the Delegation of the Bolivarian Republic of Venezuela, noted that a number of issues would need to be resolved. Once the IGC got to final stages of drafting, the common and civil law elements and other specificities would have to be accommodated. The IGC needed first to agree on what it wished to do. Implementation in the relevant legal systems, as well as appropriate reflection in the different languages, would need to be done at the appropriate time. He noted though, that balancing common and civil law distinctions, as well as ensuring consistency in languages, were considerations that were not unique to the IGC and affected all international drafting. There were cross-cutting questions that would be addressed at the appropriate time using common standards in the context of multilateral legal drafting.

141. The Delegation of South Africa, speaking on behalf of the African Group, noted the progress made as far as conceptual clarity was concerned. It acknowledged the constructive engagement of delegations. They had learned from each other in the process. It acknowledged the contribution of the facilitators, by assisting in framing the complex issues. The IGC had begun a process of giving contours to guidelines that would continue to be worked on in the future. It said that the African Group would have wished to assist in reducing further the number of objectives and focus on those that were IP-related. For the record, the African Group would reduce the objectives to only five: Objectives 1, 3, 4, 5 and 8. Since articles had already been developed, it noted that the guiding Principles might have become outdated, belated or overtaken by events. The African Group welcomed the work done in Article 1. Its questions concerning paragraph 1.2 remained. In an attempt to be constructive and persuasive, the Delegation suggested to put the section on "utilization" in Article 3 and on page 13 in a List of terms and invited proponents of paragraph 1.2 to do the same in order to make the text clearer. The African Group wished to bracket the term "only" in the first line of paragraph 1.3, since it felt that it was an attempt to limit the effectiveness of the criteria for eligibility. It considered that paragraph 1.4 also attempted to put limits on the subject matter, and was a matter that should be inserted into the part related with the exceptions and limitations. The same applied to paragraph 1.5 on databases. The Delegation recalled that databases were not a subject matter of protection. Databases could be administrative measures related to how the rights of right holders were to be managed. It was pleased to note that the facilitators had pointed out a mistake in Article 2 related to the reference made to Article 1.3. It understood that the reference, in both paragraphs 2.1 and 2.2, would be to Article 1. The Delegation continued to request from the proponents of paragraph 2.3 to consider shifting it, since it was imprecise and would contribute to uncertainty in the distribution of rights. It welcomed the work that had been done on Article 3 as it made it clearer. The Delegation reminded, however, that there was no divide in this particular part between the two approaches, namely rights-based and measures-based, that they were complementary and could be collapsed into one Article or be part of one single option. It did not favor a third

option that would combine Option 1 and Option 2, since it did not wish to add to the text unnecessarily. On Article 6, the challenge remained on the second part. It recalled that the informal working group took up that part that included paragraphs 6.3 to 6.5. It noted that the spirit under which those paragraphs had been negotiated was commendable. However, the issues remained to be resolved and noted it was the IP system as a whole that had to address that at the national and international level, not just the forthcoming regime on TK. The African Group did not wish to burden the TK negotiations with indecisive issues that concerned the IP system as a whole in defining public domain. It was the IP community at large that needed to take up the question of public domain, and not only those who had an interest in protecting TK. The Delegation thanked the Chair for his leadership and especially for introducing the “informal informals”, as they had contributed to sharpening the focus of the IGC on specific issues.

142. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the facilitators for their efforts and timely revision of the text. Regarding Article 1, it was pleased to see that there was no redundancy between paragraphs 1.1 and 1.3 on the element “from generation to generation”. Regarding the reference to agricultural, environmental and other aspects of TK in the second paragraph of 1.1, it considered that that reference would be more appropriately dealt with in a preamble. In any event, it should remain under brackets. It noted that the term “medical” was used twice in the second line and wondered if that was redundant. It emphasized that it attached great importance to the definition of TK and in particular the criteria for eligibility which defined what protected TK was. It wished to retain in the text paragraphs 1.3 and 1.4. It had proposed the insertion of the word “only” in paragraph 1.3. It had heard the request made by the Delegation of South Africa on behalf of the African Group to remove it, but the Delegation wished to keep it in the text. In paragraph 2.1, it wished to keep in brackets: “and nations” and “or any other national entity defined by national law”. In the first line of paragraph 2.1, the word “and” should be added between brackets, after “indigenous [peoples]” and before “local communities”, so that it read “indigenous and local communities”. It had reservations about the language employed in paragraph 2.2, since it might not only be contradictory with Article 1, in that it seemed to define TK that was not related to an indigenous or local community, but also appeared to extend protection to knowledge that was not traditional, but any kind of knowledge, including that in the public domain. In any event, it believed it was legally unclear. Regarding Article 3, it would not be in favor of merging the two Options as suggested by the African Group. The EU and its Member States supported the measures-based approach in Option 2. With regard to subparagraphs (c) to (g) in Option 2, as it had indicated in the informal expert group, while it supported the principle of defensive protection, in the sense that TK in the public domain could form novelty destroying prior art in the context of patent applications, it would need more time to reflect on how that issue might be dealt with in the instrument. It would be keen to work with the other proponents of the measures-based approach to reach an understanding on that issue. It thanked those who had worked on the global restructuring of Article 6, which improved the text, but it would need further substantive reflection and discussion on the content. While it supported the spirit of paragraph 6.1, the Delegation had questions about its suitability in that location, and wondered whether it might not be better placed as a policy objective or a principle. It noted that the Chair had given his assurance the day before that while the text received a place marker in Article 6, the Committee would return to it when dealing with objectives and principles. It was pleased with the suggestion by the facilitators to add a footnote on the question of location of paragraph 6.1. It noted the merger that had been done between two sets of criteria in paragraph 6.2. It would need more time to reflect on that and, therefore, requested to bracket subparagraphs (a) to (e) for the time being. It wished to insert brackets in paragraph 6.3, which was new text, and requested more time to reflect upon it. On paragraph 6.9, it wished the new text inserted in subparagraphs (a) to (c) which was underlined to be bracketed, to allow the EU and its Member States to reflect on that. The Delegation would need to consider some of the other terms in that article and in particular, in paragraph 6.12, the expression “without restriction to the general public”. As had been pointed out by the facilitators, it noted that paragraphs 6.4 and 6.11 were identical and it would be

necessary to reflect on which one should be retained in the text. It pointed out that the difficult issue of how protected TK interacted with the public domain had not been settled yet in the text. That was an issue of great importance to the EU and its Member States as a key part of the definition of what protected TK was. It emphasized its strong preference to include “not in the public domain” as a criteria for eligibility. It reserved its right to comment on the text further at a later stage.

143. The Delegation of El Salvador reminded, regarding the reference to “[fifty years]” in paragraph 1.3, that it did not agree with minimum time limits. It wished the entire phrase containing the reference to 50 years to be put between brackets or at least the part starting with “and has been used for”. The Delegation recalled that time limit would not accommodate the social, economic and historical situation of its country. In its recent history, there had been a number of cases of repression, civil wars and periods during which TK had been overshadowed and hidden. It noted that some research, update and reuse of TK in its country had been very recent and could only cover the last ten years for example. Regarding paragraph 1.5, regardless of putting this paragraph there or elsewhere, reference should be made not only to patents but to IPRs, at the end of the sentence. The Delegation could accept the phrasing proposed for paragraphs 2.1 and 2.2. It would prefer a relatively broad definition and include nations as beneficiaries of protection in order to reflect the specific situation of its country. With reference to paragraph 2.2, national legislation should be mentioned as the norm that would determine who would be the beneficiary of protection. The additional option relating to paragraph 2.3 could introduce more confusion and was not particularly useful. Though that reference was in square brackets, the Delegation emphasized that it was opposed to its inclusion. It requested that it be deleted. It recalled that the notion of defensive protection was very precise. It was therefore difficult to associate this notion with the beneficiaries. The idea of “society at large” was an extremely vague notion. It wondered how society at large could be a legal entity that would benefit from defensive protection. It believed that more discussion was needed on Article 3, Option 1, paragraph 3.1, subparagraphs (d) and (dbis). It noted that the capability of national offices or the relationships that linked those national offices to the beneficiaries of TK had to be taken into account before that mechanism was set up. It could not speak out in favor of that sort of measures at that stage and wished to keep the square brackets in order to allow for much more in-depth analysis. Regarding Article 6, it noted that it was necessary to continue discussions, and to integrate them into a future text. It did not participate in the meeting of the two informal working groups, but had a lot of contributions to make, as well as other delegations.

144. The Delegation of Indonesia, speaking on behalf of the Like-Minded Countries (LMCs), found some progress in Rev. 2, particularly as far as the structure was concerned, and believed that the text might serve as a good basis for future work. On paragraph 1.1, it suggested that the brackets around “peoples” and “local communities” be broadened, so as to include indigenous peoples and local communities. The insertion of paragraph 1.2 was problematic. On paragraph 1.3, the Delegation supported the proposal made by the Delegation of South Africa on behalf of the African Group to remove the expression “only”. In addition, it wished to replace the word “and” after “cultural” with a comma. The Delegation had repeatedly underscored that the word “and” should be replaced with a comma, because both parts reflected different notions. Time limit was also problematic in its view. It proposed therefore to remove the phrase that started with: “has been used for a term as may be determined by (...)”. It attached great importance to recognizing the cultural diversity of the beneficiaries and wished therefore to maintain a reference to it in paragraph 1.3. It recommended maintaining the brackets in paragraphs 1.4 and 1.5, as the formulation in paragraph 1.5 was not related to the subject matter of protection. It proposed to put brackets around the formulations that were included in paragraph 6.2 (d) and (e), since it needed more time to reflect on those formulations. It requested to maintain the brackets around paragraphs 6.3 and 6.4, and to bracket paragraphs 6.5 and 6.6. It proposed to remove paragraph 6.8. It also proposed to fully bracket paragraphs 6.9, 6.10, 6.11 and 6.12.

145. The Delegation of Sri Lanka fully supported the statement made by the Delegation of Indonesia, on behalf of the LMCs. It agreed with the Delegation of the EU that requested the second reference to “medical knowledge” to be deleted. It was pleased with the addition of a reference to “indigenous and traditional medical knowledge”, as suggested by the representative of FAIRA and endorsed by the Delegation of Australia. It proposed the deletion of paragraph 3.1(b).

146. The representative of INBRAPI acknowledged that progress had been made at least in having a more constructive dialogue and better understanding of the different points of view. She said that the indigenous peoples and local communities had showed sufficient flexibility in making their knowledge available to other peoples. But time had come for them to better understand the IP issues that might affect them, to suggest improvements in the text and ensure that the text was as fair as possible to all stakeholders. In paragraph 1.1, the issue of the moral rights of indigenous peoples and local communities to TK had to be reinserted. She noted that the reference to TK being “inalienable, indivisible and imprescriptible” in Rev. 1 had disappeared. This reference could be placed elsewhere. In any event, for their own survival, indigenous people needed to see their moral rights to TK that formed part of their identity and cultural heritage be recognized. She supported the statement made by the Delegation of South Africa on behalf of the African Group regarding paragraph 1.2: that paragraph should be placed in the List of terms and not under the Subject Matter of Protection. She was concerned by the exclusion of innovations developed by indigenous peoples in a traditional context in paragraph 1.3, if the reference to a term was to be maintained. She highlighted that it was not a question of time or decades, it was the link with tradition that made knowledge traditional or not. She supported the statement made by the Delegation of El Salvador in that regard and emphasized that a temporal limit should not be included. Paragraph 1.4 should be placed under the exceptions and limitations. She emphasized that exceptions and limitations should not harm the cultures, customs and traditions of the indigenous peoples and local communities and that those limitations which did should not be allowed. She shared the concern expressed by the Delegation of El Salvador regarding paragraph 1.5 and considered that reference should be made to the grant of IPRs, not just patents. She noted that paragraph 1.5 might not be part of the subject matter of protection but be another limitation. In any event, she wished to ensure that free PIC of the indigenous peoples and the local communities who held the TK be included, in accordance with other international legal instruments. Article 2 was far too broad in the representative’s view. To encompass society at large as a beneficiary would be very problematic. She requested Member States to reflect on this and consider that the beneficiaries should be the indigenous peoples and the local communities in the first place. She suggested including a reference to MATs in paragraph 6.2, in order to make sure that the exceptions and limitations did not harm indigenous peoples and local communities. As a matter of principle, there should always be a PIC and MATs for any exceptions and limitations that were to be established. She supported the statement made by the Delegation of Indonesia regarding the bracketing of paragraphs 6.6 to 6.11. Member States might recognize that there were publicly available TK, but this did not mean *per se* that such TK did not have owners and that those owners did not have rights to that publicly available knowledge. Discussions were needed to determine whether the concept of public domain was or not applicable to TK in an instrument that was supposed to be providing protection to TK. She hoped that she would continue to be involved in the discussions and thanked the Member States which had contributed to the WIPO Voluntary Fund so far.

147. The representative of HEP suggested putting “in particular” between brackets, in the second paragraph of paragraph 1.1. She fully supported the statement made by the Delegation of South Africa on behalf of the African Group regarding the criteria for eligibility in paragraph 1.3, and in particular regarding the deletion of the word “only”, as it was an exclusive term. She expressed preference for not including a time limit in paragraph 1.3. In paragraph 2.2, where it said “defined by national legislation”, she suggested the brackets being removed. In paragraph 3.1 (d) and (dbis), there was a clear need to take into account the existing regional offices. Article 6 was superfluous and redundant in her view, since it had too

many elements that were similar. Their distribution seemed somewhat obscure to her.

148. The Delegation of China believed that Rev. 2 had absorbed many proposals made in the expert group and the plenary. The Delegation recalled that it repeatedly emphasized in both the expert group and the plenary the importance and the necessity of protecting TK that was known publicly. The Delegation had not seen that reflected in the text. It proposed to delete Articles 1.4, 6.9, 6.10 and 6.12 in Rev. 2.

149. The representative of Tulalip Tribes made a general comment on Article 6.3. He recalled that the discussion in the expert group had not been restricted to secret and sacred TK. He believed that, wherever there was irreparable harm, there should be protection and there should not be differentiated according to the types of knowledge. Taking an example, he said that social security numbers in the United States of America were protected not because it was secret or sacred, but because revealing them could lead to irreparable harm. The representative supported many interventions made on the public domain and he believed that it needed very careful consideration.

150. The Delegation of Niger supported the comments made by the Delegation of South Africa, on behalf of the African Group. It proposed to bracket “only” in Article 1.3 and “in the public domain” in Article 1.4, which it had defended in the expert group, since those terms eliminated almost all TK from protection in its view. The Delegation supported the comment made by the Delegation of El Salvador. Life expectancy in Niger was less than 40 years a few years ago and it was 48 years currently. However, two thirds of the population in Niger was aged under 20. Thus, 50 years or 100 years was inconsistent in different countries. It suggested bracketing “fifty years” in Article 1.3. The Delegation proposed to bracket Articles 6.9 and 6.10. It provided an example based on Article 6.10(a): an ethnologist went to a local community and included TK of that local community in his book. According to Article 6.10(a), such TK could not be protected, while it should be.

151. The Delegation of Nigeria associated itself with the comments made by the Delegation of South Africa, on behalf of the African Group. It noted an omission in footnote 4, and suggested adding “consistent with other IP treaties” after “a single option”.

152. The Delegation of Brazil supported the intervention made by the Delegation of Indonesia, on behalf of LMCs. Even though there were still many issues where the views of delegations were far apart, the IGC had made progress. The Delegation was satisfied with the work carried out during the present session of the IGC, and was hopeful that the continuation of discussions would allow for further progress in the direction of convening a Diplomatic Conference. The Delegation recalled that it had reserved the right to revisit the issue regarding “inalienable, indivisible and imprescriptible” and eventually did not oppose the view of those who had expressed that the reference to “inalienable, indivisible and imprescriptible” in Article 1 should be deleted. With the view to take into account the position of other delegations and as a demonstration of its engagement in discussions and negotiations, the Delegation proposed an alternative text that addressed all the concerns expressed. It proposed to add “as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with traditional knowledge” at the end of Article 3.2(b). The proposal made explicit reference to the fact that the inalienable, indivisible and imprescriptible nature of TK referred to moral rights. It hoped that that fundamental aspect of TK could be fully appreciated and favored by delegations as well as duly recognized in the future agreement.

153. The Delegation of the United States of America addressed the questions raised by the facilitators and identified some omissions in Rev. 2. Alternative Policy Objective (iii) “be guided by the rights and needs of the holders of traditional knowledge and society” should replace “be guided by the aspirations and expectations expressed directly by traditional knowledge [holders]/[owners]”. It proposed to replace “their” in line 2 of Policy Objective (iii) with “the”, “as” with “of”, and “them” in line 5 with “the holders/owners”. It suggested inserting “protected”

before “traditional knowledge” in line 3 of Policy Objective (viii). In response to the question of the facilitators, the phrase under the “Alternative” of Policy Objective (xi) should be inserted at the beginning of paragraph (xi), and should not be a separate paragraph. The Delegation looked forward to future negotiations on the Objectives and Principles. Regarding Article 1.4, it proposed to replace “Article 2” with “Article 2.1” and to add “which is” before “the application”. It preferred to maintain the placement of Articles 1.4 and 1.5. It suggested bracketing “or” in line 2 of Article 2.1, because it could modify the term “hold”. That would result in including museums as beneficiaries. The facilitators had suggested replacing “Article 1.3” in Article 2.2 with “Article 1”. The Delegation preferred to maintain the reference to Article 1.3. Regarding Article 3, it suggested bracketing “protect” in Article 1.3(a) of Option 1, and adding “protected” before “traditional knowledge”. It preferred to bracket the entire definition of utilization, and it appeared that an open bracket was missing before “For”. Regarding Article 6, the Delegation preferred to bracket Article 6.1 as it required further consideration. It believed that Article 6.4 might not be clear under “General Exceptions” as it began with the words “Except for”. There might be a clearer formulation. The Delegation suggested bracketing “provided that the beneficiaries are adequately compensated” and replacing it with “without consent of the traditional knowledge holder”. The chapeaus in Article 6.9 and Alternative Article 6.9 should be side by side and each of them should be in brackets. It preferred to insert “without the consent of the protected traditional knowledge holder” at the end of Article 6.11.

154. The Delegation of Japan stated that, regarding the new language proposed for a time-related component of eligibility in Article 1.3, it had consulted with some delegations but could not find a common ground yet. Some delegations had said that the importance was not how long TK was used, but how it was passed on from generation to generation, or the mode of intergenerational transmission. Others had been concerned about cases in which TK was once lost or rediscovered or revived later, as observed by the Delegate of El Salvador. However, the Delegation still believed that there was a need to distinguish TK from contemporary knowledge in some way or another. Otherwise, the IGC might end up with creating a TK protection system that would eventually bring down the whole current IP systems established for contemporary creation and innovation. It believed that it was a fundamental issue that the IGC could not afford to ignore. The Delegation was open to any suggestion to make the language acceptable to all and looked forward to continuing the discussion on that matter in a constructive manner. Regarding the inclusion of “and nations” and “or any other national entity defined by national law” in Article 2.1, the Delegation was confused as to what the instrument intended to provide effective protection to. It reiterated that beneficiaries should be defined in relation to individual TK because it believed that the distinctive linkage between TK and cultural identity of beneficiaries was crucial, as defined in Article 1.3. The Delegation proposed therefore to delete the mentioned inclusion. In the same vein, Article 2.2 should be deleted. If the IGC was to broaden the scope of beneficiaries, it would expand the scope of TK dramatically to include virtually any type of knowledge, which would affect the very objectives of the instrument. When considering issues like those, the Delegation suggested streamlining the text in accordance with the policy objectives and general guiding principles. It was vital to reach a common recognition on those fundamental issues. Therefore it suggested giving an increased focus on those objectives and principles at the next session of the IGC. It reserved its right to come back at a later stage to comment on Rev. 2.

155. The Delegation of Cameroon supported the comments made by the Delegation of South Africa, on behalf of the African Group. It believed that the term “only” in Article 1.3 was restrictive and prejudiced, so it proposed to bracket it. It supported the interventions made by other delegations calling for reintroducing “from generation to generation” in Article 1.3, which was vital not only for Cameroon, but also for other African countries. A footnote could be included to explain what “generation” meant. It might be 50 years, 100 years or whatever, because it was different from one country to another. In Article 2, it asked for clarification on whether to replace “Article 1.3” with “Article 1”. It supported the proposal made by the Delegation of Brazil regarding Article 3.2(b).

156. The Delegation of the Republic of Korea stated that there were two categories under Article 6, which were general exceptions and specific exceptions. It noted that Article 6.2 provided that Member States “may adopt appropriate limitations and exceptions under national law”. If each Member State had completely different limitations under their national law according to Article 6.2, they could not be generally agreeable and acceptable exceptions. Thus, it did not see the need of such divide into two categories. The Delegation suggested deleting the first chapeau of Article 6.9. For the sake of clarity, it proposed to delete “outside the beneficiaries’ community” in Article 6.9(a), “legally” in Article 6.9(b), and “through lawful means” in Article 6.9(c). Since those terms were newly added, it needed more time to consider them. The Delegation reemphasized that it recognized the economic and scientific value of TK and, at the same time, the role of the IP system in promoting innovation and preventing erroneously granted patents. It was vitally important for patent offices to have access to information and TK in order to achieve transparency in the process of granting patents.

157. The Delegation of Canada supported the comments made by the Delegation of the EU, on behalf of the EU and its Member States, on Article 3. It believed that it was important to keep the two options; otherwise, there would be a risk to have a whole series of brackets in each option. Footnote 4 accurately reflected the possibility of having the two options merged in the future. The Delegation supported the comments made by the Delegation of the United States of America and the Delegation of the EU, on behalf of the EU and its Member States, regarding the fundamental issue of TK in the public domain. It believed that that issue was most appropriately dealt with in Article 1, where it was currently reflected in Article 1.4. Regarding Article 6, the Delegation had participated in the informal discussion the day before, and had had a very useful discussion. However, there had not been sufficient time. Even though the current text was full of brackets, it should be considered as the reflection of a work in progress for future discussion.

158. The Delegation of Egypt endorsed the comments made respectively by the Delegation of South Africa, on behalf of the African Group, and the Delegation of Indonesia, on behalf of LMCs. It welcomed the progress made in terms of text simplification as well as language and concept clarification, and hoped that that would be sustained through the positive work mechanism of informal consultations. It noted the importance of having a separate section for all proposed definitions. The Delegation proposed to replace “refers to” and “includes” with a generic term such as “means”, and to add “a state or states” after “indigenous peoples and local communities” in Article 1.1. It stated that the provision relating to term of protection under Article 1.3 could be transferred and discussed under Article 7 on “Term of Protection”. Similarly, Article 1.4 could be moved to Article 6 on “Exceptions and Limitations”. Regarding Article 2.1, it considered that the expression “or any other national entity defined by national law” could exempt the text from using the term “nations”. The same would apply to Article 2.2. Brackets would therefore be reduced in light of the definition of “beneficiaries” in the TCEs Draft Articles. With regard to Article 6, it noted that the reflected proposals had significant implications for the copyright system and treaties, notably the right of reproduction, as well the WTO TRIPS Agreement, in particular Articles 13, 30 and 31 relating to “Exceptions to Rights Conferred” and “Other Use Without Authorization of the Right Holder”. Such considerations should be taken into account in order to avert that the future work of the IGC negatively affect internationally established legal systems and frameworks. In any case, it called on the proponents of Articles 6.7 and 6.8 to attend the SCCR meetings and supported exceptions and limitations for libraries, archives and educational institutions. It pointed out an editorial discrepancy in Article 6.4, where “this parties” should be replaced with “the parties”.

159. The Delegation of Kenya aligned itself with the views expressed by the Delegation of South Africa, on behalf of the African Group, and the Delegations of Niger, Nigeria, Cameroon and Egypt. The Delegation said that its country was in the process of coming up with legislation on TK and TCEs by the end of June 2013. Thus, it was very passionate about the IGC process and its completion. Regarding Article 2.2, the Delegation stated that the national

entity should be specifically identified. Kenyan draft national legislation had mentioned that the national competent authority would work with other agencies in a complementary manner. It supported the proposal made by the Delegation of Brazil on including “inalienable, indivisible and imprescriptible” at the end of Article 3.2(b). This inclusion should be addressed with reference to moral rights.

160. The Delegation of Zambia fully supported the statement made by the Delegation of South Africa, on behalf of the African Group. Zambia had recently developed a bill on the protection of TK which would hopefully be adopted by the end of 2013. It believed that the IGC’s work would help to implement that bill. The Delegation supported the comments made by the Delegation of Cameroon regarding the omission of “passed on from generation to generation” in Article 1.3. It believed that “passed on from generation to generation” was a critical criterion for protection. It welcomed the flexibility granted to Member States in determining the length of time that TK had been used in Article 1.3. It welcomed as well the fact that Article 2.2 addressed orphan TK, because there were many instances where a particular TK did not belong to any particular group. Article 2.2 would assist in determining who the beneficiaries were. It sincerely hoped that the current text would be presented to the General Assembly and that a Diplomatic Conference could be organized soon to move the work forward.

161. The Delegation of Trinidad and Tobago stated that Article 2 was of much importance for the Caribbean region. It would like to see a broad definition of beneficiaries. In some countries in the region, there were no indigenous peoples at all, but still rich TK. Article 2.2 gave Member States some flexibility to determine beneficiaries in such cases. It was happy to see the inclusion of Article 2.2, even though it was in brackets.

162. The representative of Tupaj Amaru supported the statements made by the Delegation of South Africa, on behalf of the African Group, and the Delegations of El Salvador and the Bolivarian Republic of Venezuela. He proposed to delete Article 1.2, because the issue of GRs was being dealt with separately. He proposed to delete “only” and “fifty years” in Article 1.3. It was not clear whether the protection of TK would last only 50 years or more. He believed that the protection of TK should be indefinite. He proposed to delete “and nations” in Article 2.1, which had not been included in Rev. 1. He suggested replacing “national law” in Article 2.1 with “international standard or standards”. He proposed to replace “national legislation” in Article 2.2 with “the present international instrument”. He emphasized that national legislation should adapt to an international instrument and not the opposite. He suggested deleting Article 2.3 because it led to confusion. Regarding Article 3, the representative suggested reintroducing “inalienable, indivisible and imprescriptible” in the text. That was important for the survival of indigenous peoples. Those principles should not be confused with moral or ethical principles and conducts.

163. The Chair noted that constructive comments had been made on Rev. 2 and that the process of reviewing this last revision of the Draft Articles at this session had been successfully completed. He read out a draft decision in this regard that was subsequently adopted. The Chair opened the floor on a “Joint Recommendation on Genetic Resources and Associated Traditional Knowledge” (document WIPO/GRTKF/IC/24/5).

164. The Delegation of the United States reminded that the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America had tabled this Joint Recommendation. The Delegation expressed the hope that this proposal could be adopted and used as a confidence-building measure to help the Committee to advance on key issues concerning GRs and associated TK. It believed that the Joint Recommendation captured key objectives and facilitated the establishment of effective mechanisms for the protection of GRs and associated TK. It pointed out that the proposal was without prejudice to the continuing work of the Committee on the negotiating text. The Delegation recognized the value that biodiversity contributed towards society. It stated that along with co-sponsors of the Joint

Recommendation, it supported the objective of using national laws to promote biodiversity, fair and equitable benefit-sharing mechanisms as well as requirements for PIC and MATs. The Delegation indicated that the Joint Recommendation would facilitate clear procedures for obtaining authorized access to GRs in exchange for equitable, monetary or non-monetary benefits. It believed that patent offices should have the kinds of information available to enable examiners to make proper decisions on patentability. That included comprehensive prior art relating to GRs. The Delegation observed that patents should only be granted for inventions that were new and involved inventive step and unique standards of utility. In this regard, it believed that national databases of GRs and related TK would help to prevent the erroneous granting of patents and played a pivotal role in addressing patent quality concerns. The Delegation reiterated its belief that the Joint Recommendation could help to address concerns relating to the erroneous granting of patents while complementing the existing patent system. It was looking forward to discussing the Joint Recommendation at the present session.

165. The Delegation of Brazil, speaking on behalf of the Development Agenda Group (DAG), noted that DAG had been speaking at the IGC only in order to comment on rules of procedure. It pointed out that this document, as well as documents WIPO/GRTF/IC/24/6 and WIPO/GRTF/IC/24/7, were related to GRs and had already been presented at previous sessions. It believed that Member States should not discuss nor comment on the three proposed documents. It proposed to take note of the three documents but leave the discussion on them at other sessions. The Delegation recalled that the mandate of the General Assembly stipulated that the work at the present IGC should build on existing texts submitted by the IGC to the General Assembly. It stated that after 12 years of discussions and gap analysis, the three proposed documents would create a parallel process that could jeopardize the discussions at the present IGC.

166. The Delegation of Japan associated itself with the introductory statement made by the Delegation of the United States of America. It considered that the document was a good basis for discussion. The Delegation affirmed that Member States should concentrate on text-based negotiation according to the mandate of the IGC. However, it believed that the Joint Recommendation included similar objectives and principles to the ones included in the text negotiated at the present session (document WIPO/GRTKF/IC/24/4). The objectives of the Joint Recommendation were also the prevention of erroneous granting of patents and the protection of indigenous people and local communities TK associated with GRs. The Delegation believed that parallel discussion on document WIPO/GRTKF/IC/24/5 would advance mutual understanding of the issues contemplated at the present IGC and provide some preliminary solutions. It believed that this would contribute to the text-based negotiation.

167. The Chair expressed his concern over a parallel discussion of the proposed document. He also pointed out that the Joint Recommendation primarily dealt with issues related to TK associated with GRs. He noted that while Member States could discuss document WIPO/GRTKF/IC/24/5 separately, a parallel discussion to the negotiation that was going on document WIPO/GRTKF/IC/24/4 in view of the General Assembly would be more challenging. The Chair asked for a clarification from the proponents of the Joint Recommendation as to whether they wished to discuss document WIPO/GRTKF/IC/24/5 as a parallel negotiating text or as a separate document.

168. The Delegation of the United States of America responded that it considered the proposed Joint Recommendation as building upon document WIPO/GRTKF/IC/24/4. The text of the proposed document was contributing to, supplementing and building upon the work at the present IGC. The Delegation suggested that the Joint Recommendation should be viewed as part of the same work stream.

169. The Chair asked the Delegation of the United States of America whether the content of document WIPO/GRTKF/IC/24/5 could be added to Rev. 2 of the Annex to WIPO/GRTKF/IC/24/4.

170. The Delegation of the United States of America responded that the Joint Recommendation was intended to be an independent legal instrument. It would not have the same effect, should it be dismantled and placed into document WIPO/GRTKF/IC/24/4 as negotiated at the present session. The Delegation suggested that the Joint Recommendation be annexed as a whole to the negotiating text.

171. [Note from the Secretariat: the Chair suspended the session for the lunch break.]

172. The Chair referred to consultations with the proponents of the Joint Recommendation that had taken place during lunch break. He emphasized that he intended to make sure that the intention of the proponents was not to have a parallel document competing with document WIPO/GRTKF/IC/24/4. The Chair noted that the Joint Recommendation was properly listed in the Agenda of the session and its work program. This should enable its proponents to present it and Member States to comment on it. The Chair urged delegations not to engage in a procedural debate over the status of the proposed document WIPO/GRTKF/IC/24/5 as a document that could be commented upon or not. He reminded the IGC that a Rev. 2 of the Draft Articles had already been noted and transmitted for the purposes of the General Assembly and reminded that, while document WIPO/GRTKF/IC/24/5 was to be noted, it was not to be transmitted to the General Assembly in parallel with Rev. 2. At the same time, he emphasized that in his view there was no basis for a debate over whether document WIPO/GRTKF/IC/24/5 could be commented upon or not. The Chair considered that the proponents of document WIPO/GRTKF/IC/24/5 would be interested in other delegations' perspectives on the document, although it was at the discretion of Member States to determine whether and how they would further engage on it.

173. The Delegation of Canada expressed its confidence that all Member States agreed that patents should not be granted in error for inventions that were not novel or inventive with regard to GRs and TK associated with GRs. It believed that this was the common ground that the proposed Joint Recommendation sought to encapsulate and build upon. The Delegation stated that it did not dispute the fact that additional measures would be required to address the issue at hand. It rather wished to highlight that the proposal sought to outline key measures that could address, at least partly, the issues that were being discussed at the present session. The Delegation noted that there were a number of high-profile cases in which patents had been granted in error with regard to GRs but subsequently invalidated. It was of the opinion that patents were erroneously granted due to a lack of awareness and information on the patenting of GRs. The measures outlined in the proposal could help prevent any such patents from being granted in the first place, including by raising the awareness of patent examiners and practitioners in general. That would help to avoid lengthy invalidation procedures. The Delegation reiterated its support for the Joint Recommendation. It believed that the objectives, principles and measures identified in the proposed Joint Recommendation could provide practical and effective solutions to address the erroneous granting of patents.

174. The Delegation of the Russian Federation thanked the Delegations that sponsored document WIPO/GRTKF/IC/24/5. The Delegation wished to welcome again the proposed document. It associated itself with the statement made by the Delegation of Canada. It acknowledged that the Joint Recommendation contained parts on definitions, objectives and principles, prevention of erroneous grants of patents, opposition measures, supporting measures relating to the development of codes of conduct and guidelines regarding the protection of GRs and associated TK. The Joint Recommendation also related to the creation of databases which had to be considered by patent offices and the need for additional normative documents which would be used as guidelines when carrying out patent examinations involving GRs and associated TK. The Delegation believed that this set of measures would contribute to prevent the erroneous grant of patents. It reiterated that document WIPO/GRTKF/IC/24/5 could be a good basis of work under Agenda item 5. It said that it could be adopted in the future by the Committee as guidelines for the protection of TK and TK associated with GRs.

175. The Chair emphasized that the basis of work for the Committee was set out in the IGC mandate as decided by the General Assembly. He added that adopting the proposed Joint Recommendation as a basis of work would not be welcomed as this had not been contemplated by the IGC mandate. The Committee was expected to work on a single central document and whilst the proposed Joint Recommendation could be presented as an ancillary document, it could not be considered as a parallel document along with the Draft Articles annexed to document WIPO/GRTKF/IC/24/4. The Chair reminded delegations that whereas the present IGC had a clear mandate with respect to document WIPO/GRTKF/IC/24/4, it had not such authority in relation to other documents. However, he added that if Member States wished to discuss the proposed Joint Recommendation as a separate document for further work, they would need to agree among themselves as to whether this could be so done following the revision of the mandate of the IGC. The Chair stressed out that he wished to avoid competition between document WIPO/GRTKF/IC/24/4 and the proposed Joint Recommendation at this session. The Chair advised Member States to limit therefore their statements to comments in relation to the proposed Joint Recommendation.

176. The Delegation of the Republic of Korea, as co-sponsor of the proposed Joint Recommendation, recognized the economic and social value of GRs and TK associated with GRs as well as the role of the IP system in promoting innovation and preventing of erroneously granted patents. It believed that it was vitally important for patent officers to have access to information on GRs and TK associated with GRs in order to achieve transparency in the process of granting patents. The Delegation advocated that databases of GRs and TKs associated with GRs would significantly assist in preventing erroneously granted patents. The Delegation suggested that those databases should be easily accessible on websites for patents examiners around the world. It wished to emphasize the importance of the Joint Recommendation. It stated that the Joint Recommendation did not diverge from the IGC mandate, since it was proposed as an international instrument. Furthermore it noted that the IGC mandate clearly stated that there could be more than one international instrument. The Delegation recommended that Member States consider the proposal as a promising solution for the IGC.

177. The Delegation of Norway, as a co-sponsor of the proposed Joint Recommendation, wished to highlight that it considered the document as complementing, and not competing with, document WIPO/GRTKF/IC/24/4.

178. The Delegation of Indonesia, speaking on behalf of the LMCs, shared the concern of the DAG as expressed by the Delegation of Brazil and believed that the IGC mandate at the present session concerned only TK. That mandate did not authorize to discuss or consider any other document. The Delegation maintained that the present IGC was not the proper forum for considering the three proposed documents.

179. The representative of Tupaj Amaru supported the statement made by the Delegation of Brazil in the sense that the Joint Recommendation had already been submitted at past sessions and that the Committee had duly taken note of it. He supported the suggestion of the Chair that Member States should not confuse different aspects. He reminded that the present session dealt with TK only. There was to be another session specifically envisaged for GRs. The representative reiterated that Member States should not engage in a debate on document WIPO/GRTKF/IC/24/5.

180. The Delegation of the EU, speaking on behalf of the EU and its Member States, welcomed the opportunity to discuss document WIPO/GRTKF/IC/24/5. It believed that while a new consolidated document relating to IP and TK would emerge from document WIPO/GRTKF/IC/24/4, other texts, including the Joint Recommendation, were relevant and should be made available for discussion.

181. The Delegation of India wished to associate itself with the statement made by the

Delegation of Brazil, speaking on behalf of DAG, and endorsed the suggestion of the Chair. It noted that this document, as well as documents WIPO/GRTF/IC/24/6 and WIPO/GRTF/IC/24/7, had already been discussed during the previous sessions.

182. The Delegation of Algeria, speaking on behalf of the African Group, commended the position of the Chair that the proposed documents should not be in competition with document WIPO/GRTKF/IC/24/4. The Delegation wished to reaffirm the position of the African Group which had already been expressed during the past sessions. It expressed its concern over document WIPO/GRTKF/IC/24/5, as it did not believe that the proposed document had any relation to document WIPO/GRTKF/IC/24/4. The Delegation disapproved proposals of that nature and believed that the proponents of the proposed documents intended to prejudice what would result from the negotiating work of the Committee.

183. The Delegation of South Africa supported the statement of the Delegation of Algeria, speaking on behalf of the African Group, and the statement of the Delegation of Brazil, speaking on behalf of the DAG. The Delegation supported the Chair's position in relation to the document WIPO/GRTKF/IC/24/5. It did not wish to comment any further on the proposed document and invited the IGC to take note of it.

184. The representative of FAIRA was concerned that the document WIPO/GRTKF/IC/24/5 did not include any provisions relating to ownership of and authorization from indigenous people to release some of the information that might be contained within the proposed database.

185. The representative of the HEP suggested that Member States took note of the document WIPO/GRTKF/IC/24/5. That said, she wished to include provisions relating to "access to databases" in the proposed document. The representative considered it important to understand the objectives of databases as proposed in the document. She raised a number of questions in relation to databases, such as whether people having access to databases could be identified and if so whether they should be subject to national or international legislation. She supported the statement made by the Delegation of Algeria, speaking on behalf of the African Group regarding that document.

186. The Delegation of Nigeria wished to associate itself with the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation believed that the proposed document could benefit from a discussion within the WIPO Standing Committee on Patents (SCP). Document WIPO/GRTKF/IC/24/5 contained some useful points which could bridge the gap between the outcome of the IGC work and the work of the SCP, which considered ways of improving the patent system in general. The Delegation stated that as the proposed document dealt with the issue of preventing the erroneous grant of patents, there should be ways to work together with the proponents of document WIPO/GRTKF/IC/24/5 to ensure coherence and relevance within the WIPO system.

187. The Delegation of China supported the statements of the Delegations of South Africa and Brazil. It reminded that the mandate of the IGC was to focus on the issue of TK at the present session.

188. The Chair, observing that there was clearly no agreement on the proposal, proposed that the IGC take note of the proposed Joint Recommendation. The Chair opened the floor on a "Proposal for the Terms of Reference for the Study by the WIPO Secretariat of Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems" (document WIPO/GRTKF/IC/24/6).

189. The Delegation of the United States of America introduced the proposal which was co-sponsored by the Delegations of Canada, Japan, the Republic of Korea, and the Russian Federation. It explained that this proposal was modeled upon other studies that

had been recently conducted to support the norm-setting work of WIPO. It would help to gather relevant information to support the work of the IGC. This proposal was also drafted in consideration of Development Agenda recommendation 15, which provided that norm-setting activities of WIPO should reflect a balancing of the costs and benefits. Although the IGC was considering a disclosure requirement as a possible outcome of its work, the IGC had not yet fully informed this recommendation by determining how existing disclosure requirements and ABS systems worked at the national level. This was why, as the work of the IGC continued, the co-sponsors proposed a study of the options that were being considered.

190. The Delegation of Japan emphasized that document WIPO/GRTKF/IC/24/6 did not intend to prejudice the IGC's ongoing work on the TK Draft Articles. The Delegation believed it was a way to deepen mutual understanding of possible measures for preventing patents from being granted erroneously. It reiterated that it should be useful that the Secretariat conduct a fact-based analysis in that regard. As a co-sponsor, the Delegation recognized discrepancy in the expectations of Member States regarding a disclosure requirement. One of the main reasons for this discrepancy was the lack of fact-based analysis. The effectiveness and burden of the system should be thoroughly analyzed and illustrated based on evidence. Otherwise Member States could not be certain that a mandatory disclosure requirement would contribute to the achievement of the shared objectives, including actual benefit-sharing. It noted that mandatory disclosure requirement was a relatively new concept and was not implemented in many countries. That was why there was little knowledge based on real cases. From a logical standpoint, such factual analysis should be planned and conducted by the Secretariat as soon as possible. If the proponents and co-sponsors of document WIPO/GRTKF/IC/24/6 had the support of Member States, it could be beneficial to expand the fact-based analysis to cover the protection of TK itself. The Delegation believed that based on the survey and analysis of experiences of countries that adopted a TK regime of protection, Member States could better clarify the concept, definition and objectives of TK protection. It believed that advancing such discussion was important in order to achieve a positive result.

191. The Delegation of Nigeria thanked the proponents for the document. It pointed to three studies that had addressed most of the questions raised in the proposed document. It encouraged the proponents to revisit document WIPO/GRTKF/IC/24/6 after reading those studies. Professor Peter Drahos prepared an extensive study on patent offices and what they looked at. The Delegation mentioned that there was an ongoing study by Margo A. Bagley that focused on patent offices on the African continent. It also mentioned a study conducted by the Queen Mary Intellectual Property Research Institute that looked at disclosure requirements and addressed at least 60 to 70 per cent of the questions raised by the proposal. The Delegation suggested that it would be efficient to make use of those studies and take them into consideration.

192. The Delegation of the Republic of Korea, as a co-sponsor, believed that the proposal was crucial for advancing the IGC work. The Delegation stated that it was not able to support mandatory disclosure requirements without further study on the impacts of disclosure requirements on national patent systems and overall costs and benefits in adopting such system. It believed that introducing a new system could impose a burden on patent offices of Member States. In 2012, the Korean Intellectual Property Office (KIPO) spent six months on investigating where GRs were used in Korean patent applications. The scope of that investigation was restricted to the field of biotechnology as defined by the IPC. Even with that restriction, there were still an excessive number of applications. For these reasons, the Delegation of Republic of Korea was concerned about disclosure requirements from a practical perspective. If mandatory disclosure requirements were adopted, it would be a great burden on IP offices of Member States.

193. The Delegation of the EU, speaking on behalf of the EU and its Member States, considered the proposal to be of interest as it addressed the needs of WIPO Member States

across the spectrum of development. It emphasized that studies had been carried out in other areas of WIPO normative work and, internally, the EU and its Member States followed an evidence-based policy-making approach. In general, the Delegation favored further studies to be carried out in relation to GRs and associated TK. However, it understood that some studies had already been carried out by the International Association for the Protection of Intellectual Property (AIPPI) and the WTO. The Delegation suggested that in making future decisions those studies should be taken into consideration in order to avoid duplication.

194. The Delegation of Canada, as a co-sponsor, reiterated its support for the proposal. The Delegation believed that the list of questions provided by the Delegation of the United States of America in its draft terms of reference would provide the IGC with insight on important technical issues, including those that were constructively identified by the Delegation of Namibia at IGC 23. The Delegation stated three reasons for supporting the proposal for a study. First, it believed that policies, including those that were set forth by the international instrument, must be based on evidence. Any sound policy should pursue its stated objectives in a manner that balanced the interests of all parties involved and minimized unintended consequences. Secondly, the WIPO Secretariat's latest study, namely "The Technical Study on Disclosure Requirements in Patent Systems Related to GRs and TK" that was published in 2004, was thus almost 10 years old. The Delegation believed that the study needed an update. Thirdly, while there was ample information in the WIPO Technical Study and elsewhere on the various existing mandatory disclosure requirements and more broadly on the principle of disclosure, there was a lack of factual information, statistics and data on the interpretation and day-to-day implementation of those requirements. This gap must be addressed, as this practical information representing current practices and experiences could provide evidence as to whether these mandatory disclosure requirements achieved their goals and whether this was done in a balanced manner. The Delegation expressed its hope that the Committee would support the proposal for a study. It noted that it remained fully committed to the work of the IGC and looked forward to continuing the collective exploration of those issues.

195. The representative of FAIRA stated that document WIPO/GRTKF/IC/24/6 did not include provisions that addressed the absence of mandatory disclosure requirements and its negative impacts on indigenous peoples. This, however, could be included in a separate study and taken into consideration in order to give a proper balance to any study of that nature.

196. The Delegation of the Russian Federation, as a co-sponsor, reiterated its proposal for a study. It endorsed the statements made by other co-sponsors of that proposal. The Delegation reminded that it had already expressed its concern at IGC 10 over the issue of how mandatory disclosure requirements could be met. From a practical perspective document WIPO/GRTKF/IC/24/6 could provide answers to many questions that the Committee had. The Delegation did not believe that the discussion on document WIPO/GRTKF/IC/24/6 would hold up the future work of the Committee. It wished to clarify its past statement in relation to document WIPO/GRTKF/IC/24/5, which it saw as an additional or complementary document and not as a parallel document in competition with the main document WIPO/GRTKF/IC/24/4.

197. The Delegation of Algeria, speaking on behalf of the African Group, wished to express its concern over documents WIPO/GRTKF/IC/24/5 and WIPO/GRTKF/IC/24/6. It stated that they fell outside the General Assembly's mandate, which clearly indicated that Member States should concentrate on text-based discussions. The Delegation did not believe there was a link between the proposed study and the on-going text-based negotiations. The proposed study concerned the issue of technical assistance for patent offices and improvement of the patent system. Beside the present Committee was discussing the protection of TK and not the protection of patents. If the proposed study had to be carried out, it should be commissioned by the SCP which had the mandate to discuss those issues.

198. The Delegation of South Africa reminded that the issue of the proposed study had

already been raised at IGC 23. The Delegation supported the comment made by the representative of FAIRA that the proposed study did not address the issue of what impact misappropriation had on indigenous people and local communities. The proposed document was unbalanced and did not reflect all Member States' interests. On these grounds, the Delegation found it difficult to support the proposed study. It also wished to associate itself with the statement made by the Delegation of Algeria, speaking on behalf of the African Group, in the sense that the mandate of the present session did not cover the proposed study. The Delegation agreed with the statement made by the Delegation of Nigeria that referred to other studies already available. It disagreed with the view of the co-sponsors that the proposed study would enhance understanding of mandatory disclosure requirements. It believed that the proposed study would not contribute to the on-going work of the IGC as foreseen by its mandate.

199. The Delegation of Peru stated that it was sympathetic to the initiative proposed by the Delegation of the United States of America and other co-sponsors. The Delegation had no doubt that the initiative was made in good faith and with constructive intention. Even so, the Delegation could not agree with the statements of the Delegations of Japan and the Republic of Korea in the sense that the proposed study had a fundamental nature or was essential to the discussion of the text-based negotiation. There existed other studies on this subject, including those that dealt with practical experiences in both the northern and southern hemisphere. The Delegation was concerned that the proposed study addressed only issues from the perspective of patent offices. The proposed study did not address the interests of beneficiaries or potential beneficiaries; in particular, it did not take into account the costs of not having a mandatory disclosure system. For these reasons, the Delegation expressed its readiness to contribute to the improvement of the proposed terms of reference. It stressed out, however, that the proposed document should not be taken as a precondition or as a parallel element to the text-based negotiations.

200. The Delegation of Brazil wished to reiterate its comment in relation to the previous document WIPO/GRTKF/IC/24/5. The Delegation believed that the proposed study would bring a parallel discussion, on which delegations could not engage at the present session. It suggested that the proposed study be discussed at an appropriate time when GRs would be taken up again.

201. The Delegation of India recalled that the mandate of the present session was to negotiate a legal instrument for providing effective protection to TK. For this reason, the Delegation did not consider it appropriate to discuss the proposed study at the present session which had another focus. Furthermore the Delegation did not believe that the proposed study could be beneficial to the negotiation process. It recalled that there were numerous studies which covered a majority of the terms of reference of the study. Therefore, the Delegation did not support the proposed study.

202. The Chair noted that there was clearly no agreement on the proposed study to be undertaken at the present session and proposed that the IGC take note of the proposal. He suggested that the proponents engage informally with other delegations on it. He opened the floor on a "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources" (document WIPO/GRTKF/IC/24/7).

203. The Delegation of Japan introduced the Joint Recommendation, with a view to deepening mutual understanding on the fundamental issues at stake. The Delegation wished to emphasize again that document WIPO/GRTKF/IC/24/7 did not intend to prejudice the present IGC's ongoing work on the protection of TK. It hoped that the adoption of this recommendation would contribute to reducing the number of erroneously granted patents which did not meet the patentability requirements of novelty and inventive step. This recommendation would improve the framework for searching prior art on TK and GRs. In

addition, a patent granted through the one-stop-portal database as proposed would have stable patentability, which would enhance innovation and help achieve benefit-sharing thereof. The Delegation emphasized that developing one-click databases would reduce the examination workload of IP offices. In Japan, various TK databases were used along with the Internet to conduct prior art searches in the patent examination process. Such searches for prior art required consulting a number of various databases which increased the examination workload. If one-click databases as proposed in document WIPO/GRTKF/IC/24/7 became a reality, it would be possible to reduce the workload involving prior art searches during the examination stage, as examiners would be able to search for information in each database simply by accessing the portal site and entering a search entry. Since there were various databases on TK, including commercial databases, one-click database would have an enormous effect. The Delegation addressed some concerns raised by delegations in relation to the database proposal. It believed that in relation to the cost of the database, a study conducted by the Secretariat would clarify this issue. The concern over free-riders could be resolved by prohibiting third parties other than examiners in IP offices from accessing the information in the database. In relation to the issue of unintended disclosure of information through hacking or corruption, the Delegation proposed that such confidential information should not be contained in the prior art database in the first place, since information not publicly available would not qualify as prior art when determining the patentability requirements of novelty and inventive step. The Delegation believed that since patent offices around the world often dealt with confidential information contained in patent applications, the information security management of patent offices could be trusted. This Committee would be able to examine these issues further if Member States agreed that the Secretariat should explore the idea of developing such database and conduct a feasibility study. The Delegation remarked that the database proposal was supported by Member States in the previous sessions. It welcomed any suggestions or comments in relation to the proposal and looked forward to continuing the discussion on this matter in a constructive manner.

204. The representative of Tulalip Tribes expressed his view that the database proposal was unbalanced and needed additional work before it could be supported. The proposal involved the presumption of “public domain”; however, some major questions relating to this concept remained unresolved at the present IGC. In particular, the questions of indigenous ownership and authorization to compile information had to be resolved. He emphasized that indigenous people and local communities were the holders and owners of TK and should be the ones to make any authorizations in relation to compiling their TK. In respect of defensive protection, the representative stated that while he understood the need for defensive protection, it had its own dangers to TK. Too heavy emphasis on defensive measures was causing indigenous peoples problems. Finally, he raised the issue of security for databases beyond mere hacking such as changes in laws or the legal authority. A secured database might become publicly available as a result of a change in the legal regime. Such uncertainty presented a major concern.

205. The Delegation of the Republic of Korea wished to point out that the database proposal had been supported by many Member States in the previous sessions. The Delegation was convinced that by improving the search system for prior art relating to GRs and TK associated with GRs as proposed by document WIPO/GRTKF/IC/24/7, the number of erroneously granted patents could be reduced. It wished to share its experience with other Member States: KIPO's database contained more than 86,000 TK documents from the past and the present. The database was available online through the Korean TK Portal, which was used by Korean patent examiners. The Delegation believed that the defensive protection of TK had been successful in Korea. It wished to reiterate its belief that databases of GRs and TK associated with GRs would greatly assist in preventing erroneous grant of patents.

206. The Delegation of the United States of America, as a co-sponsor, reiterated its support for the Joint Recommendation. The Delegation viewed the proposal as a key element in the IGC work that aimed to provide an international legal instrument or instruments for the effective

protection of TK. It would allow WIPO Member States to link their national TK databases to a WIPO portal, making them available for search by WIPO Member States' patent offices. The Delegation expressed its willingness to discuss these issues and other concerns that the representative of the Tulalip Tribes or delegations had about this proposal in efforts to improve it. The Delegation stated that this proposal would help to address key issues that had been identified by WIPO Member States by helping to prevent the erroneous grant of patents.

207. The Delegation of South Africa recognized the importance of databases and their contribution to the preservation of TK. To this end, the South African government was launching its own National Recordal System on May 24, 2013. The features of this system went beyond the narrow perspective of defensive protection. The Delegation stated that the purpose of databases should determine the manner in which they were constructed. It believed that protection of TK should not be limited only to defensive protection but could also include positive protection. The Delegation believed that while such databases as proposed by document WIPO/GRTKF/IC/24/7 could be a great source of information for advancing innovation and creativity, they could also be abused. It was of the opinion that the proposed Joint Recommendation did not address the issue of abuse of databases and was therefore unbalanced. The Delegation wished to question as well the nature of the metadata that were to be created behind the system, because it would also be influenced by the purpose for which databases were developed. Its experience of databases proved that the process of developing databases was complex. Document WIPO/GRTKF/IC/24/7 lacked technical requirements of a balanced database that would serve the interests of both the user and the knowledge holder. The Delegation stressed out that the needs for a database differed among Member States. In its view, the Traditional Knowledge Digital Library (TKDL) of India was different from what would be required in Africa, where much of the knowledge was oral, transmitted from generation to generation and inter-generationally. This specific situation required a completely different type of database, and the proponents underestimated the importance of working with communities in the creation of databases which would be based on oral information. The Delegation stated that having gone through the experience of launching a database, it was well aware of technical difficulties of databases, security issues, the needs of indigenous people and their sensitivity to databases. It believed that the proposal as tabled was not comprehensive from a technical perspective. For these reasons, the Delegation did not wish to support document WIPO/GRTKF/IC/24/7 until it was sufficiently balanced and addressed the interests of all Member States.

208. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the proponents and was of opinion that document WIPO/GRTKF/IC/24/7 was relevant and should remain on the table for discussion.

209. The Delegation of Canada, as a co-sponsor, reiterated its support for the proposal. The Delegation believed that the most promising way forward was the adoption of concrete measures for defensive protection. Databases were one of those measures as they could significantly help preventing the erroneous grant of patents in relation to GRs and TK associated with GRs.

210. The representative of FAIRA noted that the proposal should include mechanisms that submit the compilation and use of the content of TK to the authorization of the TK owners. He stated that the Committee's main purpose should remain the protection of TK as such.

211. The Delegation of Algeria, speaking on behalf of the African Group, wished to refer the Committee to the comments that the Delegation had made in relation to documents WIPO/GRTKF/IC/24/4 and WIPO/GRTKF/IC/24/5. Although the subject was different, the Delegation held the same concerns in relation to procedure. Regarding the substance of document WIPO/GRTKF/IC/24/7, it recognized that the issue of databases was important. But

it added that Member States would need to adopt, as a framework, an international and legally binding treaty, establishing rights and the effective protection of TK, before discussing how to set up databases.

212. The Delegation of Chile believed that this document contained interesting elements concerning the use of databases in the patent examination procedure. It recognized the importance of the use of databases for a proper functioning of the patent system. The Delegation noted that its IP office continued working on this matter in cooperation with other national offices. In this regard, it supported the suggestion that IP offices should have access to these types of databases. Nonetheless, the Delegation believed that under the circumstances, the Committee should dedicate its efforts and time principally to the discussion of the text attached to document WIPO/GRTKF/IC/24/4.

213. The Delegation of Brazil, speaking on behalf of DAG, reiterated its position that the present mandate of the General Assembly did not authorize the inclusion and discussion of documents WIPO/GRTKF/IC/24/5, WIPO/GRTKF/IC/24/6, WIPO/GRTKF/IC/24/7 at the present session.

214. The Delegation of India expressed its belief that a database as proposed by document WIPO/GRTKF/IC/24/7 was important. However, the Delegation stated that the present Committee was negotiating an instrument to provide legal protection to TK. The proposal as contained in WIPO/GRTKF/IC/24/7 was not appropriate at the present session and could only constitute a complementary measure.

215. The Chair noted that there was no agreement on the Joint Recommendation and proposed that the IGC take note of it. He suggested that the proponents further engage informally with other delegations on it, as on the two other proposals.

Decision on Agenda Item 5:

216. The Committee developed, on the basis of document WIPO/GRTKF/IC/24/4, a further text, "The Protection of Traditional Knowledge: Draft Articles Rev. 2". The Committee decided that this text, as at the close of the session on April 26, 2013, be transmitted to the WIPO General Assembly taking place in September 2013, in accordance with the Committee's mandate contained in document WO/GA/40/7 and the work program for 2013 as contained in document WO/GA/41/18.

217. The Committee also took note of documents WIPO/GRTKF/IC/24/5, WIPO/GRTKF/IC/24/6 Rev., WIPO/GRTKF/IC/24/7, WIPO/GRTKF/IC/24/INF/7 and WIPO/GRTKF/IC/24/INF/8.

AGENDA ITEM 6: ANY OTHER BUSINESS

218. [Note from the Secretariat: no statement was made under this Agenda item.]

AGENDA ITEM 7: CLOSING

219. [Note from the Secretariat: delegations and observers that intervened under this Agenda item thanked the Chair, Vice-Chair, facilitators, Secretariat and interpreters.]

220. The representative of FAIRA noted that April 25, 2013 was Anzac day, a day in which Australia celebrated and remembered Australian service personnel that had given up their lives in war. He shared the story of Gunner Percy, an indigenous prisoner of war, and the effect that the rejection of indigenous peoples in Australia at the time had had on him as well as its role in his eventual disappearance. The representative pointed out that indigenous people would share their TK but appealed to Member States not to leave them destitute, as Gunner Percy was when he returned to Australia, once the sharing of their knowledge and the bounty had happened.

221. The Delegation of Belgium, speaking on behalf of Group B noted that though substantial progress had been accomplished in exploring national practices and clarifying differences in positions, further work still needed to be done. It stated that Member States had engaged with the text, especially Articles 1, 2, 3, and 6, and noted that while positions had been clarified, further proposals had been made and further clarifications were still needed. It was of the view that there had been a movement to a better understanding of each other's positions. The Delegation noted that due to the fact that some policy objectives, general guiding principles and TK articles remained conflicting, the importance of the discussion during IGC 25 could not be overemphasized. This discussion would enable delegations to reflect on whether and how the draft TK text could further evolve into a balanced instrument or instruments that could provide certainty and flexibility in the TK area. Finally, the Delegation noted that though the current text still contained a lot of brackets, it could still benefit from a substantial amount of further clarification and result eventually in a satisfying instrument.

222. The representative of Tupaj Amaru noted that he had defended TK passionately because he was the spokesperson for the secret knowledge which his forefathers had conveyed to him. He informed the plenary that he would convey to the Secretariat an alternative version of the text which, he noted, could be a suggestion for thinking and for history. It would enable future generations to remember the hard work that had been put into the present discussions. He requested that this suggestion be kept in the archives and translated. [Note from the Secretariat: as previously mentioned, this suggestion would be posted on the observers' page of the WIPO TK Website.]

223. The Delegation of Poland, speaking on behalf of the Central European and Baltic States Group (CEBS), welcomed the approach to the negotiations adopted by Committee and noted that the discussions within the expert group contributed considerably to a better understanding of the concerns underlying the positions of various Member States. It was pleased with the progress made during the session but was of the view that the Draft Articles could still be further simplified and improved. It had followed with great interest the discussion on Articles 1, 2, 3 and 6 of Rev. 2 under Agenda item 5, especially the issues concerning the public domain, and looked forward to continued discussions. The Delegation was of the view that in the interest of an agreeable solution to all parties, a right balance between the effectiveness of protection and the flexibility of the negotiated instruments was needed. It expressed its readiness to engage and collaborate with Member States on the important outstanding issues during the forthcoming IGC 25.

224. The representative of ADJMOR stated that in his view the Indigenous Caucus was placing great hopes in the legal instrument which was being negotiated and wished to see it enshrined the respect for TK and corresponding rights of the indigenous peoples. He pointed out that due to the fact that TK was of utmost importance for indigenous peoples, the

international instrument should insist on the respect of the rights of the indigenous people as well as all parties concerned. He reiterated the importance of the involvement of indigenous peoples in the making of decisions which concerned them. He stated that the indigenous peoples were counting on the awareness of and respect from delegations, as the process was essentially about the respect of Indigenous people and their human rights as required by international instruments, which, he reminded, Member States of the IGC had subscribed to.

225. The Delegation of Indonesia expressed its gratitude to the Chair, the Vice-Chair and facilitators and all the members of the bureau for their hard work.

226. The Delegation of Egypt, speaking on behalf of the African Group, highlighted that the issue of TK was a particularly important issue for all African countries. They had watched, for the past 12 years, the progress made on the issue and were hopeful that progress was presently being made to the final stretch of the marathon. It expressed the hope that beyond the existing brackets, options and alternatives within the text, delegations could jointly address the fundamental issues which were of great concern and importance to all humanity. The Delegation was of the view that collectively, delegations possessed the knowledge, both traditional and modern, to keep the stone up as Sisyphus did and to complete the mandate of the Committee.

227. The Delegation of the European Union, speaking on behalf of the EU and its Member States, expressed its support for conducting informal expert groups, and noted it proved to be an extremely efficient way for the drafting work. It believed that more time should be devoted in the future to the discussion of the objectives and principles which would help to make further progress on the text. It noted that on the key issues, like the public domain, there remained a wide divergence of views and policy approaches. It reiterated its view that the complex issue of the protection of TK should be addressed in a separate non-binding, clear and flexible instrument, different from those on the protection of GRs and TCEs. It looked forward to the useful discussions to take place at the end of IGC 25 which would consider further steps to be taken on the three IGC instruments. Regarding the mandate of the IGC and the decision on whether to convene a Diplomatic Conference, the Delegation was of the view that it was important not to attempt to accelerate work before issues were mature. It expressed its commitment to working constructively within the framework of the IGC.

228. The Delegation of India, speaking on behalf of the Asian Group, assured delegations of its constructive engagement during the forthcoming session of IGC for the purpose of arriving at a text which could be presented to the 2013 General Assembly and would enable it to take the decision of convening a Diplomatic Conference in 2014.

229. The Chair thanked all who had participated in the session, including the Secretariat and the interpreters, and brought the session to an end.

Decision on Agenda Item 7:

230. The Committee adopted its decisions on agenda items 2, 3, 4, 5 and 7 on April 26, 2013. 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 4, 2013. 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 Twenty-Fifth Session of the Committee.

[Annex follows]

**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)

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Assembly of First Nations

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Association européenne des étudiants en droit (ELSA International)/European Law Students' Association (ELSA International)

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Asociación Kunas unidos por Napguana/Association of Kunas United for Mother Earth (KUNA)

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Vice-présidents/Vice-Chairs: Bebeb DJUNDJUNAN (Indonésie/Indonesia)
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VII. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE
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[End of Annex and of document]