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**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

Third Session
Geneva, June 13 to 21, 2002

REPORT

adopted by the Committee

TABLE OF CONTENTS

	Paragraphs
INTRODUCTION	1 to 7
AGENDA ITEMS	
(see document WIPO/GRTKF/IC/3/1)	
Item 1: OPENING OF THE SESSION	8 to 9
Item 2: ADOPTION OF THE AGENDA	10 to 19
Item 3: ACCREDITATION OF CERTAIN ORGANIZATIONS	20 to 30
Item 4: GENETIC RESOURCES	31 to 81

		Paragraphs
Item5:	TRADITIONAL KNOWLEDGE	82to266
Item6:	FOLKLORE	267to294
Item7	FUTUREWORK	295to309
Item8:	ADOPTION OF THE REPORT	310
Item9:	CLOSING OF THE SESSION	311
ANNEXI	LIST OF PARTICIPANTS	
ANNEXII	POSITION OF THE AFRICAN GROUP	

INTRODUCTION

1. Convened by the Director General in accordance with the decision of the WIPO General Assembly (see document WO/GA/26/10, paragraph 71), and of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as "the Committee") at its second session (see document WIPO/GRTKF/IC/1/13, paragraph 176), the Committee held its third session in Geneva, from June 13 to 21, 2002.

2. The following States were represented at the meeting: Albania, Algeria, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Bhutan, Bolivia, Brazil, Burundi, Canada, Cameroon, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Latvia, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malaysia, Mali, Malta, Mauritius, Mauritania, Mexico, Morocco, Myanmar, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, Tunisia, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela, Zambia, Zimbabwe (97). The European Community was also represented as a member of the Committee.

3. The following intergovernmental organizations (IGOs) and secretariats took part as observers: The African Intellectual Property Organization (OAPI), African Regional Industrial Property Organization (ARIPO), Eurasian Patent Organization (EAPO), European Patent Organization (EPO), Food and Agriculture Organization of the United Nations (FAO), General Secretariat of The Andean Community, International Labour Organization (ILO), Latin American Economic System (SELA), League of Arab States (LAS), *Organisation internationale de la francophonie (OIF)*, Organization of African Unity (OAU), Pacific Islands Forum Secretariat, Secretariat of the Convention on Biological Diversity (SCBD),

Secretariat of the Pacific Community, United Nations Conference on Trade and Development (UNCTAD), South Centre, Union for the Protection of New Varieties of Plants (UPOV), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), World Trade Organization (WTO) (21).

4. Representatives of the following non-governmental organizations (NGOs) took part as *ad hoc* observers: Aboriginal and Torres Strait Islander Commission (ATSIC), Action Aid, Arctic Athabaskan Council, Berne Declaration, Biotechnology Industry Organization (BIO), Brazilian Association of Intellectual Property (ABPI), Center for International Environmental Law (CIEL), Crop Life International, FARMPU – Inter and CECOTRAP – RCOGL, Genetic Resources Action International (GRAIN), Health and Environment Program, Ibero-Latin American Federation of Performers (FILAI E), Indian Movement *Tupajamaru*, *Ingénieurs du Monde*, Institute for Agriculture and Trade Policy (IATP), International Association for the Protection of Intellectual Property (AIPPI), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Environment Law Research Centre (IELRC), International Federation of Industrial Property Attorneys (FICPI), International Federation of Musicians (FIM), International Federation of Pharmaceutical Manufacturers Associations (IFPMA), International Federation of Reproduction Rights Organization (IFRRO), International Institute for Environment and Development (IIED), International Literary and Artistic Association (ALAI), International Plant Genetic Resources Institute (IPGRI), International Publishers Association (IPA), International Seed Federation (FIS), International Work Group for Indigenous Affairs (IWGIA), Inuit Circumpolar Conference (ICC), Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, *Mejlis* of the Crimean Tatar People, Russian Association of Indigenous Peoples of the North (RAIPON), SAAMIC Council, Tulalip Tribes of Washington Governmental Affairs Department, World Conservation Union (IUCN), World Self Medication Industry (WSMI) (38).

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

6. Discussions were based on the following documents and information papers prepared or distributed by the Secretariat of WIPO (the Secretariat):

- “Draft Agenda” (document WIPO/GRTKF/IC/3/1 Prov.),
- “Accreditation of Certain Non-Governmental Organizations” (WIPO/GRTKF/IC/3/2),
- “Structure of Proposed Database of Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing” (WIPO/GRTKF/IC/3/4),
- “Inventory of Traditional Knowledge-related Periodicals” (WIPO/GRTKF/IC/3/5),
- “Inventory of Existing Online Databases containing Traditional Knowledge Documentation Data” (WIPO/GRTKF/IC/3/6),
- “Review of Existing Intellectual Property Protection of Traditional Knowledge” (WIPO/GRTKF/IC/3/7),
- “Elements of a *suigeneris* System for the Protection of Traditional Knowledge” (WIPO/GRTKF/IC/3/8),
- “Traditional Knowledge – Operational Terms and Definitions” (WIPO/GRTKF/IC/3/9),
- “Final Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/3/10),
- “Expressions of Folklore” (WIPO/GRTKF/IC/3/11, submitted by the European Community and its Member States),

- “Certain Decision of the Sixth Conference of the Parties to the Convention on Biological Diversity” (WIPO/GRTKF/IC/3/12, submitted by the Secretariat of the Convention on Biological Diversity),
- “Report of the Thirty-First Session of the Committee of Experts of the Special Union for the International Patent Classification” (WIPO/GRTKF/IC/3/13),
- “Current Status on the Protection and Legislation of National Folklore in China” (WIPO/GRTKF/IC/3/14, submitted by the Delegation of China),
- “Position Paper of the African Group” (WIPO/GRTKF/IC/3/15, submitted by the African Group), and
- “Traditional Knowledge and Intellectual Property Rights” (WIPO/GRTKF/IC/3/16, submitted by the European Community and its Member States).

7. This report summarizes the discussions without reflecting all the observations made nor necessarily following the chronological order of interventions.

AGENDA ITEM 1: OPENING OF THE SESSION

8. The session was opened by Mr. Francis Gurry, Assistant Director General of WIPO, who welcomed the participants on behalf of the Director General.

Election of the officers

9. At its second session, the Committee had elected Mr. Henry Olsson (Sweden) as chair for one year, and Mrs. Homai Saha (India) and Mr. Petru Dumitriu (Romania) as Vice-Chairs for one year. Mr. Olsson and Mrs. Saha accordingly continued to serve in these positions during the third session. Following the reassignment of Mr. Petru Dumitriu, the Delegation of Argentina, on behalf of the Group of Latin American and Caribbean countries, nominated Mr. Mwananyanda Mbikusita-Lewanika of Zambia to be elected in his place. This nomination was supported by the Delegation of Algeria, on behalf of the African Group, and agreed by the Committee. Mr. Antony Taubman (WIPO) acted as Secretary to the third session of the Committee.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

10. Before submitting the Draft Agenda for approval, the Chair made several general comments on the work of the Committee. Equal weight and time should be given to all three issues before the Committee: genetic resources, traditional knowledge (TK) and folklore; the Committee was encouraged to deliver tangible results, such as those canvassed in documents WIPO/GRTKF/IC/3/4, WIPO/GRTKF/IC/3/5 and WIPO/GRTKF/IC/3/6. All Committee Members would be given the chance to speak, yet interventions should be brief. Members should try to reach consensus decisions, rather than decide issues on the basis of a majority. Individual Members would not be encouraged to make general opening statements, but were asked to concentrate on the specific documents and issues at hand. The Chair proposed that WIPO/GRTKF/IC/3/12 be discussed under Agenda Item 4 (Genetic Resources) after WIPO/GRTKF/IC/3/4, and the Draft Agenda (WIPO/GRTKF/IC/3/1) was adopted on this understanding.

General Statements

11. The Delegation of Argentina, on behalf of Group of Latin American and Caribbean countries, said that it was grateful for the detailed and substantive documentation prepared by the Secretariat, but that very few of the documents were currently available in Spanish. Many of the documents had not been distributed at least two months in advance of the third session, as the WIPO guidelines required.
12. The Delegation of Egypt raised the question of the availability of the documentation in Arabic. The Delegation stated that Arabic was an official language in twenty-two countries. The Delegation stated that this issue had also been raised at the two preceding sessions and that it would appreciate an explanation from the Secretariat as to why documents were only available in English, French and Spanish. Several other delegations expressed concern as to the unavailability of documentation in Arabic and noted that this concern was expressed on behalf of all Arab-speaking countries.
13. The Delegation of Algeria, on behalf of the African group, stated that it hoped that the third session would demonstrate the same spirit of cooperation as in preceding meetings. The Delegation expressed concern regarding the issue of documentation in Arabic. The Delegation also commented that, on behalf of the African Group, it would later present a position paper on the issues to be discussed by the Committee.
14. In response to the above, the Secretariat stated that it was highly conscious that certain documents had only recently been disseminated to Committee Members. This was partly because some documentation had been circulated earlier for comment and required input from Members, and much of the subject matter addressed by the Committee was new territory and had required a considerable amount of work by the Secretariat. In the future, the Secretariat would endeavor to send out documentation at least two months prior to the meeting date. Noting the concerns raised by the Delegation of Egypt on behalf of all Arab-speaking nations, confirmed that the established practice within WIPO was for documentation for all Committee meetings (such as the Standing Committees and the present Committee) to be prepared in the three working languages of the Secretariat (English, French and Spanish). Only for WIPO diplomatic conferences and Assemblies was documentation prepared in the six official languages (Arabic, Chinese, English, French, Russian and Spanish). It noted that after coming to office the current Director General of WIPO had extended the interpretation available for Committee to all six official languages, whereas in the past it had only been available in the three working languages. He noted that to translate all documentation into all six official languages for all Committee meetings would involve changes in the structure of Secretariat, the program and budget, and the engagement of a considerable number of language experts. It further stated that such a change would need to be placed before the Program and Budget Committee and approved by the WIPO General Assembly, since the issue would have significant budgetary implications.
15. The Delegation of Egypt stated that it was the first time that it had been informed that the issue of translation within the United Nations was one of budget and that it should have been informed of this at the first session of the Committee. The Delegation reaffirmed the entitlement of Arab-speaking delegations to receive all Committee documentation in Arabic.
16. The Delegation of India, on behalf of the Asian Group, said that the countries of its region were rich in genetic resources, TK and folklore and it was committed to working with

all countries for achieving conclusions which moved them towards protection of those resources. The Delegation recalled the position papers submitted at the previous session of the Committee, which reflected the broad convergence of views on those crucial issues and the Group's specific needs and interests. The Delegation was pleased to see that many of the Group's concerns were being addressed in the work of the Committee. The Asian Group commended documents WIPO/GRTKF/IC/3/8 and IC/3/9 that sought to clarify the complex elements of a *suigeneris* system and the definitions to be agreed to before these issues could be addressed in the Committee. Concerning legal protection of expressions of folklore, the Asian Group had suggested that WIPO explore practical options for the protection of tangible expressions of folklore through existing intellectual property rights (IPRs), such as copyright, industrial designs, certification and collective marks, and geographical indications, and, if necessary, study the possibility of establishing additional IPRs for handicrafts and other tangible expressions of folklore which were not protected by such existing rights. The Secretariat had conducted a survey on national experiences with the protection of folklore and from the limited information available had concluded that there was currently little practical experience with the implementation of existing systems and measures which countries had established in law. National systems, therefore, needed to be strengthened. But equally, there was a strong need for international protection for expressions of folklore. These suggestions would need to be discussed in detail by the Committee and the suggested tasks approved.

17. The Delegation of China expressed its satisfaction in seeing that, after its two first sessions, the Committee had already started achieving concrete results. The Delegation emphasized some of the important points and supported, in principle, the statement of the Delegation of India, on behalf of the Asian Group.

18. The Delegation of Algeria, speaking on behalf of the African Group, introduced the content of document WIPO/GRTKF/IC/3/15, which was circulated to the Committee. The position adopted by the African Group is provided as Annex II of this Report.

19. Mr. Edwin Vasallo, Minister for Economic Services of Malta made a general statement. He referred to the essential role played by the intellectual property (IP) system in the promotion of a culture of entrepreneurship and innovation. He had emphasized to Maltese entrepreneurs the essential role of this system for a healthy business environment and a prosperous economy. IP legislation had existed in Malta for over a century and was consolidated when the Industrial Property Office was set up as a distinct entity in 1994. Through this last period, WIPO had cooperated with that Office in raising awareness of the use and value of IPRs and in training staff. WIPO had also assisted in updating IP legislation through consultations. Innovators could now protect their economic rights through an extensive modern legislative framework. WIPO had recently supported a seminar on IP for Small and Medium Sized Enterprises (SMEs), which had been welcomed as timely by many organizations. His government hoped that this past cooperation would continue in the future so as to consolidate what had been achieved. He recorded his personal gratitude to the Director General of WIPO and the Secretariat for their commitment and endeavors in promoting the use of IP, and welcomed the Director General's emphasis on developing IP systems in developing countries and increasing awareness among SMEs. Turning to the Committee's work, the Minister referred to the questions that the Committee was aiming to answer. While his country lacked formal innovators, the people were innovators in the informal sense of the word, constantly coming up with new ideas and solutions. His country had a rich and vivid historical heritage, one of the oldest in the world, and a wealth of traditions and folklore, handed down through the generations, drawn from diverse sources and

influences. Space was limited, and natural vegetation was under threat. The Committee could therefore understand why he attached great importance to the issues of genetic resources, TK and folklore. Malta was drafting new legislation on plants, seeds and propagating material and was working to conserve local flora. Endemic plants that were near to extinction had been saved through the micropropagation of tissue culture and replanted in nature. Genetically modified organisms were recurrently banned in Malta, in line with the moratorium imposed by the European Union. The Malta Crafts Council had recently been set up within his Ministry to promote and protect local crafts and the products of Maltese folklore, with a certification system to distinguish authentic Maltese craft products from imitations which had recently entered the market. This system had added value to local products, and enhanced the image of Maltese crafts. Work was in train on a conformity mark for certain crafts sectors to set manufacturing standards. The Crafts Council promoted local traditions and crafts through awareness seminars, targeted marketing, a website, and a Directory of Craftsmen. Regular exhibitions were held, and information distributed to inform locals and tourists about the value of Maltese traditions, especially crafts. Craft workers registered with the Council received these services at no charge. His Ministry was encouraging innovation within the crafts sector. Yet products made according to local traditions were being copied, manufactured and sold cheaply. The survival of Maltese traditions and folklore required a system to protect TK and folklore. The leeway afforded to counterfeiters should be minimized. An adequate and efficient enforcement system was needed to deter potential infringers and to catch those who did breach IPRs.

AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS

20. Documents WIPO/GRTKF/IC/3/2 and WIPO/GRTKF/IC/3/2/Add. gave details of eighteen organizations that had requested *ad hoc* observer status for the session of the Committee: the *Association Bouregreg*; the *Asociación Civil Comunidad Aborigen* - “*Toba, Pilaga, Wichí*” - *To.Pi.Wi*; the *Pauktuutit - Inuit Women's Association*; the Society for Research into Sustainable Technologies and Institutions (SRISTI); the *Ainu Association of Sapporo*; the *Asociación Ixacava de Desarrollo e Información Indígena (ASIDII)*; the Indian Confederation of Indigenous and Tribal Peoples North-East Zone (ICITP -NEZ); the Indigenous Peoples Program; the Institute of Social and Cultural Anthropology, University of Oxford; the International Institute for Environment and Development (IIED); the *Ka Lahui Hawai'i*; the Nepal Federation of Nationalities (NEFEN); the *Organisation des Volontaires Acteurs de Développement - Action Plus (OVAD -AP)*; the *Pachamama Asociación Civil*; the South Centre; the *Fin-Hinane*; the Tulali Tribes of Washington Governmental Affairs Department; and the World Trade Institute. The Committee unanimously approved accreditation of these organizations as *ad hoc* observers.

21. The representative of the Indian Movement *Tupaj Amaru* recalled the proposal submitted at the last session of the Committee on behalf of the European Community and its Member States and supported by a number of Members, concerning the availability of funds to encourage and support the participation of representatives of TK holders at the sessions of the Committee. He asked about the implementation of this proposal.

22. The Secretariat explained that the proposal had been reported to the Program and Budget Committee, which was the appropriate body to address the issue. The next meeting of the Program and Budget Committee would take place in September. If the Budget Committee

could reach a favorable decision, then it would be reported to the WIPO Assembly in September, for consideration by WIPO Member States.

23. The representative of the Saami Council, on behalf of the indigenous caucus, described the United Nations Permanent Forum on Indigenous Issues (the Forum). The representative indicated that he had no mandate to speak on behalf of the Forum. Its Members should themselves be present to address the Committee but a lack of funding prevented this, and the Committee should have a basic understanding of the Forum. The representative averred that over the years indigenous peoples had been subjected to severe forms of wrongdoings, including institutionalized forms of discrimination, when the international community, with the establishment of the United Nations, started to focus on human rights and human aid. Only in the 1980s were indigenous issues added to the United Nations (UN) agenda. Even when the international community started to address indigenous issues, the indigenous peoples themselves were rarely invited to participate in these processes. In recent years, the international community had begun to address more adequately the particular needs and concerns of indigenous peoples, so that today it formed an important part of UN work. The representative acknowledged that several achievements had been made to remedy some of the problems faced by the indigenous peoples, yet indigenous peoples still faced grave forms of discrimination, as was highlighted at the United Nations World Conference Against Racism and Racial Discrimination in South Africa in 2001. The international community's failure to adequately address the situation of the indigenous peoples was attributed not to the lack of effort but to limited understanding of the particular concerns of indigenous peoples, due to the lack of indigenous input to UN processes. The Forum was the first permanent UN body dealing solely with indigenous issues. It reported directly to ECOSOC. It had first met in New York in May 2002, and would meet annually for two weeks each spring. The representative assessed the creation of the Forum as the greatest achievement of the UN in its work for promoting indigenous rights, with indigenous peoples and governments meeting for the first time on an equal level. The Forum consisted of eight members appointed by governments and eight appointed by indigenous peoples. These members serve in their own capacity with equal powers. The Forum was mandated to address all issues within the mandate of ECOSOC that are relevant to indigenous peoples; it was not a human rights body as such, since human rights was just one of the issues it addressed. Its main role was to coordinate work on indigenous issues within the UN system, to ensure that indigenous views and concerns are taken into account in UN work, to interact with all UN bodies dealing with issues of relevance to indigenous peoples and to ensure an holistic approach to indigenous issues. The Forum's mandate was given in ECOSOC Resolution 2000/22. At its first session, several UN Agencies, including WIPO, described their work on issues relevant to indigenous peoples; there were no thematic discussions. WIPO was a member of the Interagency Support Group created to assist the Forum to become as effective as possible. The representative called on the Secretariat to seek the advice of the Forum in its future work, and considers such advice when proposing future actions. The Permanent Forum, at its first session, requested among other agencies WIPO, to conduct a comprehensive review on how its policies affect indigenous peoples as well as to identify good and bad practices, policies, programs, gaps, problems, and obstacles in addressing issues regarding indigenous peoples. The Permanent Forum recommended that WIPO hold a technical workshop, including both state and indigenous representatives, to investigate the linkage between cultural diversity and biological diversity, ecosystem approaches and collaboration between scientific and TK and to evaluate the IP regime and to consider elaborating *suigeneris* systems for the protection of indigenous bio-cultural heritage, genetic resources and TK, and to identify the support for indigenous peoples to develop and consolidate their own policies and principles for the

protection of biological resources, TK, innovations and creativity. The representative expected the Permanent Forum members to take an active part in WIPO's work in the future. The representative urged WIPO to cover the costs of the Forum members' participation in the Intergovernmental Committee. The representative stated that the Permanent Forum could assist the Intergovernmental Committee by providing advice on how to allocate the means in the fund that could be set up for indigenous participation in the Committee.

24. The Delegation of Spain, on behalf of the European Community and its Member States, supported the intervention by the indigenous caucus and welcomed the Permanent Forum. The Secretariat was invited to coordinate and work closely together with the Forum.

25. The Delegation of Mexico expressed support for the establishment of the Forum and its hope that WIPO and other IGOs would continue to cooperate with the Forum. The Delegation expressed satisfaction in seeing the participation of Indigenous Peoples in the Forum, noting that the Committee should include TK holders in decision-making on these systems.

26. The Delegation of Algeria on behalf of the African Group expressed their support for the establishment of the Forum within the UN framework, and for extended cooperation between WIPO and the Forum in the field of IP.

27. The Delegation of New Zealand supported the Forum and the statement of the indigenous caucus concerning cooperation between WIPO and the Forum. The Delegation supported the suggestion that WIPO cover the costs of the attendance of the Permanent Forum at the Committee's meetings, until the Forum obtained the necessary funding.

28. The Delegation of Thailand supported extended cooperation between WIPO and the Permanent Forum and urged the participation of indigenous peoples in IP forums and in WIPO. The Delegation of Venezuela supported the creation of the Forum and stated that the cooperation between WIPO and the Forum should be enhanced.

29. The Secretariat noted that the establishment of the Permanent Forum was indeed a significant step, and it was pleased to be able to participate at its first session. The presentation given to the Forum on the work of the Committee was well attended and that WIPO was also part of the Interagency group with several other UN bodies which he had prepared for the Forum's first meeting. There were possibilities for cooperation between WIPO and the Permanent Forum so as to enhance the participation of indigenous peoples in the Committee. One possibility, linked to the Saami Council's statement, concerned the proposal to the Program and Budget Committee that there be funding of indigenous participation at Committee meetings, was for the Permanent Forum to assist in identifying the recipients of such funding. This proposal had been made at the second session of the Committee by the European Community and its Member States, and would be considered by the Program and Budget Committee at its next scheduled meeting.

30. The Chair made the following conclusions. The Chair thanked the Saami Council for raising the issue to the Intergovernmental Committee. He noted the establishment of the United Nations body of the Permanent Forum. He stated that the Committee encouraged close cooperation between WIPO and the Intergovernmental Committee with the Forum. With regard to the financing of participation, the Chair noted the explanations provided by the Secretariat that the Program and Budget Committee would

look further into the issue, and the present Committee would therefore leave the matter pending.

AGENDA ITEM 4: GENETIC RESOURCES

31. At the invitation of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/3/4 (Possible Format for an Electronic Database of National and Regional Clauses and Practices Concerning Access to Genetic Resources and Benefit-Sharing) and the activities it proposed. The Chair recalled that at its previous session, the Committee had agreed to a two-step approach – discussion of the structure of the database to be followed by work on its contents – and invited the Committee to decide on the database structure and on the distribution of the questionnaire proposed in the document.

General issues on the contracts database

32. The Delegation of Spain, on behalf of the European Union, voiced general support for the approach set out in document WIPO/GRTKF/IC/3/4 but noted that there were several technical problems, such as responsibility for channeling information from Members to the database; issues regarding languages; and inclusion of detailed legal documents in summary form.

33. The Delegation of Venezuela emphasized that the databases should contain information based on the experience of all Members, especially developing countries, and that its structure should reflect their requirements and needs of developing countries. It encouraged developing countries to send their remarks and comments, so as to achieve this balance. The Delegation supported the general structure of the database, and said it should be flexible enough to accommodate emerging needs. The Delegation stressed the importance of including the origin of the genetic resources and/or associated TK within the contract checklist (item 4.4 of document WIPO/GRTKF/IC/3/3). Information should cover whether the resources came from an *in situ* or *ex situ* origin, and also whether there had been prior informed consent. The Delegation stressed the need for any mechanism aimed at resolving disputes to be compatible with national law. It welcomed references to both monetary and non-monetary benefit-sharing, farmers' rights and confidentiality clauses, and stressed that definitions of terms for the purposes of the questionnaire should be as contained in the Convention on Biological Diversity (CBD) and not interpreted in a way that could prejudice agreements previously reached in other fora. The Delegation called for account to be taken of work in other WIPO Committees which were addressing issues related to the work of the present Committee, particularly on substantive patent law.

34. The Delegation of India, on behalf of the Asian Group, expressed appreciation for the work on collecting and compiling existing contractual clauses, but noted the need to focus on IP-related aspects in contractual agreements concerning genetic resources and benefit sharing. The proposed questionnaire would benefit from the range of views and experience within the Committee. At the previous session, the Group had underlined the importance of prior art in its consideration of the protection of TK and the need to integrate TK documentation into the databases available to patent offices worldwide.

35. The Delegation of India appreciated the Secretariat's efforts to extend the coverage of periodicals, gazettes and newsletters in the minimum documentation list of TK for international and international type searches. It recognized that such an inventory could not fully reflect the scope and diversity of TK or the documentation available. It was a useful starting point, but this exercise could not be in isolation. An effective classification system for such disclosed prior art documentation was necessary, such as TK Digital Libraries with search tools for the retrieval of relevant information. The Delegation noted that this was presently being addressed by the WIPO Task Force on Classification of Traditional Knowledge, as part of the Committee of Experts of the Special Union for the International Patent Classification (IPC). The Delegation of India endorsed cooperation between the IPC Committee of Experts and the Committee. In the Delegation's view, the Committee also needed to address the more complex issue of "defensive protection" of TK and the "positive legal protection" through existing IP or contractual agreements or the development of *sui generis* rights. A review of national systems and existing IP mechanisms was crucial in this exercise.

36. The Delegation of Thailand agreed that the databases should be a user-friendly and concise source of information to all those parties involved in drafting and negotiating contractual agreements on access to genetic resources and benefit sharing, particularly on IP related clauses. Members and stakeholders should be encouraged to make use of the database and provide information on the effectiveness or problems encountered in using clauses, so that the database may be a more useful and realistic tool for use by Members and stakeholders concerned with IP related aspects of contracts on access to genetic resources and benefit sharing. The Delegation, in general, approved the proposed structure of the database but added several suggestions. The title page and terms of use should clarify the IP status of the contract clauses so as to avoid potential violations of IPRs if users of the database copied contractual clauses. On item 4.2(b)(ii), a search tool could be inserted in order to enable end-users to look for contract parties that signed the contract on behalf of other organizations or stakeholders, such as when a governmental body signs on behalf of a community which holds TK. On (b)(iv) 'contract scope,' the Delegation proposed the addition of "know-how," since much know-how was distinct from TK, even though the two were related. On item (j), concerning dispute resolution, the Delegation said that the questionnaire should cover how parties had agreed to resolve disputes but also the effectiveness of alternative dispute resolutions. This would help illustrate what forms of dispute resolution are most beneficial. The Delegation agreed, in principle, that the questionnaire could be disseminated with some adjustments. In many countries there were several governmental bodies, organizations, or institutions responsible for the provision of access to genetic resources and benefit sharing (in Thailand, the Department of Agriculture, the Forestry Department, and the National Institute on Traditional Medical Practices were all involved). All responsible parties should be encouraged to cooperate on responses to the questionnaire, including consultation with stakeholders such as holders of TK. Where different approaches were evident in a particular country, the databases should include this diverse information so as to ensure a full picture of the various options.

37. The Delegation of Peru accepted the proposals in principle, yet emphasized that the databases should be flexible so as to allow for the compatibility of the different interests involved. The Delegation of Bolivia supported the position of the Delegation of Venezuela, noting that the checklists should contain the origin of genetic resources and TK, and definitions should correspond with the CBD.

38. The Delegation of Australia welcomed the database as a useful step towards clearly identifying the issues and addressing the concerns raised before the Committee. The database would provide a practical tool to aid contract negotiators when considering protection and commercialization of IP related to genetic resources, and would increase understanding about existing practices. It would therefore contribute to assessments of the need for and the nature of any change to national or international regimes. Noting that the database would serve immediate and ongoing objectives, the Delegation informed the Committee of the “Intellectual Property & Biotechnology: Training Handbook,” produced by Australia under the auspices of Asia-Pacific Economic Cooperation (APEC) as a practical introduction to the management of IPRs in relation to biotechnology for the use of developing countries in the Asia and Pacific region. The database, once ready, would give actual operational examples of contractual terms; the Handbook gives practical insight on how to negotiate those terms. In order to encourage contributions to the database, the Australian Government had conducted wide consultations with State Governments, research institutes, professional and industry organizations, indigenous groups and companies, and many stakeholders had agreed to contribute – once aware of the purpose of the database, they saw value in contributing to it. Other delegations were invited to discuss how Australia had engaged key stakeholders. The Delegation flagged the need for technical cooperation on consultation mechanisms, and recommended that the Secretariat direct technical assistance towards ensuring developing countries had ample opportunity to contribute to the database. The Delegation noted the need to examine how confidential information could be handled, and whether such information should be collected at all.

39. The Delegation of the United States of America reaffirmed its support for this exercise, as it sought to even the playing field by providing capacity building to suppliers of genetic resources and also provided guidelines for researchers and users of the resources. It agreed with other delegations that the final product must be user-friendly to make the greatest impact, and expressed support for many of the items in document WIPO/GRTKF/IC/3/4, including the confidentiality provision, as it was often the practice to keep price and terms of agreements confidential, while at the same time making the existence of the agreement known. It suggested that the database include information on whether any patents had been granted on research-relevant activities as a result of the partnerships (and, in the case of commercialization of a pharmaceutical product, any marketing approval), and information on whether the research had been subject to approval by the national authorities (a distinct from the holders of the knowledge). The Delegation supported dissemination of the questionnaire to Committee Members and stakeholders and looked forward to a compilation of responses which would assist the Committee in its work.

40. The Delegation of Brazil advised that Brazil had carried out thorough consultations with relevant national stakeholders in preparation for this session of the Committee. This involved representatives from different governmental policy areas such as trade, IP, indigenous affairs, environment, culture, research and science and technology, together with non-governmental representatives of indigenous communities, such as the Coordination of Organizations of the Brazilian Amazon (COAIB) and the Council for Articulation of the Indigenous Peoples and Organizations of Brazil (CAPOIB). These consultations had been very useful in identifying its interests in the Committee’s work. The Delegation referred to recent developments in other IGOs which were dealing with the issues of genetic resources, TK and folklore, and commented that WIPO could have a significant role in contributing to the international debate on the protection of TK and folklore, as well as on access to genetic resources as far as IPRs

were concerned. This task was not exclusive to WIPO and could not be carried out in isolation from the work of other relevant IGOs that also had their respective mandates to address genetic resources, TK and folklore. Particularly relevant were the Food and Agricultural Organization (FAO), the World Trade Organization (WTO) and the CBD. The FAO International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Treaty) contained provisions related to IPRs which must be taken into account in discussions regarding access to genetic resources. The WTO Doha Ministerial Declaration (adopted 14 November, 2001) instructed the Council for TRIPS to examine the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the CBD, the protection of TK and folklore. Integrally with the single undertaking of the Doha Development Agenda, the TRIPS Council would address these outstanding implementation issues. The Committee would have to take account of developments in the World Trade Organization (WTO). The Decisions adopted by the Sixth Conference of the Parties of the CBD were also important inputs for the Committee. The “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization” (Bonn Guidelines) clearly supported disclosure of the source of the genetic material in IP legislation, matter that should be considered in the Committee’s discussion on access to genetic resources. Discussion on issues related to genetic resources, TK and folklore in WIPO did not and should not duplicate discussions in other organizations. Progress in the Committee that was not clearly compatible with developments in the CBD and FAO would not be meaningful or acceptable. Likewise, progress in WIPO would be extremely limited if the TRIPS Agreement remained unchanged in matters related to genetic resources and TK. Therefore, in light of its expertise and resources on IPRs, WIPO could contribute to synergy among the relevant international fora. Cooperation between the WIPO Secretariat and the Secretariats of other relevant organizations had been very positive in this respect. At the national level, Governments should ensure that the relevant stakeholders would also contribute to this synergy. Finally, the Delegation referred to the ongoing discussions on the Substantive Patent Law Treaty (SPLT) in the WIPO Standing Committee on the Law of Patents (SCP). The Delegation was seriously concerned with the fact that the developments in the SPLT could actually represent a step backwards in relation to important provisions of the CBD, FAO and over the flexibilities contained in the TRIPS Agreement. Ultimately, developments on patent harmonization in the SCP could be in serious contradiction with possible developments in the Committee, and the Delegation invited other Members to reflect on the urgent need for coherence between those two exercises. The Delegation noted that the proposed database of contractual practices and clauses was in accord with the spirit of the Bonn Guidelines. The proposed definitions (Part III of Annex II) should include the term “derivatives” related to biological resources, as it was not adequately covered in the questionnaire. “Products thereof” can be both natural, such as the resin of a tree – which does not contain the original genetic material, but has been synthesized from the original biological material of a tree – or it may have been artificially synthesized from the genetic material in a laboratory. Annex II did not mention derivatives, but Question 6 of Annex II did.

41. The Delegation of Japan supported development of the proposed database, as a useful and practical means for parties involved in contract negotiations. It queried whether it would be feasible to collect sufficient actual contractual information. An initial survey of the Japanese private sector had revealed hesitations about contributing commercially sensitive information. Some measures may be necessary to encourage various kinds of stakeholders to contribute to the database. It may also be useful to pursue the additional approach of developing a guide of contractual practices, guidelines and model IP clauses, as originally

proposed by the Secretariat, a guide which would be beneficial to stakeholders. The Delegation accordingly favored a dual approach, combining development of the database with the elaboration of a guide to contractual practices.

42. The Delegation of Norway generally supported the proposed database and questionnaire but raised a specific comment on the term "contract purposes" which, it felt, needed a different approach, since the categories given needed to reflect relevant uses. Material falling under the FAO Treaty, was to be used for research, breeding and training in food and agriculture, uses which seemed to fall between the categories as currently proposed. The Delegation supported Brazil's reference to the relevance of developments in areas such as the FAO, the CBD and the WTO.

43. The Delegation of France suggested an extension of the deadline for the collection of information on practices. The samples of contracts attached should be distributed in their original languages and that the databases should reflect the regional diversity and diversity of legal systems. The questionnaire and databases should include an indication of the conditions of scientific publication and communication. Finally, the explanatory parts of the questionnaire could be corrected in two ways: first, there was no automatic correspondence between commercial and industrial application and bioprospecting, on the one hand, and scientific applications and *ex situ* exchanges, on the other; second, the explanatory document should not mention definitions contained in the CBD nor should it propose additional definitions not yet agreed upon.

44. The Delegation of New Zealand expressed its support for the proposed database as set out in the Secretariat's document, which it considered to be comprehensive and user-friendly, and for the questionnaire. The request, in the questionnaire, for confidential or commercially sensitive information to be deleted from many contracts or comments would reassure those asked to participate in the process and would ultimately enhance the number of responses received. The Delegation recommended that work on the database proposal be advanced as soon as possible and as a matter of priority. The Committee could expect to make relatively fast progress through the provision of a practical tool to aid those entering into negotiations concerning the use, protection and commercialization of genetic resources and associated TK.

45. The Delegation of Zambia said that there was a need to identify the source of genetic material, whether obtained *in situ* or *ex situ*. The original sources should be identified of material obtained *ex situ*. The Delegation proposed that no patents be applied for information obtained from the database.

46. The Delegation of Switzerland supported the proposed structure as meeting the needs of potential users and providing a concise and user-friendly source of information for use in drafting and negotiating relevant agreements. The Delegation supported the dissemination of the proposed questionnaire to Committee Members and a wider range of stakeholders with practical experience in the area of contractual practices and agreements relating to IP and access and benefit sharing. The Delegation hoped that many stakeholders would send a reply so that the database would be as complete and comprehensive as possible. The next meeting of the Committee should review progress made.

47. The Delegation of India supported the two proposals, in principle. It had always supported WIPO as the most appropriate and neutral forum to harmonize and resolve the interests of different stakeholders. It shared the views of the Delegation of Brazil on the need

to complement and coordinate with the activities of other bodies, and to establish a equitable and enforceable legal framework. This would be important if the approval of the two current proposals were to lead to salutary consequences for developing countries, especially those where awareness levels were low or where awareness was just increasing or where the holders of such resources were yet to be fully empowered.

48. The representative of the FAO advised that the FAO Treaty had already obtained seven ratifications and 47 signatures. The Treaty dealt with a specific kind of genetic resource, namely plant genetic resources for food and agriculture. Synergies across the various sectors concerned with those resources, such as WIPO, CBD and the WTO, was of utmost importance. He stressed the difference between the multilateral system, established by the FAO Treaty, and the contractual or bilateral systems of access. The multilateral system was based on the understanding that plant genetic resources belong to the international community and therefore it followed rules established multilaterally, examples of which could be found already under the Consultative Group on International Agricultural Research (CGIAR), which held hundreds of thousands of plant genetic resources in trust for the international community. Agreements that gave access to resources under the control of the CGIAR were not bilateral contracts, but agreements entered into in the framework of internationally approved rules. The question, then, was whether those rules should be reflected in the database, and yet taking into account that they had not been individually negotiated. The representative suggested that this question should be reflected in the database, or at least the existence of internationally established rules could be mentioned.

49. The Delegation of Argentina called for further consideration of some questions raised by the representative of the FAO and expressed full support for synergy and cooperation between the work of the FAO and WIPO. The exact linkages and interactions between the proposed electronic database and the FAO Treaty should be clarified, particularly how plant genetic resources for food and agriculture were to be covered in the database.

50. The Delegation of Egypt referred to the difficulty faced by developing countries in dealing with such complex and multi-faceted issues in a short time, and referred to the need for coordination between WIPO and other IGOs, notably under Article 19 of the WTO Doha Ministerial Declaration and certain work of the World Health Organization (WHO). The Delegation voiced concern of the impact of the SCP's activities on the Committee's work. The Committee's work would not be effective unless it resulted in a binding international instrument.

51. The representative of the Indian Movement *Tupaj Amaru* stated that there was no IP system that protected genetic resources and TK of indigenous peoples. He rejected any debate on human genetic resources and any contract involving the transfer of human genes.

Scope of subject matter

52. The Secretariat outlined the comment process that had been undertaken. One amendment that was introduced as a result of a Member's proposal at the comment phase was to include a reference under subject matter to human genetic resources, derivatives, modifications and progeny, and non-biological natural resources. Many delegations expressed views on this amendment.

53. The delegations of Bolivia, Brazil, Egypt, France, the Holy See, Peru, Spain (on behalf of the European Union), Venezuela, and Zambia objected to the reference to human genetic resources, on the basis of a range of ethical, cultural and religious grounds. The Delegation of Brazil pointed out that such resources are not covered by the same legislation as genetic resources of plants, animals and microorganisms. The Delegation of the Holy See added that a prudent approach to matters concerning human genetics was called for and that the reference to human genetic material is inappropriate in a contractual context. The delegations of Algeria (on behalf of the African Group), France, Peru, Spain (on behalf of the European Community and its Member States), Venezuela and Zambia opposed the inclusion of non-biological natural resources. The delegations of Algeria (on behalf of the African Group), France, Spain (on behalf of the European Community and its Member States), and Zambia raised concerns about the reference to derivatives.

54. The Delegation of Thailand noted that the inclusion of a reference to human genetic resources was sensitive and that the Committee must ensure that such inclusion would not lead to the belief that they were supporting the bio-prospecting of human genes or other human genetic entities and understood that much research was undertaken in this area, i.e. the search for human genes or genetic entities. It clarified that it was not taking a position as to the inclusion or exclusion of human genetic material in the document, but that it was concerned that the Committee should not be seen as accepting the bio-prospecting of human genes. With regard to (j), Dispute Resolution, the Delegation stated that not only that the provision of information should be on how the parties have agreed to resolve any disputes but also on the effective alternative dispute resolution used so far in the contracting party countries, if any, with details of how it was utilized and why it was a success. The Delegation stated that this was to provide an idea of what sort of dispute resolutions should be incorporated in the contract in order for the parties to effectively resolve the problems without delay. The Delegation recommended the dissemination of the questionnaire of contractual practices and clauses relating to intellectual property, access to genetic resources and benefit sharing provided in Annex II, with the following suggestions, namely that since in many countries there are several governmental bodies, organizations, or institutions responsible for the provision of access to genetic resources and benefit sharing. The Delegation stated that in answering the questionnaire all responsible parties should be encouraged to cooperate on the preparation of the information given together with the consultation with stakeholders to obtain the uniform and harmonized information relating to intellectual property related clauses and contractual practices in individual contracts concerning access to genetic resources and benefit sharing of each country. It added that if the uniformity and harmonization of such information cannot be met among responsible parties of the country, differences in each version of the information should be provided so that the Secretariat could compile a completed data of practices in that country.

55. The Delegation of Australia indicated it did not share the other delegations' concerns regarding the listing of human genetic resources. Since the prospecting of human genetic resources was actually taking place, it may be useful for further information to be available on these activities. On the other hand, it acknowledged that the interface between IP and human genetic resources was a sensitive issue.

56. The Delegation of Norway noted that this was not a normative document but a database that reflected realities. If human genetic resources were actually the subject matter of contracts, they should be included. The Delegation of New Zealand called for the retention of reference to human genetic resources and non-biological natural substances, as a collection of

contractual terms concerning those matters must surely be of assistance to indigenous peoples and communities being asked to participate in such arrangements.

57. The Secretariat clarified that the proposed database was intended solely to gather information. It would assist research into contractual practices and IP clauses relating to access to genetic resources and benefit-sharing; provide guidance on how other parties had dealt with IP issues of access and benefit-sharing contracts and on lessons learned; and enable those who were unfamiliar with the field of IP and genetic resources to learn about contracting practices. Since the database would potentially deal with many contracts concerning genetic resources, the proposed structure divided genetic resources into several categories solely to assist in information retrieval. As the Delegation of Norway had pointed out, the database would not have a normative nature, and would merely reflect existing practices. Nonetheless, a statement could be added to the relevant part of the database explaining that the reference to human genetic resources should not be seen as an endorsement of any practices in that area. The Secretariat clarified that the reference to 'human genetic resources' and other terms which had been discussed by the Committee had not been included at the initiative of the Secretariat, but was included following the receipt of comments by Members on the proposal in document WIPO/GRTKF/IC/3/3. On confidentiality, the Secretariat did not expect to receive any information that was of a confidential nature, nor would it cater for it. The FAO Treaty covered material which would overlap with "plant genetic resources" in the questionnaire. Yet in contrast to the proposed database, the FAO Treaty was not an information collection exercise but a binding international treaty establishing a multilateral system of access to plant genetic resources for food and agriculture. Some information in the proposed database might relate to contracts on such resources, both outside and within the multilateral system. Hence the exercises undertaken by the FAO and WIPO were complementary rather than contradictory, and the database would include suitable references to the multilateral system under the FAO Treaty.

58. The representative of the FAO concurred, observing that there was no problem between the exercises undertaken by the FAO and WIPO. The Governing Body of the FAO Treaty, was establishing a work program in which it would define the Material Transfer Agreement for the multilateral system. He stated that the interest of the FAO was to ensure that nothing was done in the context of the present exercise which would prejudice the further work of the Treaty, and supported the approach set out by the Secretariat.

59. The Chairman noted that there was a broad support both for the structure of the proposed database and the dissemination of the questionnaire. On the structure, the general comments concerned the eventual grant of patents on research based on genetic resources and whether the research had been approved by national authorities. The structure should also take account of specific remarks on IP aspects; know-how and confidentiality; the reference to prior informed consent; the concept of derivatives; and publication of scientific research. The Committee had noted the need to encourage a wider range of recipients of the questionnaire to submit information, and the need for technical assistance for developing countries to use the questionnaire. The matter of confidentiality had been raised, but had already been clarified by the Secretariat. A further common topic had been the need for synergy and cooperation between intergovernmental organizations.

60. Noting that there were two distinct views on maintaining the reference to human genetic resources, as well as to non-biological natural resources, the Chair observed that the questionnaire was clearly not a norm-setting exercise and the Committee was not endorsing anything by means of the questionnaire; the questionnaire only sought to collect data for the potential use of people interested in precedents of various contractual practices; and the Committee was at present only establishing the database, which would have to be revised over the years to come. There were ethical concerns relating to human genetic resources, and a distinct concern about the scope of WIPO's competences since the questionnaire was aimed at elucidating practices in benefit-sharing and the CBD did not cover human genetic resources. The Chair's proposal to replace the reference to human genetic resources by a reference to medical research was not accepted by several delegations.

61. The Chair therefore proposed, and the Committee agreed, that the questionnaire be circulated without the reference to human genetic resources. The Chair proposed, and the Committee decided, that given the lack of consensus on reference to derivatives and non-biological natural resources, the questionnaire should be circulated without them.

Certain Decisions by the Conference of the Parties to the Convention on Biological Diversity (WIPO/GRTKF/IC/3/12)

62. At the invitation of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/3/12. The representative of the Secretariat of the CBD reported on the outcomes of the sixth meeting of the Conference of the Parties (COP) to the CBD, reporting that the COP had noted the work of the Committee with appreciation. She described several COP decisions of particular interest to the Committee, namely the decision on:

- Article 8(j) and related provisions (Decision VI/10);
- access and benefit-sharing as related to genetic resources (Decision VI/24);
- cooperation with other organizations, initiatives and conventions (Decision VI/20);
- agricultural biological diversity (Decision VI/5); and
- scientific and technical cooperation and the clearinghouse mechanism (Decision VI/18).

63. The representative recalled that COP Decision VI/10 ("Article 8(j) and Related Provisions") had invited the Committee:

- to continue to promote the more effective participation of indigenous and local communities in its work;
- to examine and consider mechanisms to protect TK, such as the disclosure of origin of relevant TK in applications for IPRs; and
- to forward to the Executive Secretary all documents considered relevant with respect to advances made by the Committee.

The COP had also requested the Working Group on Article 8(j) and Related Provisions to address the issue of *suigeneris* systems for the protection of TK, taking into account the work of the Committee. The CBD therefore welcomed document WIPO/GRTKF/IC/3/8

(“Elements of a *suigeneris* System for the Protection of Traditional Knowledge”). The COP had urged CBD Parties and Governments, with the approval and involvement of indigenous and local communities, and with the support of WIPO, to develop and implement strategies to protect TK based on a combination of appropriate approaches. To this effect, the COP had identified a number of additional measures to assist the protection of TK which included improving operational links between national IP bodies and indigenous and local communities, as well as inviting Governments, with the assistance of WIPO, to take into account TK in the examination of novelty and inventive step in patent applications. The COP, at its seventh meeting, would examine the feasibility of establishing appropriate dispute-settlement or arbitration procedures and mechanisms to address disputes between CBD Contracting Parties concerning the interpretation or application of the CBD relating to TK, innovations and practices. Decision VI/20, entitled “Cooperation with other organizations, initiatives and conventions,” addressed matters of cooperation with WIPO, recognized the role of WIPO as the lead specialized agency to address IPRs, and emphasized continued cooperation between the CBD and WIPO. The COP had invited WIPO to address, as a matter of priority, the role of IPRs in the implementation of access and benefit-sharing arrangements. With reference to Decision VI/24, entitled “Access and benefit-sharing,” one of the main achievements of the sixth meeting of the COP had been the adoption of the Bonn Guidelines, which were to assist Parties and relevant stakeholders in implementing the access and benefit-sharing provisions of the CBD. The Guidelines were to be “...applied in a manner that is coherent and mutually supportive of the work of relevant international agreements and institutions...[and that] the work of [WIPO] on issues of relevance to access and benefit-sharing should be taken into account.” The COP addressed the role of IPRs in access and benefit-sharing arrangements, inviting Governments to encourage the disclosure of (i) the country of origin of genetic resources in IPR applications as a possible contribution to tracking compliance with prior informed consent and mutually agreed terms on which access to those resources was granted; and (ii) relevant TK in applications for IPRs. The COP had recognized that further work was needed on these issues and, in relation to the role of IPRs, sought the help of WIPO to undertake further information gathering and analysis. The COP had invited WIPO to prepare a technical study and report its findings to the COP at its seventh meeting, on methods consistent with obligations in treaties administered by WIPO for requiring the disclosure within patent applications of, *inter alia* (a) genetic resources utilized in the development of the claimed inventions; (b) the country of origin of genetic resources utilized in the claimed inventions; (c) associated TK utilized in the development of the claimed inventions; (d) the source of the associated TK; and (e) evidence of prior informed consent. COP Decision VI/24 had also encouraged WIPO to make rapid progress in the development of model IP clauses which may be included in contractual agreements when mutually agreed terms were under negotiation.

64. The representative noted that in Decision VI/5, entitled “Agricultural Biological Diversity,” on the impacts of genetic engineering technologies (GURTS), the COP had invited the Committee and other relevant organizations to undertake several activities, including (1) to examine the specific IP implications of GURTS, particularly in respect of indigenous and local communities; (2) to further study their potential impacts on smallholder farmers, indigenous and local communities and on Farmers’ Rights; and (3) to study the applicability of existing, or the need to develop new, legal mechanisms to address the application of GURTS. In the context of Decision VI/18, “Scientific and technical cooperation and the clearing-house mechanism,” she welcomed the WIPO Portal of TK Databases. If WIPO should decide to implement Options 2, 3 or 4 (Section IV of document WIPO/GRTKF/IC/3/6), the CBD Secretariat would be willing to discuss areas of

collaboration and potential support. This support could be based upon the experience of the SCBD with common formats, protocols and standard issues that would be of central concern in the development of the WIPO Portal of TK Databases. The representative referred to many areas of mutual interest under the CBD and WIPO, particularly with regard to the work of the Committee, and expressed confidence that the outcomes of the Committee's third session would contribute significantly to progress in the CBD's current work.

65. The Secretariat reported that a Memorandum of Understanding between WIPO and the SCBD was in the process of being signed by the Executive Secretary of the CBD and the Director General of WIPO, responding to COP decisions in this regard. This would reinforce and confirm the positive cooperation that existed between the two Secretariats. It would set out the main areas of collaboration along the existing lines of cooperation between the WIPO and CBD Secretariats and help clarify the distinct roles of the two agencies, while ensuring that they continue to work cooperatively.

66. The representative of the United Nations Environment Programme (UNEP) reported on the working relationship UNEP had with WIPO on IPRs, access to genetic resources and benefit-sharing, noting that the WIPO and UNEP had jointly launched a CD-ROM, with a full WIPO-UNEP study to follow in the course of 2002. The Executive Secretary of UNEP had announced at the recent COP the UNEP's new initiative on Access to Genetic Resources and Benefit-sharing. UNEP had recently put together a Partnership Proposal for the World Summit on Sustainable Development.

67. The representative of United Nations Conference on Trade and Development (UNCTAD) reported that UNCTAD's work on TK protection focused on exchanging national experiences with TK protection and on identifying policies to harness TK for trade and development, adding that UNCTAD would include capacity building on TK in its work on post-Doha capacity building. She reported on an International Seminar on Systems for the Protection and Commercialization of Traditional Knowledge, which had been convened by UNCTAD and the Government of India in New Delhi. UNCTAD also planned to organize a meeting in Geneva on the FAO Treaty in the fall of 2002. She offered the full support of UNCTAD to the work of the Committee.

68. The Chair invited comments from Committee Members on the work schedule proposed in paragraph 3 of document WIPO/GRTKF/IC/3/12 in carrying out a technical study on certain IP issues related to genetic resources and TK, noting that it fell within the Committee's mandate.

69. The Delegation of Spain, on behalf of the European Union, stated that it supported the proposal made by the Secretariat and that it considered that the suggested timetable was well coordinated with the CBD work program. Other delegations voicing general support for the proposal included those of India, Norway, Switzerland and Thailand.

70. The Delegation of the Dominican Republic recalled that it already had taken a specific position on the issue of the disclosure of origin of genetic resources, and, in particular, on the issue of whether such disclosure should be a condition of patentability, and that this position had already been put before the Standing Committee on Patent Law (SCPL). The Delegation requested that the list of questions prepared by the Secretariat to answer these technical questions should first be made available for comment by its capital. The Delegations of Venezuela, of Peru, of Bolivia and of Sri Lanka supported this request. The Delegations of

Peru, of Ecuador and of Bolivia also raised questions concerning the overlap with work of the SCPL and the need for sensitivity in this regard.

71. The Delegation of the United States of America recognized that the identification of the origin of genetic resources was a part of the disclosure for some patent applications, but noted that, in keeping with the TRIPS Agreement, such identification could not be a substantive legal requirement for patentability. It voiced support for the CBD and for a cooperative relationship with WIPO.

72. The Delegation of Zambia noted that it was very important for IGOs to work together and that it was also very important for the source of genetic material to be disclosed. This was one way to enable the fair and equitable sharing of benefits.

73. The Delegation of Thailand expressed support for the proposed timeframe for conduct of the technical study. It further invited the Secretariat to consider specifically Section C of Decision VI/24, paragraph 4 by emphasizing in paragraph 8 to invite other organizations to study paragraph 3 and 4 of such decision, as set out in document WIPO/GRTKF/IC/3/12. The Delegation in particular requested the Secretariat to invite the WTO to consider the addition of such disclosure proposed in paragraph 4 of Decision VI/24 into the TRIPS Agreement, Section 5 on Patent, particularly Article 27.

74. The Delegation of Switzerland supported the work schedule as laid out in document WIPO/GRTKF/IC/3/12 and noted that it was important that WIPO, as the expert organization in the field of IP, should give consideration to these issues.

75. The Delegation of Sri Lanka said that it accepted the outline program, but would like to see the structure of the proposed questionnaire. The Delegation indicated that it took a different view on compatibility with TRIPS from that of the Delegation of the United States of America.

76. The Delegation of Egypt welcomed the cooperation between the CBD and WIPO, and supported the Delegation of the Dominican Republic, in particular its position regarding declaration of origin as a condition of patentability. The Delegation of Sudan expressed its support for this position.

77. The Delegation of Norway noted that the Committee should not reedit the mandate of CBD. If the Committee were to adhere to the proposed timetable, there would not be sufficient time to comment upon the proposed questionnaire. The Delegation stated that it would be very unfortunate to delay the process and asked for advice on the best way forward.

78. The representative of the Saami Council recalled that his organization and other indigenous organizations had repeatedly stressed the need for the Committee to consider aspects other than IP if its work were to be relevant to indigenous peoples. This entailed sustainable development and other environmental issues, as were raised in document WIPO/GRTKF/IC/3/12. He noted that paragraph 38 of decision VI/20 encourages WIPO to take account of the objectives and principles of the CBD and urged the Committee to seek information from the CBD on the relevance of sustainable development aspects to genetic resources and TK. The representative urged the Committee to cooperate fully with the newly formed United Nations Permanent Forum on Indigenous Issues.

79. The Chair concluded that:

- the Committee welcomed the proposed cooperation with the CBD;
- the Committee in essence, agreed with the timescale set out by the Secretariat; and
- a number of delegations wished to comment upon the draft questionnaire upon which the requested technical study would be based.

80. The Secretariat noted that document WIPO/GRTKF/IC/3/12 had necessarily been subject to a very tight timetable, due to factors beyond the control of the Secretariat of both the CBD and WIPO. The sixth CBD COP was held in April 2002; the letter of invitation from the Secretariat of the CBD to WIPO was dated May 21, 2002; and the current date was June 13, 2002. While Members could comment on the questionnaire, they would need to accept that this would radically alter the timetable set out in document WIPO/GRTKF/IC/3/12. In particular, the process of commenting on the questionnaire would give Committee Members relatively little time to consider the first draft of the technical study in December 2002 at the fourth session of the Committee, and still less time for translated versions of the study. The draft technical study had to be available for consideration by the Committee at its fourth session, to allow time for it to be revised for the fifth session and then considered by the WIPO Assemblies prior to transmission to the CBD Secretariat in time for the seventh COP. The issues set out in paragraph 4 of document WIPO/GRTKF/IC/3/12 would shape the proposed questionnaire.

81. The Chair noted that several Members had expressed strong interest in receiving the draft questionnaire for comment. He stated that, if this request was acceded to, Committee Members had to be aware that it would result in a very short timetable. In particular, the draft technical study may not be complete, may not be translated into all the working languages of the Committee and may be disseminated only a short time in advance of the fourth session. The Chair also noted that, in any event, the main discussion about the technical study would take place in June 2003. The draft questionnaire would be made available for comments in the language in which it had been written at the end of June 2002 and in the other two working languages of WIPO as soon as possible thereafter.

AGENDA ITEM 5: TRADITIONAL KNOWLEDGE

Inventory of Traditional Knowledge - related Periodicals, Gazettes and Newsletters *(WIPO/GRTKF/IC/3/5)*

82. The Chair identified two distinct aspects of the discussion on TK: defensive protection, concerning prior art for patent purposes (documents WIPO/GRTKF/IC/3/5 and WIPO/GRTKF/IC/3/6); and the active protection of TK, which contained three sub-topics, namely the application of existing mechanisms and to what extent could they protect TK, the elements of *suigeneris* systems, and the matter of definitions. The Chair emphasized that the Committee needed to have time to thoroughly discuss all the elements of those sub-topics, which were described in documents WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9. The third pillar of the Committee's work, protection of folklore, also needed to be accorded enough time for a full debate.

83. At the Chair's invitation, the Secretariat introduced document WIPO/GRTKF/IC/3/5 and the five tasks it proposed.

84. In-principle support for the implementation of all five tasks was expressed by the delegations of Bolivia, Brazil, Cameroon, Canada, China, Côte d'Ivoire, the Democratic People's Republic of Korea, Egypt, India, Indonesia, Malaysia, Mali, Malta, New Zealand, Norway, Panama, Peru, the Republic of Korea, the Russian Federation, Spain (on behalf of the European Community and its Member States), Sudan, and the United States of America.

85. The Delegation of Thailand supported the implementation of all five activities, with the emphasis on activity three, and urged WIPO to encourage patent authorities of Member States to collaborate on sharing the database, since it was a way to help each other trace the use of TK by comparing patent applications with documented TK. The Delegation noted that these activities should not prejudice future work on the protection of TK.

Comments on possible Activity 1 (PCT minimum documentation)

86. Concerning Activity 1, the Delegation of the Republic of Korea indicated that the Inventory of Periodicals should be continually updated and the inclusion of new periodicals should be subject to an appropriate examination and verification. The Delegation of Mali suggested a longer Inventory which would include TK documentation collected at various universities in developing countries. The Delegation of Morocco felt that before establishing TK documentation which would form part of the PCT Minimum Documentation List, the Committee should decide upon criteria for the admission of documents to this List. It also wished to have a clear definition of the classification of TK documentation, which might differ from the classification currently adopted in the field of patents. The Delegation of Canada said that further work was necessary to ensure that the list of periodicals was useful and relevant and was in a format that could be used by patent authorities in undertaking searches of prior art. This basic information should be supplemented where possible with a detailed description of the contents of the publication in order to determine the relevance of the periodical to TK. The Delegation of Japan agreed with Activity 1, yet noted that the PCT Union, not the PCT-CTC, had the mandate to decide on the scope of the minimum documentation list. The Delegation of Venezuela understood that this task would contribute a mechanism for defensive protection of TK, but this should not prejudice the issue as to whether disclosure of TK made it fall into the public domain. The Delegation of the Russian Federation considered it too soon to embark on this activity, since Members needed first to work further on Activities 3 and 4 and to assess the results of those activities.

Comments on possible Activity 2 (uploading inventory to WIPO website)

87. Concerning Activity 2, the Delegation of Peru proposed that access to the Inventory should be limited to patent examiners for patent examination purposes only. It added that this should go along with an obligation of confidentiality for those who had access to the information. Bolivia, Brazil, Panama, and Venezuela, and the representatives of the Saami Council and UNCTAD supported this view, voicing concerns as to how the information in these periodicals had been obtained, particularly whether it had been obtained with the prior informed consent (PIC) of the TK-holders and proposing that access to the Inventory should be limited to patent examiners. This should go along with an obligation of confidentiality for those who had access to the information.

88. The Delegation of Peru also explained that although it referred to TK that is already in the public domain, nevertheless Peru, like other delegations, was concerned that in the end biopiracy might be favored. To avoid this, access should be limited to patent examiners. It is very different to have TK in the public domain, yet still in a restricted publication, than to disseminate that knowledge at a much larger scale through a database.

89. The Delegation of Venezuela added that the characterization of TK as prior art was a modality of negative protection, the purpose of which was to prevent those who had not a legitimate right from obtaining patents. But negative protection was just a partial one. It should be accompanied by positive protection, which was the appropriate mechanism for benefit sharing. The representative of ARIPO suggested that it might be necessary to provide a glossary of terms, in order to provide clarification of certain terms used in the Inventory. The representative of FICPI cautioned that if only patent examiners were given access to a database of disclosed TK, several problems may arise: (1) parties may spend time, effort and money filing patent applications for subject matter which is prior art and therefore not protectable; (2) under most existing patent systems patent examiners would not be able to use the information to reject the patent application if it was not publicly available; (3) if the information could be used to reject the application, but could not be given to the patent applicant, then the patent applicant would have no way of responding to the rejection of the application. The representatives supported the development of a database of disclosed TK and the principle that only information which had entered the public domain lawfully should be included in the database. He urged, however, that the databases should be freely available to any interested party.

90. Responding to the statement made by the representative of FICPI, the Delegation of Peru indicated that the Committee should prioritize the interests of TK holders, rather than those of patent applicants. It underscored that if the Inventory were made available to patent examiners only, patent agents conducting state-of-the-art searches before filing patent applications would still have access to the information in the periodicals through the normal channels, since the TK had already been disclosed and was therefore included in the Inventory. In closing, it insisted that the Inventory should be made available only to patent examiners and the relevant judicial authorities, where appropriate.

91. The Delegation of Canada supported this activity: making this list available and accessible to patent examiners and other interested parties around the world would help ensure that patents were not granted in subject matter that were already in the public domain. If the list were to be put on-line, the Delegations suggested the development of a search engine and an evaluation mechanism to measure the list's usefulness. The Delegation of New Zealand expressed concerns about the implications for third party access following publication of the inventory online at the WIPO website as a source of documented, disclosed TK for use by patent examiners and other interested parties. The information in the periodicals may be in the public domain, but in some cases the TK holders concerned might not have consented to its publication and might still wish to prevent its wider dissemination. Placing the inventory on the WIPO website, and providing access by third parties, might facilitate even easier access to and exploitation of TK by third parties. The Delegation of Japan had no objection to making the inventory available on the WIPO website, in order to encourage its use by the examiners and other interested parties, because of its usefulness for the actual, substantial examination, although technical and budgetary implications should be weighed. Access to the on-line inventory should be free of charge.

92. The Delegation of Switzerland noted that the inventory contained many periodicals, a number of which were already available on -line, observing that it would be helpful to make this inventory available on -line at the WIPO website. Yet the specific contents of the TK-related periodicals listed in the inventory and their potential usefulness for patent granting authorities required additional analysis.

Comments on possible Activity 3 (patent authorities sharing resources)

93. The Delegation of Thailand emphasized the importance of possible Activity 3 and the need for WIPO to encourage patent offices to use and share contents of the Inventory.

94. The Delegation of China suggested that priority be given to the collection of documentation and information as prior art for patent examination. Activity 3 merited the special attention of the Committee. Patent classification issues and evaluation of TK documentations should be taken into consideration together by patent granting authorities. This matter could be of importance to future patent granting at the national level.

Comments on possible Activity 4 (passing document to IPC Task Force)

95. The Delegation of Venezuela was pleased with the work conducted by the International Patent Classification (IPC) Task Force on Classification of Traditional Knowledge, but it wished to see a presentation on what was being done. The Delegation reiterated that the process mentioned in paragraph 15 (b) should continue to be guided by Members. It supported this activity but requested that the Committee be informed about the classification process.

96. The Delegation of Canada noted that the Task Force had already recommended collaborating with the Committee and that increased searchability could be achieved through the establishment of a classification system under the IPC. The Delegation of China commented that the Task Force had already done very good work and could be strengthened so as to give the Committee a stronger basis for future work.

97. The Delegation of Japan understood that the Task Force had been making progress in the investigation of the classification of the materials related to TK under the present IPC system and supported this activity since the present document would assist the Task Force.

98. The Delegation of the Democratic People's Republic of Korea observed that the most efficient way of developing classification tools for TK would be the integration of TK into the IPC. The Democratic People's Republic of Korea was facing problems with TK classification particularly in the field of traditional medicine because only few entries were recurrently available under the IPC. A new subclass covering Korean traditional medicine was being developed and an IPC revision proposal for a new subclass A61K35/78 was being prepared. The Delegation indicated its intention to submit this revision proposal to the IPC Union in the near future. The Delegation of the Islamic Republic of Iran suggested that proper attention should be paid to the distinction between TK which forms part of the common human heritage and TK which does not. It felt that it was essential to create databases for the registration of TK which is being used by the public so that the competent authorities may grant licenses to interested parties. Other elements of TK, which had not been disclosed to

the public, should be kept confidential until relevant standards of protection had been adopted at the international level.

Comments on possible Activity 5 (preparation of IP Documentation Toolkit)

99. The Delegation of Venezuela welcomed the reference in paragraphs 17 and 18 to issues that should be taken into account in inventorying of periodicals. It was worried that many of those periodicals may have been elaborated without the consent of the knowledge holders. The publication of the inventory should not preempt the holders' rights, in particular those of challenging them as appropriation and claiming compensation. The Delegation estimated the toolkit would be convenient, but it did not wish to deal with some implications in an unbalanced manner, which could undermine other implications. Moreover, that should not be the only activity to be undertaken. Capacity building was of utmost importance. A part of the toolkit should be dedicated to the importance of TK, including folklore, associated or not with genetic resources. In other words, the Delegation wished that both the negative and the positive implications of knowledge disclosure be emphasized. In the same vein, the toolkit should not encourage in any way indigenous peoples and Afro-American communities to disclose their knowledge. In the Delegation's view, that was a decision to be taken exclusively by the communities involved, in contact with national authorities.

100. The Delegation of Canada strongly supported Activity 5, noting that this kind of proposal dated back to the WIPO fact-finding missions on the needs and expectations of TK holders in 1998-1999. These missions illustrated that many needs and expectations of TK holders related to operational problems or issues, such as the need for improved legal awareness, access to the legal system, TK documentation and assistance in negotiating contracts for TK protection. Activity 5 would help serve these needs.

101. The Delegation of New Zealand, in supporting Activity 5, recommended that the Toolkit be progressed as a matter of priority. This work was particularly important in the context of the discussion of the Committee concerning the documentation of TK in databases and registries. The Toolkit would assist TK holders to assess, in an informed way, the risks or benefits of documenting and recording TK where that knowledge was not already in the public domain.

102. The Delegation of Peru laid emphasis on Activity 5 and expressed its wish to cooperate with the Secretariat in preparation of the Toolkit. Simple languages should be used so that the Toolkit was accessible to all users, in particular indigenous peoples. The final inventory of periodicals should be broader in scope and contain publications from different geographical regions.

103. The Delegation of Norway noted that given the uncertainties whether *sui generis* protection systems would be developed, the so-called "defensive measures" would be all the more important. It was essential to introduce the analysis being done in the Committee into the regular patents system. As shown in other documents before the Committee, documentation of TK could be a two-edged sword, underlining the need for the effective participation of indigenous peoples and communities in all documentation efforts, thus underscoring the importance of Activity 5.

104. The Delegation of Japan supported Activity 5, but stressed the need for the Toolkit to be based on the presently existing situation, so that it did not prejudice the Committee's future work.

105. The Delegation of Switzerland fully supported proposed Activity 5, considering that the toolkit would be of great practical and legal assistance to the holders of TK. The toolkit should be prepared in close cooperation with its primary addressees, namely, indigenous and local communities and their representatives. Only close cooperation would ensure that it served their needs and expectations. This cooperation could, for example, include the dissemination of a questionnaire covering the usefulness of and demand for such a Toolkit, and the needs and expectations of indigenous and local communities and their representatives.

106. The Delegations of Bolivia, Cameroon, Côte d'Ivoire, Egypt, and Panama emphasized the importance of Possible Activity 5.

107. The Delegations of Bolivia, Cameroon, Côte d'Ivoire and Egypt further specified that the Toolkit should be developed in a simple language accessible to TK holders and in the original language of the countries.

108. The Delegation of Panama added that it had requested the assistance of WIPO in the establishment of a national inventory of TK, which was closely related to Activity 5.

109. The representative of the Saami Council added that the Toolkit should not be limited to IP implications of TK documentation and that it should supplement other capacity building activities, such as workshops and seminars. He added that the toolkit should be prepared in close cooperation with representatives of indigenous and local communities and other relevant organizations, such as the Secretariat of the CBD. The representative of IPAC called attention to the implications for the Toolkit of a summary definition of TK that would need to be more carefully defined if additional international TK protection were developed in the future. He offered the assistance of IPAC in developing a subject-sensitive classification.

110. The representative of the Inuit Circumpolar Conference (ICC) supported Activity 5 and recommended that an advisory body, including indigenous representatives, be established to develop the Toolkit.

General comments on proposed activities

111. The Delegation of Venezuela called for greater recognition of the various concerns expressed by Members as to the reliance on negative protection, aimed at preventing the illegitimate patenting of TK, and the need for positive protection which would determine benefit sharing. During the compilation of the inventory, as in Annex I, contribution of TK should be voluntary. TK holders could determine that some elements of their knowledge would not be publicly disclosed, and access only granted to patent authorities, an issue that the Committee should address in its future work. Based on these considerations, the Delegations supported Activities 1, 2 and 3 of paragraph 13.

112. The Delegation of Indonesia supported the non-exhaustive inventory and noted it was still compiling relevant information. The Delegation considered all the activities in paragraph 13 of document WIPO/GRTKF/IC/3/5 to be important in reinforcing the character of TK as prior art, and favored further work by WIPO on those activities.

113. The Delegation of the Russian Federation said that Activity 5 would help the holders of TK to decide whether it should be published and under which format. On Activities 3 and 4, the Delegation understood it would bring expertise on the use of TK and the patent rights based on that knowledge, and would help in establishing prior art in many countries. Activity 2 would help the implementation of Activities 3 and 4.

114. The Delegation of the United States of America noted that dissemination of existing TK-related information could only make patent examination more effective and help avoid the granting of patents that did not meet the requirements of patentability, provided the documentation was well-indexed and sufficiently detailed to allow an examiner to evaluate patent claims. The Delegation suggested that the Committee needed to establish a definition of TK, to determine whether the inclusion of folklore periodicals might be useful in this context. When considering periodicals and other non-patent literature, copyright in this material, including rights of reproduction and distribution, should be respected. An enormous amount of data was available and further work was needed to associate those periodicals and non-patent literature databases with particular technologies, as has been done in the United States Patent and Trademark Office's "Search Guidelines." The Delegation suggested that the Secretariat should maintain the databases, subject to budgetary considerations.

115. The Delegation of India recalled the international seminar held at New Delhi in April 2002, mentioned earlier by the representative of UNCTAD and attended by Brazil, Cambodia, Chile, China, Colombia, Cuba, Egypt, Kenya, Peru, Philippines, Sri Lanka, Thailand, Venezuela, India, as well as several international experts and IGOs. The seminar focused on the process of identifying essential components of a framework for international recognition of various *suigeneris* systems, customary law and others for protection of TK. Some of the possible components identified included (i) local protection to the rights of TK holders through national level *suigeneris* regimes including customary laws as well as others and its effective enforcement *inter alia* through systems such as a positive comity of protection systems for TK; (ii) protection of TK through registers of TK databases in order to avoid misappropriation; (iii) a procedure whereby the use of TK from one country was allowed particularly for seeking IP protection on commercialization, only after the competent national authority of the country of origin certified the disclosure of source of origin and the obtain prior informed consent, including acceptance of benefit sharing conditions, obtained; (iv) an internationally agreed instrument that recognized such national level protection. This would not only prevent misappropriation but also ensure that national benefit sharing mechanisms and laws were respected worldwide. The Delegation agreed with the concern expressed by the Delegation of the United States regarding the maintenance of databases. That matter would need special attention.

116. The Delegation of Brazil confirmed its willingness to contribute to future work. Concerns of TK holders on disclosure of TK should be fully addressed, and any activity undertaken under the auspices of the Committee should seek to be consistent with the principles of the CBD, and not facilitate biopiracy. The Delegation noted with appreciation the reference to copyright made by the United States Delegation, and said that no activity should prejudice or preempt traditional communities' ownership of TK.

117. The Delegations of Panama and Indonesia, and the representative of the International Publishers' Association (IPA), offered to make further contributions to the Inventory.

118. The Delegations of Cameroon, Côte d'Ivoire, the Islamic Republic of Iran and Panama underscored the importance of close collaboration between governmental organizations and TK holders, including indigenous peoples, in undertaking these activities.

119. The Delegations of Bolivia, Brazil and Venezuela and the representative of the Saami Council underlined the fact that the publication of the TK should not affect the recognition that the TK holders were still and would always remain the custodians of their knowledge, while the Delegation of Peru cautioned that when speaking of defensive protection one had to be careful not to favor biopiracy.

120. The Delegations of Malaysia, Panama, Peru, Thailand and Venezuela emphasized that the work on the Inventory of TK-related periodicals should not prejudice in any way the work of WIPO on the positive legal protection of TK.

121. The Delegation of Algeria, speaking on behalf of the African Group, Egypt, Panama, Peru, Thailand and Venezuela emphasized that the defensive protection of TK was not a sufficient measure for the protection of TK. They emphasized that it should be supplemented by the positive legal protection of TK through a *suigeneris* system of protection.

122. The Delegations of Egypt, Peru and Venezuela raised issues about whether the PIC of the TK holders had been obtained when the periodicals listed in the Inventory had been published.

123. The representative of UNCTAD suggested that the periodicals and databases in the inventories could be categorized into those entries where the PIC of TK holders had been obtained and those where this was not the case. Access to the latter category via the WIPO portal should be limited to patent examiners and, in cases like Switzerland, relevant judicial authorities.

124. The representative of the Saami Council opposed Possible Activities 1, 2 and 3 until WIPO could guarantee that all the TK contained in the periodicals listed in the Inventory had been disclosed with the full prior informed consent of the TK holders.

125. The Delegation of Senegal referred to the existing lack of national laws. The Delegation maintained that under Article 15(4) of the Berne Convention protection was not adequate and interpreted this fact as an indication that the States should legislate on this matter at the national level.

126. The Delegation of Algeria, on behalf of the African Group, supported the development of a TK database and its making available to ensure defensive protection of TK. It stressed that positive protection was an important part of the establishment of a database of TK which was already in the public domain. It added that the establishment of a TK database should take into account the specificity of the TK in the African continent. It explained that African systems of TK were essentially oral and therefore the African countries needed a database which would protect oral TK and its secrecy. The Delegations suggested that this should be taken into account in the Committee's exercise on TK databases. In order to establish TK databases, the Group would ask WIPO to provide support on the IP aspects of TK documentation. There was a particular need for capacity building for database development in the African region.

127. The representative of the African Regional Industrial Property Organization (ARIPO) supported the African position regarding the substantive issues raised in document WIPO/GRTK/IC/3/5 and highlighted the need for WIPO to create public awareness on the rights and obligations of the custodians of TK. He added that the issues contained in paragraph 17 of the documents should be critically examined prior to the preparation of the proposed toolkit. He also referred to Section 3(9) of the Protocol on Patent and Industrial Designs within the Framework of ARIPO (the Harare Protocol), which defines the state of the art as constituting “everything made available to the public anywhere in the world by means of written disclosure or by use.” He pointed out that this definition did not take into account orally disclosed information that had not been used and ARIPO therefore gave preference to Activities 1 and 2. He urged the Committee not to disregard the cultures and societies that had produced this knowledge over millennia and reminded the Committee that various individuals continued to innovate, based on this knowledge.

128. The representative of the International Publishers' Association (IPA) stated that, through its work with the International Digital Object Identifier Foundation (IDF), the publishing industry had gained valuable experience in devising a basis that provides a searchable classification of periodicals and publications and that could also allow identification through a description of such periodicals. He offered that IPA could assist the Committee and the IPCTask Force.

129. The Secretariat, in responding to two issues raised in the debate, provided background information about the IPC, the work of the IPCC Committee of Experts, and its Task Force on the Classification of TK. The Secretariat also addressed the balance between establishing tools for defensive protection of TK and ensuring that any basis for the positive protection of TK was not destroyed. In achieving that balance, the Secretariat pointed out, the Inventory had been limited to published periodicals containing only disclosed TK. Regarding the questions about prior informed consent, he indicated that it was not clear how WIPO could go behind the publishers of the periodicals and determine whether they had obtained the PIC of the TK holders in every instance.

130. The Chair concluded that all government delegations and representatives of intergovernmental organizations had either explicitly supported all the five proposed Activities or they had not opposed them. Specific observations that should be taken into account included: (1) the proposed Toolkit should be simple, balanced and developed with an advisory body; (2) concerns that dissemination of the Inventory on the WIPO website should not have negative implications for TK holders; (3) concerns about technical and financial aspects of the website, its maintenance and the copyright implications of putting lists of publications on the website; (4) special mention of the oral characteristics of TK and the need to have a proper definition of TK. The Chair proposed that, subject to these observations the Committee adopt the five activities proposed in paragraph 22. It was so decided by the Committee.

Report of the Thirty -First Session of the Committee of Experts of the Special Union for the International Patent Classification (WIPO/GRTKF/IC/3/13)

131. The Secretariat introduced document WIPO/GRTKF/IC/3/13 and highlighted certain activities carried out by the IPC Union that were relevant to the Committee's work.

132. In 2001, the Government of India had been invited to give presentation to the Committee of Experts on their work on a Traditional Knowledge Digital Library (TKDL), relating to traditional Indian Medicine. The Committee of Experts agreed the system of classification used in the TKDL and its relationship to the IPC should be further studied and create a Special Task Force on the classification of TK, co-ordinated by WIPO. This Task Force currently comprised the People's Republic of China, India, Japan, the United States of America and the European Patent Office and has considered, *inter alia*, TK database initiatives by India and the People's Republic of China. The Task Force concluded that the integration of TK documentation into searchable prior art requires the revision of the IPC, in particular in the area of traditional medicine, and recommended that the work of the IPC Committee of Experts and of this Committee should be closely linked. The report of the Task Force was presented to the Committee of Experts in February, 2002, which adopted its conclusions and noted that substantial revision of the IPC could be required in order to facilitate searches of TK as prior art. The Committee of Experts instructed the Task Force to continue its work and to start preparation of a revision proposal of the IPC with regard to classification of TK documentation. The Committee of Experts indicated that, in view of the urgency of the matter, it would recommend that the necessary revisions should be carried out in time for the incorporation of the results of this revision into the next edition of the IPC, which will enter into force on January 1, 2005.

133. The Chair concluded that paragraph 5 of document WIPO/GRTKF/IC/3/13, invited the Committee to take note of the Report of the Task Force and the relevant part of the Report of the Committee of Experts and to decide upon the means of continuing the cooperation between the Committee of Experts and the Committee. Committee Members agreed that the contents of WIPO/GRTKF/IC/3/13 be noted and that the result of the third session of the Committee be communicated to the Committee of Experts.

Inventory of Existing Databases of Disclosed Traditional Knowledge
(WIPO/GRTKF/IC/3/6)

134. The Secretariat introduced document WIPO/GRTKF/IC/3/6. The Chair noted that this document addressed several interlinked issues and requested the Committee to consider the document as a whole, with specific attention to: (1) decision paragraph 24 concerning the inventory of TK databases; (2) decision paragraph 78 on the future of the WIPO portal of databases; (3) decision paragraph 100 on the development of a toolkit on IP aspects of TK databases; (4) decision paragraph 112 on the preparation and dissemination of a questionnaire on the policy objectives, functional requirements and technical specifications of existing TK-related databases.

135. The Delegation of Spain, on behalf of the European Community and its Member States, supported decision paragraphs 100 and 112. As to the task in decision paragraph 24, the Delegation noted that it would be regrettable not to use the inventory at all.

136. The Delegation of Venezuela supported work on defensive TK protection. The Delegation voiced concern about the creation of an on-line database, since it might include TK which has been placed on-line without the agreement of the knowledge holders. Any subsequent use of such a database should guarantee compliance with the prior informed consent requirement, as provided for in the relevant legislation of each State. Further, access

to anyone -line databases should be limited to patent examiners. The Delegation respected the decisions of countries which had elected to place their TK databases online for patent search authorities, but that different countries may have different regulations concerning such databases and these should be complied with. Venezuela was not interested in making its own national TK database available online. The database was an important protection mechanism, but the discussion on the protection of TK should not be limited to databases only. Databases can bear risk, so it is necessary to keep the information on TK confidential for the purposes of its protection with the IP machinery. The Delegation supported proposal 2 in decision paragraph 78, observing that proposal 3 would require an in-depth examination before it could be supported. The Delegation supported the questionnaire proposed in paragraph 112, provided that it included a reference to the potential negative impact of database, and that issues of confidentiality and IP were properly examined. The Delegation foresaw a presentation by Venezuela which would refer to these last two points.

137. The Delegation of Canada stated that further time was needed to study the inventory, its scope and structure, to identify any additional references, to identify which references should be removed and to further prioritize the references before the inventory could be used in a more systemic fashion. The Delegation noted that options 3 and 4 (decision paragraph 78) seemed premature, but supported option 2, subject to budgetary limitations. For online databases to be useful to patent search authorities, information must be searchable, retrievable, and identifiable, and provide a sufficient basis for the establishment of a disclosure date. The application of classification tools, such as those set out in document WIPO/GRTKF/IC/3/13, should be further explored. The Delegation invited the Committee to consider further the development and integration of a possible search engine to undertake keyword searches across different databases. Other issues such as language and terminology should also be considered. The Delegation supported the proposals in decision paragraphs 100 and 112.

138. The Delegation of Peru stated that the inventory should only be made available to patent examiners. The Secretariat should also consider the issue of how to determine when the information included in the database was made available to the public. It explained that it was necessary to determine not only when the database itself was placed online, but also when the specific information was put online for patent examination purposes. The Delegation raised questions about the implications of footnote 24 in the document.

139. The Delegation of India stated that it was not desirable to have restrictions on the end users of the inventory of databases at Annex II to document WIPO/GRTKF/IC/3/6, since the purpose of such an inventory would be to improve the availability of disclosed TK as prior art. In relation to decision paragraph 78, the Delegation stated that option 2 should be the immediate option, as it would ensure that work on TK was driven by developments and consultation at the national level. The Delegation recommended that the Committee should also consider option 3 and should pass this option onto the WIPO Program and Budget Committee. The Delegation supported the work outlined in decision paragraphs 100 and 112 and stated that WIPO should help national governments in capacity building in rural areas.

140. The Delegation of Côte d'Ivoire stated that, in relation to option 3 of decision paragraph 24, it was vital to study coordinated approaches between countries and thereby to benefit from the specific experiences of these countries. The Delegation noted that the validity of a toolkit would depend on its operational nature for end users, such as TK holders and confirmed that it was extremely important to help TK holders in this area.

141. The Delegation of the Russian Federation stated that, in relation to decision paragraph 22, experts should be permitted to use all information that is publicly available and that the Committee should be more technically efficient in the use of such databases. The Delegation noted that such databases should be placed on the worldwide web as a matter of priority and that the Committee should work closely with the Standing Committee on Information Technologies. On decision paragraph 78, the Delegation agreed that the Portal be maintained for future work and that the goal of the TK databases should be defined so that it was possible to conduct searches. The Delegation finished by stating that, in its present form, the database was very labor intensive and that it needed to be further developed by WIPO and national experts, to include *inter alia* consideration of general standards and links between databases.

142. The Delegation of Australia supported option 22(b)(i) (decision paragraph 24), since the current inventory provided very practical experience for the Committee and should be used to clarify the issue of TK databases further. The Delegation supported option 2 (decision paragraph 78) and decision paragraph 100 since it was necessary to clarify the current IP position regarding documentation of TK and databases, and a toolkit would address the need for capacity building that was emphasized throughout the meeting. The Delegation voiced support for decision paragraph 112, so that the Committee could extend its understanding of TK databases that had already been developed.

143. The Delegation of the United States of America clarified that the objective of the inventory should be to assist researchers and examiners in their work. The Delegation lent its support to the first three options presented in paragraph 22. In relation to decision paragraph 78, the Delegation supported option 2, and also option 3, subject to budgetary considerations. The Delegation looked forward to continued co-operation between the Committee and the SCIT. The Delegation supported decision paragraph 100 and stated that such a toolkit should not be too technical. It hoped that other countries would use either the Chinese or the Indian TK databases as the model and suggested that the Chinese database be used as a model for a classified database for TK, whilst the Indian TK database be used as a model for a text searchable database. The Delegation commented that it strongly supported a coordinated approach on the issue of TK databases, since it would be very difficult to search a proliferation of different types of database. It supported decision paragraph 112.

144. The Delegation of Switzerland stated, concerning decision paragraph 24, that the contents of the databases should be further assessed as to their usefulness for the determination of prior art. The Delegation supported option 2 under decision paragraph 78, and said that the portal should be kept open. As to options 3 and 4, the Delegation stated that it was extremely important that a minimum standard of documentation existed amongst TK databases, especially if such databases were to be effectively used by patent granting authorities when determining prior art. Accordingly, the Delegation supported these options, so long as they promoted standardization and addressed issues such as access to the databases and the legal consequences of the storing of TK in the databases. The Delegation said that it was also prepared to examine options 3 and 4 in the WIPO Program and Budget Committee in the context of the biannual budget exercise for 2004-2006. The Delegation supported decision paragraphs 100 and 112.

145. The Delegation of Japan supported option 2 under decision paragraph 78, as it would fully utilize the experiences gained to date, and respect budgetary considerations, and it fully supported the proposal in decision paragraph 112.

146. The Delegation of Panama stated that Panama was in the process of developing a TK databases with the benefit of finance from the World Bank and that it would continue to study document WIPO/GRTKF/IC/3/6 and listen to the debate with interest. The Delegation supported the reference made by the Delegation of India regarding the need to promote capacity building in rural areas and stated that it looked forward to receiving help from WIPO in the development of its TK database.

147. The Secretariat observed that WIPO/IC/GRTKF/3/6 contained a long list of activities and that, given the clear support of the Committee in relation to this document, there was much work to be done. The present debate would be helpful in drafting the budget for the 2004–2005 biennium. It further commented that footnote 24 sought to clarify that even if an on-line database contained information that had been obtained without the prior informed consent of the original holder(s) of that knowledge, it was still published information and therefore could be relevant prior art in patent examination and could be used as the basis for refusing a patent claim. It was extremely difficult for WIPO to determine the consent procedures used by a particular on-line database manager and that the purpose of this exercise was, in essence, to enhance our capacity to ensure that patents and other IP rights are not granted in an authorized manner to unauthorized third parties. The Secretariat noted, however, that the issue of prior informed consent in this context was a challenging question that needed to be answered.

148. The Delegation of Peru commented that it now had a better understanding of footnote 24. The Delegation commented that, as yet, no delegation had raised the issue of whether databases that had not been prepared with the prior informed consent of the original TK holders should be excluded from the inventory. The Delegation further stated that the inventory should not only be available to patent examiners and that a search tool should be developed.

149. The Delegation of Thailand approved the use of inventory for the implementation of Task B.3 by submitting that prior informed consent should always be ensured before replacing any TK in the inventory. In relation to decision paragraph 78, the Delegation supported option 2 as a first priority and stated that WIPO should facilitate all collaboration of this issue between Member States. The Delegation supported decision paragraph 100, with the involvement of TK holders, and supported decision paragraph 112. The Delegation of Thailand approved the use of inventory but stated that prior informed consent should always be obtained before publication. In relation to decision paragraph 78,

150. The Delegation of Spain, on behalf of the Members of the European Union, indicated a preference for option 2 concerning the portal. On options 3 and 4, the Delegation understood that preparatory activities could be undertaken as from now, provided there were no immediate budgetary implications.

151. The Delegation of Brazil underlined the need for ensuring that the prior informed consent of TK holders would be adequately addressed. Paragraph 22 of document WIPO/GRTKF/IC/3/6 contained some critical elements that constituted the core issue of the establishment of databases.

152. The Delegation of Egypt said that, firstly, it was necessary to safeguard databases against the illicit use of data and its entry into public domain. Secondly, Paragraph 22

correctly acknowledged the concern of TK holders with the need for informed consent prior to any use of their knowledge. In the Delegation's view, no TK should be put to use without such consent.

153. The representative of the FAO said that databases organized with the aim of classifying species or varieties of animals and plants contained references to uses and denominations that might be of interest for patent examiners. The representative noted that EcoPort was an example of a vast database, in which the owners submitted TK and decided upon how it could be used. That was an example of a bottom-to-the-top decision, as opposed to databases that contained information without the intervention and the consent of its owners. Communities should be always given the opportunity to decide on the use of their own knowledge. The representative said that this could be a point for the Committee to analyze carefully.

154. The representative of the CBD emphasized that the activities under document WIPO/GRTKF/IC/6 were supportive of the decisions of the Conference of the Parties to the CBD on the implementation of Article 8(j) as well as on the clearing-house mechanism. The Secretariat of the CBD was open to discuss the way forward in those areas of collaboration.

155. The representative of UNCTAD supported the various statements addressing concerns on the need for prior informed consent and supported Switzerland's view that some standards, including the identification of a minimum set of data fields, should be adopted to allow eventual interoperability of databases developed and controlled at the national or community level. She had been impressed by the demonstration of the Tulalip Tribe's database, which allowed the community to control access at the individual data field level, by defining different categories of user groups. She added that the scientific naming of plants, animals and microorganisms used by local communities had not been fully examined.

156. The representative of the Saami Council reiterated his organization's concern with the risk that databases might contain TK obtained without the prior informed consent of its owners. His organization opposed the publication and dissemination of TK obtained without such consent.

157. The Chair concluded that the Committee had not identified any priority as regards the activities proposed under Paragraph 22 of document WIPO/GRTKF/IC/3/6. It was clear, however, that the Secretariat needed to work further in the topics contained in points (i) to (iii) of subparagraphs (a) and (b). The Secretariat should report on the results of such work to the next session of the Committee. Concerning the options set out in paragraph 78, the Committee had confirmed the Portal should be kept open as proposed in Option 2. Options 3 and 4 needed further analysis and budgetary consideration. The proposal for a Toolkit, as set in paragraph 100, had found support, but the Committee had clearly expressed its view that such a Toolkit must be operative and functional, and should take account of the needs of the target groups. The Committee had supported the preparation and dissemination of a questionnaire, as proposed in paragraph 112.

Demonstration of TK databases

158. The Delegations of China, India and Venezuela provided demonstrations of national TK databases, in order to facilitate the study of IP issues related to TK databases. Several of these

national databases were linked to the portal of TK databases at <http://www.wipo.int/globalissues/tk/tkportal/index.html>. A representative of the Tulalip Tribes of Washington Governmental Affairs Department provided a demonstration of a community-based database developed by indigenous peoples for both the defensive disclosure and positive protection of their TK.

159. The Delegation of South Africa commended the countries that had worked on the databases and stated that this helped the Committee with its deliberations. The Delegation further inquired what the costs were of such a system, and how long it took to compile such databases. These questions were relevant to determining whether establishing such databases would overburden developing countries' resources.

160. The presentation by the Delegation of China indicated that the China Tradition al Chinese Medicine (TCM) Patents Database has Chinese and English versions. The Chinese version contains patent applications published between April 1985 and March 2002, whereas the English version contains those published from 1993 to 1994. It has 29 search fields which fall into four categories: bibliographic information; subject index terms; uses/effects; and TCM formulas. The search features of the database which allowed the user to conduct a Quick Search, an Advanced Search, a TCM Formula Logic Search, a TCM Formula Similarity Search, and a Search History.

161. The presentation by the Delegation of India indicated that the Health Heritage Test Database (India) was established to put TK, already in the public domain, into a modern electronic format which would be available in the English language as well as link TK to modern scientific and patent literature. The Database would be used for defensive and positive legal protection, address patentability issues, increase international recognition of Traditional Knowledge Systems, and catalyze scientific collaboration. The Database had achieved the integration of widely scattered and distributed references into a retrievable form as well as increase awareness at both national and international levels. The Traditional Knowledge Digital Library (TKDL) of Ayurveda was established to prevent the granting of patents for unpatentable inventions on Indian TK, to break the language as well as the format barriers, and to establish modern classification, search and retrieval tools on TK.

162. The demonstration by the Delegation of Venezuela of the Biozulua Database reviewed the relationships between documentation, biological diversity and TK. The Biozulua Database was intended to record, with a software database application, food and agricultural information based on ancestral technology, and native medicine from indigenous peoples which are at risk of being lost due to the impacts of western civilization. Both the database and the software are the property of the Venezuelan State. All the information contained in the database has been categorized as confidential, which is why at present, until such time as *suigeneris* protection mechanisms are defined as proposed by Venezuela as well as other countries, the information contained in the database was considered a trade secret, which made access, disclosure and uses subject to express authorization by FONACIT. Further any person who had or had access to it was under the obligation to sign a confidentiality letter. The representative of the Indigenous Peoples of Venezuela stated that the database was a tool that, if properly used, could be a significant factor in the preservation and classification of indigenous knowledge threatened with extinction. The representative stated that they considered the information on agro-food, medicine and handicraft viable for the well-being of their peoples, provided that there was fair and equitable benefit-sharing and that the continued participation of indigenous peoples was ensured.

Review of Existing Intellectual Property Protection of Traditional Knowledge

(WIPO/GRTKF/IC/3/7);

Elements of a Sui Generis System for the Protection of Traditional Knowledge

(WIPO/GRTKF/IC/3/8);

Traditional Knowledge – Operational Terms and Definitions (WIPO/GRTKF/IC/3/9)

163. The Secretariat introduced documents WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9. The Chair stated that, while the documents had been introduced together in view of the close linkages between them, discussions would proceed on each document separately as had been requested by certain delegations.

Review of Existing Intellectual Property Protection of Traditional Knowledge

(WIPO/GRTKF/IC/3/7)

164. The Chair noted that the document proposed not tasks as such. Yet, it was suggested in the document, and by the Secretariat in presenting it, that the Committee may wish to approve, first, the Secretariat undertaking fact-finding missions to certain Committee Members to study actual experiences with the use of existing IPRs, and, second, the leaving open of the document to enable States that had not yet done so to submit information for inclusion in further versions of the document, or to update information already provided, as the case may be.

165. In this regard, the Secretariat had suggested issuing a streamlined set of questions to facilitate the provision of further information by Member States.

166. A number of delegations, including those of Argentina, Australia, Bolivia, Brazil, Cameroon, Canada, Colombia, Côte d'Ivoire, the Dominican Republic, Egypt, Mexico, Morocco, New Zealand, Norway, Panama, the Russian Federation, Sudan, Switzerland, Thailand, the United States of America, Venezuela and Zambia, as well as the representatives of OAPI, the Secretariat of the CBD and of UNCTAD, supported the proposal that this document remain open for further input and should be updated for future sessions of the Committee.

167. The Delegations of Bolivia, Colombia and the Dominican Republic proposed that the questions contained in the documents should be further simplified and streamlined so as to facilitate the preparation of further responses from a wide range of sources, so as to ensure the Committee has a wider information base for its future work.

168. The Delegations of Colombia and Venezuela suggested that the documents should more clearly reflect that the majority of Member States had expressed views in favor of the development of a *sui generis* system for TK. They suggested that the documents should not privilege an analysis of existing systems in its conclusions, since it was in contradiction with the responses from the majority of countries.

169. The Delegations of Bolivia, Canada, the Dominican Republic, India, New Zealand, Norway, Switzerland, the United States of America supported the proposal that understanding of existing forms of IP protection for TK be enhanced by undertaking fact-finding missions (FFMs) to countries and communities which have used IP tools for TK protection, with the

Delegations of Canada, New Zealand and the United States noting their support was subject to consideration of budgetary implications.

170. The Delegation of India expressed interest in India's hostings such a mission.

171. The Delegation of Norway added that the mission should examine how TK protection and benefit sharing worked in practice.

172. The representative of UNCTAD stressed that FFM should gather information on the cost of fusing IP systems for TK protection, to put this in perspective *via-à-vis* the per capita income level of the country, and where possible, the communities concerned.

173. The Delegations of Brazil, Colombia and the Dominican Republic emphasized the need that the Committee cooperate in its work with the CBD and FAO, in particular the CBD Working Group on Article 8(j) and Related Provisions and the FAO Commission on Genetic Resources for Food and Agriculture.

174. The Delegations of New Zealand and Nigeria stressed the need for capacity building in the field of TK, such as the 'Toolkit' referred to in document WIPO/GRTKF/IC/3/6.

175. The Delegation of Spain, on behalf of the European Community and its Member States, introduced a document on "Traditional Knowledge and Intellectual Property Rights" which was circulated to the Committee as document WIPO/GRTKF/IC/3/16.

176. The Delegation of Venezuela stated that at the second session of the Committee many delegations had supported the development of *suigeneris* systems and that this should be reflected in paragraph 2 of document WIPO/GRTKF/IC/3/7. The Delegation noted that only a few countries, mainly developed countries, had *suigeneris* systems and applied existing forms of protection. Further detail of the experiences in Canada were requested, and the experiences in Kazakhstan and the Russian Federation were also noted with interest. Particular attention should be paid to the recognized rights of indigenous peoples, as well as the intentions of protection systems. In Venezuela, collective IP was recognized and possible models were being studied. The Delegation requested the Secretariat to provide studies on the experiences of Panama, Australia and New Zealand. The Delegation stated it would wish to have further information on the limitations inherent in the current IP system as they relate to TK. The Delegation agreed with paragraph 33 of document WIPO/GRTKF/IC/3/7 that TK is not necessarily old, and that, therefore, protection should not be limited to that which is provided by current systems. The Delegation added that the recommendations in paragraph 36 should be seen in the light of the circumstances described in paragraph 33, as they believed that the tasks were not exclusive. They stated further that the Committee should see the opportunities for, and above all ways of, protecting TK with what already exists, but at the same time suggest *suigeneris* options when it is not possible to implement present systems. Those options would constitute the basis for a possible *suigeneris* model, the Delegation added, and that there should be no imbalance when the forms of protection are reconsidered. The Delegation stated further that the Committee should avoid referring only to one form of protection as stated in paragraph 40. The Delegation stated that a distinction now had to be made that was not in the survey: this related firstly to the general protection accorded to the rights of indigenous peoples, secondly to the protection of rights, and thirdly to the aims of protection. The Delegation added that the questions should be made more specific in future studies, so that there may be a common model for comparison.

177. The Delegation of Argentina supported paragraphs 37 to 39 of document WIPO/GRTKF/IC/3/7 as they were an accurate reflection of the situation concerning the treatment of the subject. The Delegation commented that although paragraph 37 referred to the need to achieve a more comprehensive understanding of how current IP law mechanisms may be used, paragraph 40 referred to and described in detail only one category of rights, which was mentioned by only five of the 48 responses to the survey. The Delegation considered that paragraph 40 did not provide a balanced reflection of the opinions of the Member States and that it appeared to prejudge the positions of both those who had responded and those who had not. The Delegation recommended that the Secretariat revise the document, taking into account all the IP categories mentioned by Members, in order to provide an appropriate balance of opinions. It added that should there be no agreement on revising the document then paragraph 40 should be deleted and the document concluded as such.

178. The Delegation of Brazil stated, in relation to documents WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9, that work by the Committee in the area of TK would be relevant for discussions in other intergovernmental organizations, such as the CBD and the WTO in carrying out their respective mandates to discuss the protection of TK. In particular, Decision VI/10 on Article 8(j) and related provisions, approved by the Sixth Conference of the Parties of the CBD was recalled, which requested the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the CBD "to address the issue of *suigeneris* systems for the protection of traditional knowledge." The Delegation believed the inputs by the Secretariat and Members would be useful for the CBD Working Group. In addition, the Delegation stated that it saw the documents prepared by the Secretariat as an initial basis for discussion, and that, therefore, its comments amounted to a preliminary reaction to their content, within the understanding that the elements contained in the three documents were not exhaustive. Addressing directly document WIPO/GRTKF/IC/3/7, the Delegation noted that most countries which relied on the conventional IP system were developed, which seemed to support the need for the development of a *suigeneris* system, in light of the difficulties of traditional communities in developing countries to adjust their knowledge to the rules of the IP system. The Delegation requested that subsequent versions of the document reflect that the Brazilian *suigeneris* system established by Provisional Measure 2.186, of August 23, 2001 on genetic resources, associated TK and transfer of technology (described in paragraph 16 of the document), provides for positive rights which cannot be altered or diminished by bilateral contractual arrangements. This correction would also be consistent with the position of Brazil in favor of protection of TK through legislation, rather than merely bilateral contracts. In the view of the Delegation, bilateral contractual arrangements alone were an insufficient means of protection of TK, as the parties involved were most often in unequal situations. On the other hand, protection through legislation, with active participation and supervision of Government, was a safer way of ensuring that protection of TK was in the best interest of their communities. The Delegation agreed with the first group of responses identified in paragraph 32, but had reservations on the first indented sub-paragraph, as it did not agree that all TK was necessarily public domain. Finally, the Delegation agreed with those Members which had expressed concerns about geographical indications having been singled out in paragraph 40 of the document, as they had considerable limitations as a means of protection of TK and were not effective in preventing biopiracy.

179. The Delegation of Australia stated that in relation to the reference to a “divide” in paragraph 38 of document WIPO/GRTKF/IC/3/7, the position of Australia was not as unequivocal as that term may suggest. Australia supported further work towards the development of an international model for the legal protection of TK. Such a model should be built upon the full exploration of the ability of the existing IPR system to meet some of the needs for TK protection. Increasing understanding of domestic practices to protect TK would greatly assist the Committee’s progress. The Delegations suggested the Committee should seek to identify areas where the existing system could be improved to assist with TK protection, and that such improvements were likely to require consideration of areas where existing systems could be improved, which could include *sui generis* responses.

180. The Delegation of Egypt advised that it had not yet provided information on its national experiences with TK protection as it has been involved with the preparation and enactment, in June 2002, of legislation on this matter. The divergence of views referred to in paragraph 38 of document WIPO/GRTKF/IC/3/7 was, in its view, natural given the differences between countries in terms of their laws, cultures and traditions.

181. The Delegation of Algeria, speaking on behalf of the African Group, supported the undertaking of additional work to further understand how existing IPRs can be better used. This would be an opportunity to help States and encourage their broader participation in such work. The African Group stressed the need for working documents to be available in languages other than English. The Delegation stated that it supported the Secretariat undertaking the task in paragraph 19. Regarding *sui generis* systems, the African Group believed that there was a need to identify the objectives of protection, the type of protection desired, the contents of the rights and the identity of the holders of the rights, and that it would be useful to draft efficient *sui generis* systems at the national, regional and international levels. Customary laws and practices should also be taken into account. In respect of the holders of rights, they were generally individuals, families or communities; however, where they could not be identified, the States should act for them. The Delegation reaffirmed its call for the establishment of an international binding instrument for the protection of TK. The Committee should draft a definition of TK which was open and allowed for a high level of protection. The support of WIPO was called upon for capacity building, the raising of awareness and the establishment of the necessary institutions at the national level. Legislative texts should be translated into local languages. Finally, the Delegation stated that it was convinced of the role that traditional communities could play, with the assistance of national Governments, in the preservation, promotion and protection of their TK.

182. The Delegation of the Russian Federation stated that Members of the Committee should continue to use existing mechanisms and find *sui generis* mechanisms to provide for the efficient protection of TK and IP. There was a need to analyze the information in document WIPO/GRTKF/IC/3/7 further.

183. The Delegation of Zambia noted that the position of the African Group, which it supported, regarding the need for a *sui generis* system had the blessing of the African Heads of State and Government, as illustrated by the adoption of the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources. The Delegation was of the view that current IPRs do not promote or reward TK, TK systems and innovations. Current IPRs also raise problems with the identification of beneficiaries. Attempting to mould TK to fit current IPRs would destroy

the very essence of TK. Therefore, *suigeneris* systems were needed at national and international levels.

184. The Delegation of India underscored the need for a deeper understanding and analysis of existing mechanisms and their effectiveness or limitations in protecting TK and endorsed paragraph 39 of document WIPO/GRTKF/IC/3/7.

185. The Islamic Republic of Iran stated that in the field of protection of TK, the common factors of TK and folklore must be taken into consideration, while all countries in principle accept to protect TK as an independent category. The Delegation noted that there was no common view needed on how to protect this independent category: some countries believed that existing IP standards in general or specific areas were available for the protection of TK, while others recommended codifying a *suigeneris* system for the protection of TK in any way. The Delegation stated further that the first steps should be to adopt a uniform legal approach for the protection of TK and that a future survey should be better formulated to obtain harmonised answers.

186. The Delegation of Guatemala referred to the Cultural Heritage Protection National Law in its country, and stated it was interested in learning more about systems in other countries. The Delegation stated that it supported the statements of Argentina and Brazil concerning the need to consider other options beyond geographical indications, and requested the Secretariat to provide more detail on the use of geographical indications to protect TK.

187. The Delegation of Thailand expressed the view that there should be a parallel study of how to use the existing IP system to protect TK, through, for example, the use of trade secrets or geographical indications to protect TK and genetic resources respectively, together with the exploration of a *suigeneris* system with the aim of eventually developing a *suigeneris* system. The Delegation stated that the documents should be open-ended, to provide more examples of how existing IP could be used to protect TK in a holistic approach to cover not only the knowledge itself, but also the culture and all heritage related to it.

188. The Delegation of Switzerland stated that the use of existing mechanisms for TK protection has not been thoroughly analyzed. More detailed and extensive analysis should be carried out.

189. The Delegation of Canada stated it was desirable to better understand how Members were using existing domestic IP mechanisms to protect TK. The Delegation offered four conclusions on the document. First, existing mechanisms have much to offer, and further reports on actual experiences would be useful. Second, it would be helpful to hear the experiences of those Members who have implemented or are contemplating specific forms of protection. Third, TK holders should be made aware of how to acquire, exercise, manage and enforce their rights under the existing systems, and it was suggested that the Committee might benefit from reports on the experiences of Members on the success of capacity-building efforts to assist TK holders in using existing systems. Finally, an identification of the scope of any limitations in the existing system which render it unable to fully meet the needs of TK holders would be possible only after these activities had been thoroughly analyzed.

190. The Delegation of Panama referred to its *suigeneris* system established by Law 20 of 2000 and offered to make a presentation on it and its experience so far in its application in practice. Panama was continuing to review and study the system.

191. The Delegation of the United States of America suggested that a thorough analysis of how existing IP rights could be used by TK holders had not yet been completed. It hoped that such an analysis could deepen the understanding of how current standards concerning availability, maintenance and enforcement of rights may be used for TK protection. TK holders might wish to use several forms of IP protection in an overlapping way. As an example, it referred to the overlapping use of copyright, trademark, trade secret and patent protection by software designers and suggested that TK holders could take a similar approach. It suggested that the example of a fashion designer's TK quoted in the document could refer to the usefulness of various forms of IPR currently in use. With this approach, it suggested, one may not need to prove infringement of all the elements of the TK. Rather, unauthorized making of a part of the TK, such as the use of the formula without the use of the chant, may, in its view, be sufficient for a finding of infringement. While conceding that existing forms of IP protection and other forms of protection, such as contracts or tort law, may not provide perfect protection, it suggested that wider use of the IP system may prove useful to those seeking to protect their TK. It therefore suggested that WIPO assist Member States in its regional programming to better adapt existing IP laws to their concerns about TK. The Delegation observed that a greater emphasis on the acquisition and enforcement of IP rights could afford economic and non-economic benefits.

192. The Delegation of New Zealand suggested that the examination of how existing IP mechanisms might be used for TK protection should have both a practical and a theoretical focus. It felt that a practical approach was important since existing IP mechanisms might be applicable to TK technically, but TK holders in practice might not use them. The Delegation observed that only through a more thorough examination of existing forms of IP, could the Committee determine what deficiencies existed and what gaps needed to be filled. That might take place, the Delegation suggested, in the form of modifications to existing IP mechanisms or the development of new IP-type approaches. It also suggested that some answers might lie outside IP, particularly where positive protection was concerned. It suggested that the Secretariat should collect further information on the actual exploitation of TK and the downstream granting of IPRs, since this would enhance an understanding of the problem under discussion.

193. The Delegation of Morocco believed that it was still early to address objectively the scope of IPRs for TK. It stated it wished to learn more about the experiences of Member States in applying existing IP mechanisms, such as Kazakhstan's experience in the application of industrial designs and Japan's experience in the application of patents. It mentioned geographical indications, appellations of origin, patents and industrial designs as IPRs which might apply to the protection of TK. It proposed to place the definition of TK in the framework of IP. It also emphasized that current IP tools could not protect TK sufficiently, and the Committee would therefore have to create new tools.

194. The Delegations of the Dominican Republic and Mexico stated that paragraph 40 of document WIPO/GRTKF/IC/3/7 was not balanced because it only stressed geographical indications. While the Delegation of Mexico agreed that geographical indications could contribute to the protection of TK associated with biological diversity and should be further explored, it noted that they would not stop biopiracy. It suggested that the Committee should evaluate existing forms of IP protection, but creating a *sui generis* system would provide a heightened advantage. The Delegation of Mexico suggested that the Committee explore the

possibility of double protection, because the use of current IPRs and a *suigeneris* system of protection were not necessarily mutually exclusive.

195. The Delegation of China noted with appreciation that in the document on expressions of folklore submitted by the European Community and its Member States (document WIPO/GRTKF/IC/3/11), in which many views worthy of consideration were proposed. On the definition of TK and the establishment of a *suigeneris* mechanism of TK protection, the Delegation commented that existing IP mechanisms, such as patents, trademarks and geographical indications, could to some extent provide IP protection to TK and the Committee should further study appropriate measures in this regard. Some TK was of a special nature, so that it was hard to know who the TK holders were and whether the TK was already in public domain. Therefore, it is of the opinion that, the existing IP systems could not provide adequate protection to TK. While using existing IP systems for TK protection, consideration could be given to *suigeneris* protection for TK.

196. The Delegation of Colombia observed that despite the analogies drawn by the document with existing IP mechanisms, it did not include other mechanisms which could be included in protection systems. It suggested that the Committee should pay more attention to the issue of PIC as it explores existing protection systems and the design of *suigeneris* systems. The Delegation reminded the Committee that work on genetic resources and TK was also ongoing in other UN fora and that WIPO should have permanent relationships with those bodies in order to take into account their work. It highlighted the decisions of the Conference of the Parties to the CBD and the Working Group on Article 8(j) and Related Provisions of the CBD. It also mentioned the work of the Commission on Genetic Resources for Food and Agriculture (CGRFA) in the FAO. It stated that the Committee should take into account Article 9 of the FAO Treaty, which related to farmers' rights and thus dealt *inter alia*, with TK. It noted the usefulness of the experiences with databases which had been presented to the Committee by China, India and Venezuela, but noted that different database approaches might be appropriate for different countries and advised to move cautiously in making general decisions on database use. It stressed the importance of protecting the rights of communities and exercising the appropriate care in the use of databases.

197. The Delegation of Kenya expressed its concern that TK was quickly disappearing and the Committee's work was therefore urgent. It informed that while Kenya was considering a *suigeneris* system, it was already exploring ways of using existing IP systems for the protection of its TK and genetic resources, such as the protection of TK as utility models. It noted that Kenya was encouraging its traditional healers to add value to their concoctions and noted that this would facilitate data collection and compilation. Having learned from the presentations of India and Venezuela, the Delegation emphasized the importance of data compilation. It stated that Kenya hoped to do what India and Venezuela had done in respect of the use of databases. The Delegation noted that TK documentation was crucial and urged WIPO to include this item in its budget for cooperation for development.

198. The Delegation of Sudan supported the statements made by the Delegation of Algeria on behalf of the African Group and other delegations that made similar statements. The Delegation also supported the proposal in paragraph 39 of document WIPO/GRTKF/IC/3/7, calling upon the Committee to further study existing protection systems and consider, at the same time, the possibility of a *suigeneris* system of protection. It noted that it was too early to conclude clearly whether it was appropriate to establish a comprehensive system for the protection of TK, be it within the present traditional IP systems or in the form of a new

suigeneris system. The Delegation stated that further consideration would allow countries which have not yet responded, to express some useful opinions, especially since only 48 countries (or 30% of the membership) had made such contributions. The Delegation stated that as indicated by the Secretariat in document WIPO/GRTKF/IC/3/7, paragraph 38, there was a clear divergence in opinions. In view of the fact that Member States have usually worked by consensus on minimum concepts and provisions to be later integrated in international conventions that harmonize their practices, the Delegation stated that there was a need to allow the Committee additional, yet reasonable, time for further studies and analyses, provided that Member States would be free to apply their own legislation for the protection of TK and genetic resources. In that respect, the Delegation mentioned a Committee for the Revision and Reform of National Legislation, including IP legislation, formed by the Minister of Justice and chaired by a former Chief of Justice of Sudan. f

199. The representative of UNCTAD noted that information on national systems of TK protection was available at the UNCTAD website. She reminded the Committee that TK holder tend to be very poor. She said that, if a survey were done, for example, of *perc apita* income level of indigenous peoples, the results would probably be quite similar to those of the Least Developed Countries. For these communities, devoting resources to obtaining IPR protection may involve very high opportunity costs in terms of meeting their basic food, health and educational needs.

200. The representative of OAPI supported paragraphs 31 to 36 of the document, but had reservations on paragraph 40 since he felt that geographical indications could better protect tangible expressions of folklore or agricultural products. Any instrument protecting TK should address the possibility of designating regional bodies such as OAPI to administer TK.

201. The representative of the Secretariat of the CBD welcomed the ongoing review and assessment of IP instruments under the present documents since it would support the work of the Working Group on Article 8(j) and Related Provisions and would assist in the preparation for the next meeting of the Working Group. Referring to the relevant paragraphs of COP Decision VI/10, she stated that the CBD Secretariat would be grateful to receive information collected by WIPO on the protection of TK through national IP legislation.

202. Responding to a question posed by the representative of OAPI, the Delegation of Australia referred the Committee to their responses submitted on document WIPO/GRTKF/IC/2/7 and stated that the listed four cases were to illustrate how the Australian legal system was able to accommodate some elements of protection for traditional, cultural and customary law. The case referred to by the representative of OAPI was one of the first to address the protection of works drawing on Aboriginal culture under copyright law. It demonstrated the ability of the existing Australian legal system to deal, in a culturally sensitive way, with the award of damages. The case confirmed that copyright protection could be granted to an artistic work which essentially drew on traditional motifs and forms. Any artist who produced works based upon indigenous forms was nevertheless producing something which had sufficient originality for copyright protection. During the actual conduct of the case, a number of artists involved had died before the proceedings were completed. Under Aboriginal law of that particular group, it was not appropriate to use the names of the deceased artists, and the court proceeded with the action without specific reference to the Aboriginal names of those particular artists so as to respect that sensitivity. On the question of the harm that suffered by the artists and the damages to which they may be entitled for the unauthorized reproduction of their material, the judge considered the damage

also concerned the reputation of the artists within their own community and their responsibilities within that community to protect and safeguard the images. The particular loss of reputation within their own community on that community's terms was not necessarily a sense of damage that would be understood within the broader Australian community, but was nonetheless taken into account in assessing the level of damage resulting from the reproductions. A further consideration was that the reproduction of this particular material caused damage to a number of people within the community other than the artists themselves. Instead of awarding a specific level of monetary compensation to each individual artist, the court provided a single overall award of monetary compensation which could then be distributed to and within the Aboriginal community in accordance with their customs and their traditions, having regard to those persons who had suffered harm from the perspective of their customary understanding and responsibilities. The Delegation concluded that the case illustrated flexibility in terms of copyright law and the common law system to accommodate customary understanding of damage and of harm, and the customary responsibilities of persons within their community.

203. Responding to a request by the representative of OAPI for further information, the Delegation of Australia advised that community rights were not specifically recognized under Australian law, except to the extent that people may be joint authors or have jointly created the particular work that is the subject of copyright action. Collective interests had been recognized, however, in the determination and distribution of damages. Australia was examining the prospect of creating a community right in relation to moral rights under copyright for indigenous communities and that proposal was at the policy level, but it was certainly something that had been indicated by the present government as an objective for its current term of office.

204. Responding to a question by the representative of OAPI, the Delegation of Peru described the Peruvian process which began in February 1996 following the realization when realizing of the need to set up a *suigeneris* system to protect TK. The draft bill, concerning a *suigeneris* system for the protection of TK, was published for comment in the Official Journal on October 21, 1999. A second version was published in August 2000, and a final draft bill was prepared. However, since indigenous communities had not been fully consulted, the proposal was not sent to Congress at that time for approval. Since then it has been held pending, mostly due to the lack of sufficient funding to carry out the necessary consultations. The new government under President Toledo had expressed great interest for all matters pertaining to indigenous communities and indigenous issues. The latest version of the Bill, completed June 10, 2002, had been overseen by the first lady of Peru, Chair of the National Commission for the Andean, Amazonian and Afro-American peoples. This proposal served as a basis for discussions of this Committee and of those to be carried out within indigenous communities and with society at large. A consultation process would be initiated in coming months. The Delegation stated that it firmly believed in the need to engage in consultations with indigenous peoples and communities in each country, respecting the provision of Convention 169 of the ILO. One of the fundamental elements of the proposal was prior informed consent and equitable benefit sharing. Another was the intention to set up a special fund, which would be managed by the indigenous peoples themselves. It added that substantial changes had been made in the latest version of the Bill concerning the registration and in the further development of such registry of TK. In the previous draft, the registry was essentially confidential and its objective was to preserve TK. At the request of indigenous representatives who participated in the work done under the new proposal, new objectives were incorporated and three types of registries were included. Two

will be managed by INDECOPI, the national office for IP. One will be public and the other will be confidential. The National Public Registry would provide INDECOPI information needed to defend the interests of the indigenous peoples and to protect their collective TK. INDECOPI would send information to other patent offices, so that patents would no longer be issued based on TK without taking account of the TK of indigenous peoples. The confidential registry would preserve the TK and keep it from disappearing. The third registry would be a local registry to be managed by the indigenous peoples and communities themselves. For all three registries, the rights of indigenous communities to register their TK would be kept in mind. TK entered in the confidential registry or the local registries would remain confidential and would be part of prior art. The registries were not mandatory, as it was recognized that it was an inherent right of indigenous peoples to develop and preserve their own knowledge. Furthermore, the indigenous peoples had rights over their TK because they have developed and preserved it, and that these rights could not be subject to any obligation. In conclusion, the Delegation stated that up -dated answer to the questionnaire would be sent to the Secretariat and further information will be provided on the new proposal for distribution to the Members of the Committee. A French translation of the proposal would be sent to OAPI.

205. The representative of the Indian Movement *Tupaj Amaru* stated that after over 500 years of exploitation and appropriation of TK, including the plunder of artistic and cultural goods belonging to the indigenous peoples, there was a urgent need to protect and to save collective heritage from the transnational corporations. The representative felt that the Committee should examine the legal protection of TK in the process of globalization of markets, capital and enterprises whose impact was fatal to the survival of indigenous peoples. He further stated that historic communities have disappeared with their knowledge, their secrets, and their law on protection of their TK. Many Members, in response to document WIPO/GRTKF/IC/3/7, reported that the existing mechanism for IP protection would be effective in protecting TK. While mechanisms for protection exist, there was no political will to put them into practice and to apply them, just as was the case with international instruments on human rights. In relation to question number 2, the representative stated that other Members stated that they would prefer a *suigeneris* system as a new mechanism to protect TK. This would seem to demonstrate that IPRs and other instruments, specifically the Berne Convention and its article 15, are neither sufficient nor effective in protecting TK which has its source in ancestral civilizations. The representative further stated that Indigenous peoples in the United States of America have been bringing to the fora of the United Nations the issue of drawing up a binding international legal framework, one that would protect, safeguard and restore genetic resources, TK and folklore. In response to the allegation that drawing up new standards at a national and an international level would be difficult, long, complex and premature exercise the representative recalled that efforts to create an international mechanism were not new. A process had begun twenty years ago by UNESCO and WIPO which resulted in the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions. In conclusion, the representative invited the Committee to continue examining the two options proposed in documents 7 and 8, which specifically included proposals from indigenous peoples.

206. The representative of the Institute for Agriculture on Trade Policy (IATP) outlined the role of the Institute and briefly elaborated on IATP's partnership with certain organizations from civil society. The representative stated that the IATP and many organizations from civil society were concerned that access to TK and genetic resources really meant easier access to such resources by corporations because the legal grounds were laid to extract those resources.

Experiences showed that access to genetic resources by corporations eventually could lead to claims of IPR on living organisms that had been obtained through the manipulation of the original genetic resources. The representative further stated that legal agreements between governments and corporations could open the doors for corporations to eventually claim ownership of genetic resources and the genes therein. In other words it would mean the legalization of biopiracy which was precisely what sessions like this one intended to prevent. The representative stated that while they welcomed the protection of genetic resources and their sustainable use for profit by the communities who hold these resources, further measures were needed to prevent claims of ownership of DNA, the blueprint of life. IATP called upon governments to support a ban on patents on life, which would protect indigenous knowledge and to take measures to prevent the ownership of genes by private companies and to declare genes a patrimony of humanity.

207. The representative of the Health and Environment Programme briefly outlined the Programme's cooperation with other organizations. The representative referred the Committee to the signed framework cooperation agreement between WIPO and the Government of the People's Republic of China. This far-reaching agreement covered all fields of IP. The representative was of the opinion that such an approach could also benefit the African countries and queried whether WIPO, OAPI and ARIPO could assist in such endeavors. The representative observed that no African country had spoken on national experiences and felt this to be rather alarming. The representative questioned whether this lacuna was a reflection of lack of political commitment or rather a lack of competence. The representative suggested that would be appropriate to train IP experts who could then assist indigenous communities. The representative called on greater efforts in raising awareness of the issues and appealed to WIPO to further cooperate with civil society from the African region so as not to repeat the experiences of other nations.

208. The Delegation of Algeria, speaking on behalf of the African Group, stated that the political will of the African group was steadfast and committed. The Delegation stressed the importance the African Group placed on the protection of TK and genetic resources and its past stress on the link of genetic resources and IP. The Delegation noted that the African group had produced a paper for this Committee and it underscored the position of the African group *vis-a-vis* local communities at the national level to better handle TK and in the provision of protection.

209. The representative of the Aboriginal and Torres Strait Islander Commission (ATSIC) stated that it was in favor of keeping the document open and welcomed comments made by the delegations of New Zealand and Kenya, particularly in relation to the identification of gaps and information, and adding this to the survey so as to look towards the practical implementation which should be included for the protection of TK. With regard to document WIPO/GRTKF/IC/3/7, paragraphs 25 to 28 and paragraphs 29 to 36, the Delegation was concerned that the document provided a global picture where no special measures were in place to assist TK holders handling their IP matters. The representative felt that special measures had to be a large part of the protection of TK. An expert legal opinion on the Convention of Elimination of Racial Discrimination indicated that the term "special measures shall be implemented" meant that special measures must be implemented to overcome racial discrimination and disadvantage. ATSIC was convinced that special measures were needed in the area of TK. The representative recalled an earlier presentation noting in some research that only half of TK had survived transmission between generations. There was a great risk of the loss of TK that had mainly been carried on through oral tradition and other forms of

tradition. The protection of TK should include special measures to ensure that there was no further loss of TK within indigenous peoples and their communities. More attention should be given to question 26 and that documents should continue to develop the issue. The representative quoted paragraph 4 of document WIPO/GRTKF/IC/3/8 and emphasized that the more that was done at the domestic level to protect TK through special measures, the less difficult it would be to deal with international *suigeneris* protection. Finally, the representative commented on the contribution of indigenous peoples and NGO groups and cited the recent establishment of the Permanent Forum on Indigenous Issues, where the Secretary General welcomed the indigenous peoples to the family of the United Nations. However, the representative stated that it was difficult to make contributions from such a small group of representatives attending the meeting and raised the issue for States to consider greater involvement of indigenous representatives in their delegations.

210. The representative of the Indian Movement *Tupaj Amaru* gave a statement with regard to document WIPO/GRTKF/IC/3/4. The representative quoted paragraph 2 of the preamble of the CBD which was ratified by 160 states. The representative stated that for Indigenous peoples' genetic and biological resources were comprised of an infinite number of living organisms which were in constant change and constituted the collective heritage of indigenous communities and world heritage and that therefore the Committee should examine this matter further and not only in terms of markets, profits and investments. The representative further added that the structure of the proposal on the database and contractual clauses for access to genetic resources and showing of the benefits in document WIPO/GRTKF/IC/3/4 sets out a simple, technical and legal methodology for a wide consensus of the Committee. He stated, however, that the indigenous communities and peoples felt that the technical mechanisms set out in the document were much too complex for them to interpret and implement and that they were inaccessible to the holders of the TK in indigenous communities and the holders of genetic resources. The representative added that the document may appear to be simplistic in its approach to genetic heritage in that it focused mainly on mercantile issues and that these were very complicated issues for indigenous communities. The representative stated that it was necessary to regulate access to these resources and clearly establish rights for equitable benefit sharing. The representative referred to the special working group of the Convention on Biological Diversity on access and benefit-sharing which recommended standard frameworks to govern the use of genetic resources, and to paragraph 3 of the WIPO document which set out options for guide contractual practices and non-binding practices and voluntary initiatives in the IP realm. He added that the Model Provisions had never functioned as effectively as they might have in the past in generating an effective framework mainly because developing countries had lost their negotiating power. He stated that developing countries were unable to lay claim to certain undertakings and fight certain activities of companies because their structures had been dismantled. The representative stated that there were no clear definitions on genetic resources. In Annex I paragraph 4.1, on conditions for use which would apply to the database, the right to manipulate genetic material was recognized and this was also the case for genetically modified foods including maize. The WIPO Secretariat, the Member States of WIPO, and providers of information should assume responsibilities when it came to the use and abuse of databases, and information protected in databases should be transparent. The representative stated that a major threat was biopiracy of genetic resources and this had always been a problem. With regard to paragraph 4.2(b), the representative urged the Committee to include the originators of TK as full right holders which have a full right to negotiate access to genetic and biological resources of which they had been deprived. The representative added that the Committee should take a further step to ensure full informed

prior consent of indigenous peoples in the negotiating process which could lead to any possible agreements. He stated that indigenous peoples should be involved in the devising of legal instruments designed to protect genetic resources as well as share in the benefits thereof. The representative stated that the procedure for application of intellectual protection should require the applicant to provide proof that the holders of indigenous communities had given them the permission for use of the resources. With reference to point (iv) on the scope of the contract, the representative stated that the indigenous peoples were opposed to the inclusion of human genetic resources in the database for reasons of ethics and respect for human dignity. In regard to the draft contract the representative requested the Secretariat to provide a clear explanation when it came to the use of genetic materials in the database and national security issues, the ultimate objective of this initiative in today's world. The representative added that WIPO should lead workshops and educational activities targeting indigenous peoples in explaining the structure and scope of instruments such as the database and of which are contained in WIPO's website.

211. The Chair concluded that document WIPO/GRTKF/IC/3/7 be left open for further input, and that the questionnaire on national experience with TK (WIPO/GRTKF/IC/2/5) would be revised and circulated in simplified form, based on any comments received by the Secretariat by the end of June 2002.

Elements of a sui generis System for the Protection of Traditional Knowledge (WIPO/GRTKF/IC/3/8).

212. Recalling that document WIPO/GRTKF/IC/3/8 concerned elements of a possible *sui generis* system for the protection of TK, the Chair stressed that the Committee was not discussing whether such a system should be set up, nor its nature, but the possible building blocks of a system; in other words it should be a purely technical discussion. Here referred to paragraphs 29 to 57 which contained several important elements, and in particular paragraph 34, which listed the elements of a *sui generis* system.

213. The Delegation of Venezuela stated that the development of a *sui generis* system should occur in tandem with a study on how to optimize existing structures to promote the protection of TK. It agreed with the Secretariat that TK had unique features that should be seen in a holistic light, but expressed uncertainty as to the suggestion in the document that all traditional forms of knowledge were generated by communities in reaction to environmental change. These features need to be reflected in a *sui generis* protection system. The Committee needed to decide whether or not to deal with this nationally or internationally. Member States needed to discuss what kind of protection was needed, whether or not to opt for a defensive or protective protection, and then determine what instruments to use and which institutions should be involved. The Delegation believed that all forms of TK should be included, and expressed preference for part B and the focus on genetic resources and biodiversity. This was a major risk area for biopiracy. With regard to additional criteria for protection, the Delegation agreed that the information disclosed should be seen as part of the public domain. The Delegation stated that many forms of TK may be lost through normal IP systems and that databases could merely heighten this risk. The Committee needed to define the object of protection and think about commercial novelty and expressions of cultural identity. Some concepts were restrictive. These criteria should serve to protect knowledge which requires protection and not be used for ulterior motives. Ownership of rights of TK should be given to the communities rather than individuals and that the Committee should recognize consensual rights. A mechanism was needed to provide geographical information

and that the Committee should focus on the needs and rights of the holders of TK particularly in situations where TK is shared among numerous communities. Laws and rules which govern indigenous societies in terms of how TK is used should also be taken into account. The Delegation stated that *suigeneris* system might include accommodating existing IP mechanisms that may be adapted or entirely new mechanisms. With regard to access to right and acquiring of rights, the Delegation preferred an indefinite protection of TK and that this should apply to specific products in particular expressions which might be put to industrial and commercial use. A *suigeneris* system should not be seen as conferring new rights for TK, as these knowledge rights already belong to the indigenous communities, but merely to take account of their rights. The Delegation stated that an effective mechanism for enforcing rights was needed to make sure that the rights are effective in all stages and that the communities are fully involved in the process. The Delegation hoped to see a defensive system for TK protection consolidated and that the Committee should work to influence the work carried out by the IPC, patents and other IPRs. It was too early to decide whether or not they should be applied nationally or internationally but this could be decided at a later stage. As previously mentioned at earlier meetings, a *suigeneris* system should be unique and adaptable, and this should be constantly kept in mind. The Delegation stated that the Committee should make sure that countries importing TK did not use patents to misappropriate TK. The Delegation believed that the Secretariat should take into account of work being done in other fora on this issue and examine how IP relates to TK protection at the current time.

214. A representative speaking on behalf of the indigenous peoples in Venezuela reiterated the concept of territoriality which was intimately linked to TK in Venezuela and that legal recognition was a starting point for true recognition for the protection of TK. He stated that TK of indigenous peoples did not just concern medicinal plants - it had a vast domain in which the magic and the sacred dimension were never lost. He believed that to try to break down their knowledge and market it would have a serious impact on their culture and was something that would have to be discussed with them, so that they could decide what contribution they might be able to make to medicine and biodiversity. The representative stressed that full prior consent and equitable benefit sharing and had to form the basis of any future discussions. He added that indigenous peoples should be involved in all stages in the promotion and protection of TK and would like to see the promotion and implementation of a fund which would allow indigenous peoples to attend and participate at the meetings of the Committee.

215. The Delegation of the Dominican Republic believed that the document was an excellent basis to develop a *suigeneris* system of protection for TK. The Delegation said that the main characteristic of TK which would define the type of protection under a *suigeneris* system was that it was generated by communities as a response to environmental changes and was therefore constantly evolving. The Delegation repeated that TK did not mean old knowledge; on the contrary, it was constantly evolving and changing and that constant change was that which made it pertinent. The Delegation stated that this character trait was important to take into account especially when the other defined elements and criteria were looked at. With regard to commercial novelty, through which TK could be protected, the Delegation felt that this notion although useful was a limiting one when speaking of the protection of TK under a *suigeneris* system mainly because this only gave protection to that knowledge which had not been commercially exploited. The Delegation felt that the Committee should go further on this issue and take into account specifically that TK already existing in the public domain and already exploited commercially. This should be a guiding principle of any *suigeneris* system

of protection for TK because protection can only be granted if the rights were already recognized. The Delegation believed that the protection of TK should not be limited to registers and documentation, as they were not the only proof of the existence of TK. The Committee should study the viability of protection without formalities, as there was TK that had not been documented and was under constant and permanent change and was created as part of cultural identity. The Delegation referred to paragraph 43 of the document which refers to TK shared between two different communities and the fact that those communities would like to commercialize the knowledge is disclosed, the document states that this is a restriction on commerce. The Delegation noted that there is no right given to the disclosure of the information, and the use of this information would not be an infringement of anti-trust rights. The Delegation stated that the paragraph should be corrected where it indicates this type of cooperation could have incidents on anti-trust law as the Delegation felt that when discussing *suigeneris* systems it would be inappropriate to discuss anti-trust legislation in the same way other IPRs are applied in the discussions. The Delegation believed that the objective was not to compete with TK holders but to recommend that the Committee foster cooperation with TK holders in order to avoid competition. With regard to future work on this issue the Delegation supported the proposal made by the Secretariat in having non-binding guidelines and recommendations. The Delegation pointed out that a *suigeneris* system does not mean that the Delegation did not want a defensive or preventive protection but the Delegation stated that they were referring to one type of protection as there can be many types and that defensive and preventive protection already exists. The Delegation stated that the Committee should look at the work in other committees of WIPO especially the position taken by the developing countries, as these positions need to be taken into account when discussing these issues. The Delegation stated that they fully supported the document and that they would like to have this document included in the next session of the Intergovernmental Committee.

216. The Delegation of Thailand proposed that a *sui generis* TK system should include the elements: (i) definition of TK; (ii) classification of each type of TK; (iii) subject matters of protection under each type of TK; (iv) the way in which the right holders should be identified; (v) the rights granted to the owner of TK, which should be based on the existing utilization of the said TK by the right holders; (vi) exemptions of the rights; and (vii) exhaustion of the rights. Protection of TK under a *sui generis* system should be continued perpetually, in other words, there should be no time period of the protection or if there was any it should be renewable as long as the said TK remained inexhaustible. The development of a *sui generis* system with knowledge of existing IP systems would always lead the Committee to borrow parts of each form of those protections and adapt them to build a particular protection for TK. The Delegation stated that this was how new systems had always been developed, and the thorough study of the combination of each type of existing IP would help form a *sui generis* system for the protection of TK. The Delegation considered that any TK protection, *sui generis* or using the existing system, must encourage TK holders to continue using, keeping, and protecting their valuable knowledge. The Committee should not let the system become an indirect form of destruction of the accumulated knowledge. The Delegation said that TK, especially medical knowledge, should flow from industrialized countries to developing countries as well, and not only from developing countries to industrialized countries. The Delegation observed that the conclusion in document WIPO/GRTKF/IC/3/8 was premature and could prejudice future work of the Committee. It was too soon to conclude that the protection of TK already occurred in the existing IP system and that more work had to be done to accomplish the appropriate protection for TK.

217. The Delegation of Australia stated that it seemed from the interventions particularly on document WIPO/GRTKF/IC/3/7 that there were many views on this issue and that the Committee needed to determine what is taking place within domestic jurisdictions. It would be difficult for the Committee to go too far towards a theoretical framework for *suigeneris* protection without being informed of what was taking place in different jurisdictions and how this was working. The Delegations suggested this document was an excellent framework within which to analyze the work that was going on in individual countries, so as to see how individual *suigeneris* approaches were being used and developed. This would clarify the elements of *suigeneris* protection of TK. The Delegation believed that the Committee needed to analyze these domestic experiences and consider the advantages and the disadvantages of the particular approaches that particular jurisdictions had undertaken. The Delegation stated that the Committee also needed to add another dimension to the analysis of *suigeneris* implementations within domestic jurisdictions and that this would be a perspective on those implementations which document WIPO/GRTKF/IC/3/8 did not clarify. One critical question was how many of these *suigeneris* implementations in various jurisdictions had dealt with lining up the protection of TK with the other forms of IP of protection that were available within that jurisdiction. The Delegation stated that one of the concerns was to clearly understand how protection under a *suigeneris* TK approach would work with the existing copyrights system in such a jurisdiction or within the existing patents system where overlaps were present, why they were there, or where there were deliberate attempts to avoid overlaps and why that sort of information was there. The documentation put forward by the Secretariat was an excellent theoretical framework for the key elements of a *suigeneris* system, but the Committee needed to take that framework as not another theoretical step but as an analytical tool to look at laws in a range of jurisdictions.

218. The Delegation of Spain, on behalf of the European Union and its Member States, stated that the documents set out an appropriate first step in analysis. With regard to paragraphs 33 to 38, the Committee should continue to work to establish a dividing line between TK and folklore. The Delegation recommended that the different legal tracks be explored which may be complementary in analyzing these two facets. In relation to paragraph 37, it was necessary to define the scope of traditional TK with regard to biodiversity and leave folklore and handicrafts to be covered by other measures.

219. Referring to document WIPO/GRTKF/IC/3/8, the Delegation of Argentina observed that the debate had not ended within WIPO on the need to devise a *suigeneris* system for the protection of TK, and therefore endorsed the statement in paragraph 4 to the effect that it was still premature to identify the characteristics of a legal framework for TK. With reference to paragraph 6, the Delegation reiterated the need to keep clear the distinction between access to genetic resources and the intellectual property rights that might arise from the protection of inventions based on such genetic resources. It was up to the CBD to regulate access to genetic resources and also benefit-sharing for the States party to it on the basis of the work done by the Working Group on Access and Benefit-Sharing. Referring to Section II of the document, where the concept of TK was discussed, the Delegation acknowledged that the characteristic of the “cultural dimension” of TK was closely linked to the identity and essential dignity of each community. Therefore, with specific reference to what was said in paragraph 14, the Delegation considered that aspects relating to the cultural dimension went beyond the subject matter of intellectual property protection, which were economic in content. It was therefore not right to attempt to find an answer to such “cultural” questions within WIPO. The foregoing was borne out by paragraph 18, in which it was clearly stated that intellectual property was a set of principles and rules that discipline the acquisition of rights in intangible

assets susceptible of being used in commerce. Regarding the questions posed in Section V, paragraph 34, the Delegation considered that the reply to the first question on policy objectives should be considered the prerequisite for defining the other questions asked in subparagraphs (ii) to (vii). The Delegation said that it understood that a useful and effective system could be developed on the basis of a definition of the policy objectives to be achieved, which should themselves be defined at a national level in each of the Member States, but that many of the questions asked in paragraph 35 were beyond the competence and terms of reference of WIPO. For example, conservation of biological diversity, sustainable use of its components and systems established in response to Article 8(j) of the CBD, equitable sharing of the benefits arising out of the utilization of genetic resources, and preservation of the cultural context. With regard to paragraph 49, on databases, the Delegation pointed out that Argentina regarded the protection provided for at the international level as relating to the original or creative selection made, but not to the actual content (data or material) of the database. Finally, the Delegation felt that the contents of the documents should be revised in the light of the discussions held during the course of the session of the Committee, and given the fact that the document had been drafted in response to a request by four WIPO countries.

220. The Delegation of Brazil stated that they believe that progress in WIPO on this issue should not be detached from developments in other international fora, in particular the CBD, the WTO and the FAO. The Delegation believed that the Secretariat had adopted a correct approach for the preliminary discussions on this issue, as it allowed the Committee to gather relevant inputs from Members for consideration of the possible structure of an international *suigeneris* system. The Delegation agreed with the affirmation by the Secretariat in paragraph 16 that “(t)he identification of additional characteristics so as to identify more precisely the scope of protectable subject matter is, of course, a question to be addressed by national laws”. Regarding the reference to Article 7 of the Brazilian Provisional Measure on Access to Genetic Resources, the Delegation requested the Secretariat to issue a corrigendum so as to clarify that such provision did not limit the scope of protection to indigenous communities, but also to local communities, including those of African descent. Article 7 (ii) defined a “local community” as a “human group, including remnants of Quilombo communities, distinguished by its cultural conditions, that traditionally organizes itself throughout successive generations and through its own customs and preserves its social and economic institutions.” The Delegation expressed some reservations as to paragraphs 22 and 23 of the document. The Delegation stated that the paragraphs illustrated how TK could be partially protected by existing IPRs. The Brazilian position differed from the suggested approach in paragraphs 22 and 23, as protection of TK should be based on a holistic approach, given that the very essence of TK would be missed if a “piecemeal” model of protection were adopted. With regard to the *suigeneris* elements suggested in Part V of document WIPO/GRTKF/IC/3/8, the Delegation of Brazil believed that the Secretariat introduced a useful basis for discussion. On paragraph 35 (i), the adoption of such a policy objective should always be in strict compliance with Article 8(j) of the CBD, according to which the envisaged protection should not detach the knowledge from its cultural context, therefore, the Delegation did not necessarily see the questions asked in item (i) as mutually exclusive. The Delegation stated that item (ii) was still being considered by the stakeholders in Brazil, particularly the possibility in paragraph 37 of addressing biodiversity-related knowledge as a separate subject-matter from folklore. Concerning item (iii) regarding additional criteria for protection, the Delegation believed that the Intergovernmental Committee should attach particular importance to avoid that the preparation of databases or inventory with the purpose of documenting TK for the purposes of barring its misappropriation by third parties’ patent applications ended up contributing to aggravation of the problem. The Delegation was of the

view that documentation did not represent a condition in itself for the protection of TK, given that such protection could be given independently from the existence of databases. This clarification was particularly important in light of footnote 37 of document WIPO/GRTKF/IC/3/8, which contained a reference to a statement by Brazil on the use of databases as a means of protection of TK. Databases could be potentially useful for preventing unauthorized use, provided that the burden of proof was not on the holders of TK and that the registry in such databases was not a requisite for the protection of TK. Within the issues included in paragraph 38, the Delegation agreed with the affirmation by the Secretariat regarding the need for defining public domain in connection with TK. In this respect, the Committee should take into account different approaches by countries in handling information on TK, based on their national experiences. The Delegation referred to the presentations by the Delegations of China, India and Venezuela and found them to be extremely useful to demonstrate that the situation of TK regarding the public domain was approached differently among countries. The Delegation requested the document to be kept under discussion for the next session of the meeting.

221. The Delegation of Peru supported the proposal made by the Delegation of the Dominican Republic on the need to closely coordinate the work of this Committee with work being carried out in other committees, especially the SCP. Document WIPO/GRTKF/IC/3/8 was a good basis for discussion on the effective protection of TK. It stressed that such protection could not take place at the national level if there was no commitment at the international level. With regard to paragraph 7, the Delegation reiterated its belief that non-binding guidelines at the international level would not be sufficient for such protection. With regard to paragraph 8, it stated that the Committee should focus on an international framework for the protection of TK. The Delegation stated that the Committee should work with a view to establishing a system of protection of TK, and did therefore not agree to prioritize the establishment of a system for the *suigeneris* protection of databases. It added that the reason for this was that protection of TK went beyond databases and did not have to be limited to the protection of databases. The Delegation supported the statement made by the Delegation of Colombia with regard to prior informed consent. With regard to paragraph 34, it was indispensable to incorporate the concept of equitable benefit sharing derived from the profits which may be gained from the commercialization of TK. The Delegation of Peru supported paragraph 37 although it was not the only option or decision which was to be taken by indigenous communities. A consultative process should take place within each country. With regard to paragraph 38, concerning TK and the public domain, the Delegation stated that considerations should be given to the fact that a great deal of TK in the public domain had been disclosed without the authorization of indigenous communities. The Delegation fully supported paragraph 42 with regard to the customary law of indigenous communities and how they were vital to those communities. With regard to paragraph 43, which dealt with the fundamental issue of development, a concept that should be developed further, the Delegation felt that caution should be taken not to create conflicts between and among communities. The Delegation did not agree with paragraph 44, but agreed with paragraph 46 as indigenous communities have moral rights as TK was part of their cultural heritage. With regard to paragraph 48, the Delegation stated that prior informed consent should be given by the indigenous communities whether it be for academic or scientific purposes and for industrial or commercial use. However, it added that in the Peruvian draft Bill, there was also the need for a licensing contract with regard to the latter form of use. With regard to the conclusions of the document the Delegation agreed with the Secretariat that IP mechanisms are indeed important and could be incorporated in the design of a *suigeneris* system for the protection of TK.

222. The Delegation of Colombia supported the main thrust of the document but stated that the discussions should be broadened to include other elements which are necessary to better place TK systems not necessarily coming out of the IP system. The Delegation supported other delegations in that the system should not be granting or establishing rights but rather that a system should recognize the existence of rights of communities over their TK. The system should dispose in a positive and negative way of the right to use the TK by third parties. The Delegation felt that in order to design a *suigeneris* system to protect TK it was important to have an holistic and integrated approach, as stated by the delegations of the Dominican Republic, Brazil and Venezuela. The Delegation stated that indigenous communities had developed TK out of a way of life and that there was no thought in commercializing such TK. Thus protection would have to include the way in which indigenous communities use the TK rather than having them adapt to a new system. With regard to issues such as prior informed consent and contracting systems, the Delegation of Colombia felt that there was a need to establish a more logical and coherent relationship between these issues, systems regulating access to the TK with other international instruments. The Delegation stated that paragraph 18 was too dependent on IP and there was the need to revise and add other elements. With regard to paragraph 35 the Delegation supported those comments made by the delegations of Brazil and Thailand. Finally, the Delegation of Colombia stated that their comments were only an initial reaction to the document and were not definitive.

223. The Delegation of the United States of America supported the conclusions presented in document WIPO/GRTKF/IC/3/8, namely that it was premature to begin work on an international *suigeneris* system for the protection of TK. The Delegation shared the views of the delegations of Australia and Brazil, and wished to learn more about the experiences in implementing the various domestic solutions that had been developed thus far. The Delegation stated that the United States responded to concerns of native American tribes when drafting a number of laws; many of these were discussed in previous interventions. The Delegation believed that in the development of domestic policies, the examination of the issues outlined in paragraph 34 of the document would be a productive work program for this Committee. The Delegation suggested that interested Member States should provide submissions of their views on paragraph 34 for the next Committee meeting. In order to consider any possible new legal system to protect TK, the Delegation stated that there was a need to define the scope of the subject matter as well as the parameters for protection. The Delegation stated that they needed to fully understand what actual economic and non-economic damages had resulted and what future damages were realistically anticipated, to determine what kind of protection was needed. The Delegation stated that there was a need to know what current laws already protected. While other documents discussed other IP laws, other laws such as those of contract and tort law, including misappropriation, unfair competition and more rights could also be appropriate. The Delegation stated that an holistic approach, as discussed in the document, might not be effective where individual elements were subject to an authorized use or misappropriation. The Delegation further stated that limitations of any rights granted should consider the inclusion of the concept of fair use or fair dealing, a important element balancing the rights of the right-holder with those of the public, particularly for non-commercial or educational purposes. The Delegation maintained that an international *sui generis* TK legal regime might not be necessary. For example, traditional communities were already receiving benefits from the TK even in the absence of such protection, including through the use of contracts. An example was the U.S. National Institutes of Health (NIH) work on a protein Kinase C Activator known as Prostratinasan

HIV treatment. Prostratin was isolated from the stems of the small Samoan Tree *Homalanthus nutans*. Traditionally, this tree played an important role in Samoan ethnopharmacology, with the leaves being used to treat back pain, the root to treat diarrhoea and stem wood to treat yellow fever. Studies that led to the discovery of Prostratin as a treatment for HIV were developed through a collaboration between an American scientist and healers from the village of Falealupo under terms of a covenant negotiated with the village chiefs and orators, and with the concurrence of the Samoan Prime Minister and members of parliament. Under the covenant, over \$480,000 had been supplied to the village for schools, medical clinics, water supplies, trails, an aerial rain forest canopy walkway, and an endowment for the rain forest. In addition, if Prostratin is approved for marketing, then the profit research organization working on the drug would pay the following royalties based on net revenues: 12.5% to the Samoan government, 6.7% to the Falealupo Village, 0.4% each to the descendants of the two healers associated with the identification and formulation and use of the original genetic resource. Once the drug is approved and marketed, it would be distributed at minimal profit in developing countries. In the light of this example, the Delegation would like to better understand the realistic practical need for *suigeneris* norm setting at the international level.

224. The Delegation of Switzerland stated the document provided a good overview of the many and complex issues that arise when identifying general features of a potential *sui generis* system. It clearly showed that the establishment of a *suigeneris* system is a very complex task as many issues needed to be addressed for the system to be practical and workable allowing for the effective protection of TK. The Delegation felt that any discussion on a *suigeneris* system needed to be closely linked to the further analyses of the usefulness and applicability of existing IP mechanisms. This exercise would show where existing mechanisms were suitable and where a *suigeneris* approach might be necessary. The Delegation further stated that clarification was needed on the purpose of protecting TK and terminology before the issues raised in paragraphs 34 to 57 could be addressed in a fruitful and constructive way. Finally, the Delegation invited the Committee to take into account the work of relevant international fora, in particular the CBD.

225. The Delegation of South Africa, with regard to document WIPO/GRTKF/IC/3/9, agreed with the Secretariat that a particular definition may not be necessary, but that a broader definition can suffice. In so doing the Delegation stated that consideration must be given to the intentions and policies of national governments which inform legislation, as well as to instruments or international treaties which such governments adhered to, or intended to adhere to. Thus the Delegation felt that an holistic approach should be taken. The Delegation highlighted certain elements to be taken into consideration. In the first instance, national governments should move very fast in legislating for the protection of TK. The Delegation believed that an international arrangement would not be informed by domestic arrangements. South Africa did not dissent with the identified activities but rather felt that national governments should have targeted to legislate in the matter which would then enable the international community to take further action. The Delegation stated that traditional narration was done orally thus TK which derives from that aspect should be protected, whether written or unwritten. The Delegation stated that Roman/Dutch Law was used in South Africa and it recognized unwritten issues. The Delegation discussed the issue of customary law and its recognition of oral traditions, stressing the need to distinguish what customary law meant and in addition to distinguish the customary law that came before colonization and that which came after colonization. The Delegation stated that certain customs came into being during both dispensations. Thus the TK that mushroomed during

those periods should be catered. The Delegation stated that they agreed to both individual and collective ownership. If an individual used a traditional means he should be protected; if it was a community, they must be protected. With regard to the issue of databases and copyright, the Delegation appreciated both dispensations but the two were not necessarily the same. While the Delegation appreciated the interventions made by the delegations of India, Venezuela, and China on the work undertaken, it noted that their work was informed by the policy directions of their governments. With regard to the law of patents the Committee should liaise with the Standing Committee on the Law of Patents. The Delegation believed that the issue of public domain was difficult and should be further explored. The Delegation further discussed issues already raised by other delegations such as benefit sharing, the law of contract, licensing, franchising, and access to genetic resources. With regard to access, the Delegation considered the need for the establishment of a recognized authority, within national boundaries, to regulate access to genetic resources. The Delegation further stated that while certain communities wished to negotiate directly with companies, the Delegation was of the view that governments should set up agencies which could act and assist those communities that did not wish or have the capacity to do so. The Delegation stressed the issue of biopiracy and invited the Secretariat to consider this issue. The Delegation stated that the Committee should not forget regional customary law when discussing the issue of international customary law. For example, when several nations or different communities share similar TK customary international law should not be forgotten. The Delegation supported the document as a discussion document but maintained that work on the issues had already begun to inform their policy directions and legislation, which cover many disciplines and many government departments.

226. The Delegation of Panama stated that the special IP system on collective rights of indigenous peoples was developed to protect and defend the cultural identity and TK of the indigenous peoples of Panama. The law, an initiative of the indigenous peoples, was supported by the government. It was slightly different from the Peruvian example outlined earlier by the Delegation of Peru. In the case of Panama, the Delegation stated that it was the indigenous peoples themselves that actually submitted the bill. The Delegation agreed with the Delegation of Colombia in that the protection of collective rights was a way to avoid losing TK and dealt more with the recognition of ancestral rights. The Delegation stated that the current framework of the *suigeneris* laws system was a combination of the traditional IP system and the use of innovative elements. The IP components were adapted to the particular nature of TK. The Delegation of Panama stated that TK comprised both of tangible and intangible expressions of culture; inventions that included genetic resources, medicinal plants and seeds; knowledge of features of flora and fauna; oral traditions, designs, visual arts, and performances. It also stated that Panama took an holistic view of the universal aspects and dimensions of TK. The government also extended protection from the misuse of TK, inventions based on TK and expressions of folklore by third parties, and use was governed and limited by the law. The law provides for TK authorities and they are given power to govern use and access. The law also encompasses other vital areas. It sets out who may have access to the database, on what terms, how the database is structured, what authorities regulate it, and what the requirements are for entering information in the database. The Delegation stated that emphasis was placed on prior informed consent and fair benefit-sharing. All forms of IP as per law 35 which governs IP, require power of attorney but in this instance, power of attorney was not required and the registry was free of charge for indigenous peoples and that there was no expiration date. TK was protected insofar as it protects cultural identity and where commercial use is involved. The register, regulated by the department for collective rights, was set up especially for this purpose. It has a public

database but the information it contained was confidential. Article 12 of Law 20 stated that access to public registers, including processes and development techniques submitted by indigenous communities, remain confidential. The data, of use to researchers and communities, submitted by indigenous peoples have a right over the data. Most of the information in the register was digitized and there was a regulation that covered the transfer of knowledge and customary practices. The Delegation further stated that the example given by the Delegation of Peru regarding the setting up of a local register and operated by the indigenous people themselves with a view to preserving their knowledge was an extremely interesting initiative and was similar to Panama's with regard to the application of cross-border measures. For example, offices were set up in customs offices and duty-free zones, however this confers no rights. In keeping with the IPLaw, the offices were connected online to the database of the national fund for patents and trademarks. The Delegation stated that the exercise had been useful. The law also sets out other functions to be created by the newly established department and those functions included the examination of submitted applications, thus creating a standardized typology for expressions of folklore; enforcement of existing laws pertaining to the protection of TK and expressions of folklore; the creation of new laws in the area of TK and expressions of folklore; the promotion of IP protection for those rights; the provision of technical assistance and capacity building; the facilitation and coordination with domestic and international organizations; the cooperation between Panama and other countries so as to make sure rights holders derive benefit. From an administrative point of view, the Delegation stated that the position of a special examiner for indigenous collective rights was created and this person would be a civil servant having the power to examine submitted applications. Additional measures to what already existed in the IPLaw were introduced, including specific measures for enforcement and procedures for infringement and attribution of authorities who have the power to investigate infringement. The Delegation said that this law, like all IPLaws, was territorial in nature and if there was a dispute between territories in two different countries the principle of reciprocal protection could be applied. When the rights being protected were distributed throughout a number of communities then each community must meet the requirements set out, and if the rights were shared among a number of communities then the benefits were shared collectively as well. Moreover, the law included provisions for disclosure and promotion in public institutions in keeping with indigenous councils' decisions. Finally, the Delegation stated that the law was in place to carry out all tasks.

227. The Delegation of Norway stated that, while it agreed to the suggestion in document WIPO/GRTKF/IC/3/8 that existing IPRs may effectively protect certain elements of TK, there were real challenges to be faced. For example, medicinal plants used in traditional medicine would not be easily protected by plant variety protection systems where criteria such as uniformity were central. With regard to the development of an international *suigeneris* system, the Delegation maintained that it was premature to develop and implement a system given the many uncertainties regarding the pros and cons of such a system. However, the Delegation drew the attention of the Committee to Article 10 *bis* of the Paris Convention which contains measures against unfair competition. This article stipulates that the countries of the Paris Union were bound to assure nationals of such countries effective protection against unfair competition. According to the article, any act of competition contrary to honest practices in industrial or commercial matters constituted an act of unfair competition. The article further mentions some examples of prohibited actions. The Delegation suggested that the Secretariat could discuss whether it would be possible to provide protection for TK along similar lines, using Article 10 *bis* as a model when considering the framework of a *suigeneris* system for TK. The idea, they said, would then be to have a general international norm that

obliged the States to offer protection against unfair exploitation of TK. Such a general norm could be supplied with internationally agreed guidelines on how to apply the norm. One aspect of such an angle to the problem would be that TK would be protected as such without any requirements of prior examination or registration, and judicial decisions in concrete cases on whether there had been an infringement of the TK protection, would be taken on the basis of a flexible norm referring to fairness and equity. The Delegation indicated that such internationally agreed guidelines would favourably assist national judges when applying such a norm. One of many possible objections to such a protection scheme could be the difficulty for a local community to obtain such a court decision in a foreign country, stating that there had been an unfair exploitation of the TK and that compensation had to be paid. Nonetheless, the Delegation said that it could be argued that the mere possibility of such sanctions would serve as an incentive for potential TK abusers to obtain prior consent from the TK-holder and to participate in benefit-sharing arrangements. They added that the strength of the system would be that it was both simple and flexible. Finally, the Delegation stressed that the voice of indigenous peoples and local communities was an important factor when deciding upon options for TK protection, and that in the case of Norway this meant consultations with *inter alia* the Saami Parliament. The Delegation emphasized that its comments were only preliminary and tentative reflections on one possible angle to the question of protecting TK.

228. The Delegation of the Russian Federation supported the statements made by the Delegations of Australia, Brazil, the United States of America and those countries which had expressed an opinion on the need to discuss the document at the local level. The Delegation stated that, first, it may be necessary to define what types of TK cannot be protected by the existing IP system, as well as their specific features and, based on these features, try to formulate responses to the questions raised in paragraph 34 of the document, relating to the definition of the purpose of protection, criteria, owners and so on. This would enable the legal framework of a future *suigeneris* system of protection for TK to be defined. *Inter alia* the question of the enforcement of rights was very important. Who would defend their interests of owners and in what way? Is it the State? Or the public representatives of indigenous peoples? For this purpose, the Delegation stated, it is desirable to become familiar with the national experiences of Members, especially those who have already worked on devising a *sui generis* system for the protection of TK.

229. The Delegation of Mexico believed it was not premature to deal with a *suigeneris* system. Progress made in WIPO was important to progress in other forums. The Delegation stated it was important to go deeper into the IP system, and to define a *suigeneris* system within the IP system. The Delegation supported the document remaining open, and also suggested that there should be further work done to define the “public domain.” The Delegation of Mexico suggested that the discussions on documents 7 and 8 would take time. In the interim it suggested caution in the use of databases and noted that the Chinese and Indian situations were unique to those countries, and their solutions would not necessarily be appropriate for African and Latin American communities.

230. The Delegation of New Zealand reaffirmed its previous statements that consideration of *suigeneris* mechanisms is both necessary and important, which statements had been made in relation to domestic work being undertaken to determine whether measures in addition to IP are required to protect the TK of Maori. At the same time, New Zealand would not encourage the consideration of an international *suigeneris* system at this stage. It was first necessary to fully examine the use of existing IPRs at the domestic level. In addition, the Committee should examine more closely the *suigeneris* systems adopted by a number of Members. This

might be done with reference to the key elements identified in paragraph 34 of document WIPO/GRTKF/IC/3/8, a key focus of which should be the policy objective of the protection afforded. Noting that the Delegation had not yet had time to consult with Maori groups on the document, the Delegation however supported the comments made by the Delegation of Mexico regarding databases and registries of TK. Particular care, it stated, should be taken in countries such as New Zealand where there was not a long history of recording TK.

231. The Delegation of Senegal stated that there should be no dichotomy between TK and folklore. The preservation of TK was important for national heritage and to prevent undue exploitation and commercialization. In this regard, international protection was very important.

232. The Delegation of Zambia stated that there should be a truly *suigeneris* instrument at national and international levels, which should meet the aspirations of TK holders and custodians of GR and folklore, and be developed with the full participation of communities. TK systems should be the foundation for developing a *suigeneris* system. To enact a *suigeneris* system in the model of the current IP regime would render the *suigeneris* system useless. The Delegation stated that the questions set out in the document were helpful. However, the ownership of knowledge and innovations is an alien concept to TK and TK systems. A further element of a *suigeneris* system is its scope, which should reflect the aspirations of TK custodians and those who depend upon TK. The issue of illegal use of TK must be included in any *suigeneris* system, which should, the Delegation added, be built around the fair and equitable sharing of benefits derived from the use of TK. In Zambia, TK is vested in TK systems and not in individuals as stated in paragraph 42 of the document. A *suigeneris* system should go beyond the issue of damage to custodians of TK to issues of illegal use and misappropriation as well as the fair and equitable sharing of benefits. In Africa, the Delegation stated, TK and TK systems transcend artificial political boundaries, which was why a global *suigeneris* system was needed.

233. The Delegation of India shared the concerns of others for the development of effective mechanisms for positive protection and benefit sharing in respect of the public domain as well as undisclosed TK. The Delegation suggested that the document be kept open for discussion and further responses. Use of existing IPRs and recourse to *suigeneris* mechanisms need not be mutually exclusive and should be concurrently examined, the Delegation stated.

234. The Delegation of Egypt pointed out that it had been one of the delegations at the second session of the Committee that had supported the preparation of a document setting out elements of a *suigeneris* system. It stated that a *suigeneris* system was not foreign to the IP system. There was also a need to understand the term "*suigeneris*." The protection of TK should be of unlimited duration. Databases should be set up but not used against stakeholders and should not be open to all. TK was neither old nor new, and was a common denominator between folklore and genetic resources. The Delegation stated that one should not separate the three elements. However, this did not mean one could not make a distinction between genetic resources and TK. In respect of right holders, this would differ from country to country. In some countries, such as Egypt, it was not possible to distinguish between communities. In such cases, the States should take responsibility and provisions should be made for a competent authority to which applications could be made for access and benefit sharing (which might not be material profit but also technological benefit sharing).

235. The Delegation of Canada advised that its comments were preliminary, and, in particular, that it was not making detailed remarks regarding the questions set out in paragraph 34 of the document. The Delegation stated that the Committee had been discussing at least three approaches to protecting TK as IP: (1) further studying and clarifying the applicability of existing IP laws to TK; (2) identifying possible new elements to add to or alter existing IP laws (referred to in the document as "*suigeneris* elements of existing IP systems"); and (3) elements of an entirely new and distinct system for TK protection (referred to in the document as "elements of a *suigeneris* system"). While these approaches were not mutually exclusive, Canada's preference was to focus on approaches 1 and 2. The Delegation stated that it was premature to identify any international legal framework specifically adapted to TK. Further exchange of national experiences would assist in identifying the scope of workable and effective mechanisms, and the Delegation suggested keeping the document open for Members to provide further practical information on national experiences. The questions set out in paragraph 34 of the document were a useful starting point, particularly the identification of policy objectives. For this purpose, Canada suggested that the Committee consider how to incorporate the perspectives of TK holders in identifying the relevant objectives. While recognizing the holistic nature of TK, the Delegation suggested that in order to divide the work into manageable pieces, further work of the Committee on elements for a *suigeneris* system follow two tracks, one for technical TK and the other for cultural expressions/expression of folklore. Finally, the Delegation suggested that the issues identified in the document might be used in redesigning the survey for document WIPO/GRTKF/IC/3/7.

236. The Delegation of Fiji stated that the document was a useful foundation to build upon. The Delegation supported a holistic approach to TK, covering oral and codified TK. Communities had developed TK in response to their environment. The Delegation noted that Fiji had included the protection of TK within its Sustainable Development Bill dealing with environmental matters. The Committee's work should take environmental concerns into account and work with other bodies dealing with the environment. The protection of TK should be perpetual, the Delegation concluded.

237. The Delegation of Niger thanked those countries and communities that had presented their databases which were found very interesting and useful. The policy objectives for TK protection were very important and it was necessary to sensitize TK holders for the promotion of their TK. The establishment of national databases was very important. Finally, the Delegation suggested that the Secretariat of WIPO continue to cooperate with the working group established under article 8j of the CBD which is also working in a *suigeneris* direction.

238. The Delegation of Ethiopia stated that although there were many ways and means of protecting TK, a *suigeneris* approach was the most appropriate. Ethiopia had drafted a proclamation on access to GR which addressed community rights and benefit sharing. It was also exploring the possibility of adapting IPR to protect TK. However, the lack of a proper inventory and documentation of TK had constrained efforts to protect TK, positively and defensively. The experiences of China, India and Venezuela were very interesting. There was a need, underlined by other Members, for the provision of technical assistance to developing countries and the Delegation called upon WIPO and other organizations to cooperate in this area. The setting up of effective national protection systems would enhance the creation of an international system.

239. The Delegation of Sudan attached significant importance to the document and said it was the first time that a basis was established for discussion of a *suigeneris* system for the protection of rights. The Delegation was of the opinion that paragraph 34 of the said document constituted an appropriate structure and starting point for discussions and consideration by Member States and the Secretariat in order to reach a comprehensive system for the protection of TK. The Delegation underlined that the meeting was not required, at that phase, to discuss details of the *suigeneris* system. It supported, in general, the contents of the document and looked to other results of the work carried out by the Secretariat and Member States. Moreover, the Delegation expressed support for the observations and excellent remarks made by the Delegation of Egypt.

240. The representative of the Andean Community stated that there was no dichotomy between conventional IP and *suigeneris* protection, as they were complementary. The representative acknowledged that recourse to trade secrets, collective trademarks, geographical indications, and copyright and related rights, for example the moral protection and the “droit de suite”, were interesting measures for the protection of TK and as elements to be considered when constructing a *suigeneris* system. However, such measures provided segmented protection for certain elements and did not protect TK as a whole. With regard to folklore, the representative said that it must be kept in mind that the UNESCO-WIPO Model Provisions proposed are a regime that related to expressions mainly of an artistic nature and these were only a type of TK. Such protection granted was only of a defensive nature against abusive or unfair use. In light of all of the above issues, the representative stated that a *suigeneris* regime appeared desirable and necessary. The Andean Community emphasized that it recognized all TK as the product of human intellect that had contributed and should continue to contribute to human development. TK therefore deserved to be protected in full in line with their holistic, indivisible nature. With reference to paragraphs 7 and 8 of document WIPO/GRTKF/IC/3/8, where the issuance of non-binding guidelines as an alternative for the treatment of TK was elaborated, the representative observed that such an alternative did not appear to be in line with the Committee’s mandate and the nature and evolution of the debate thus far. The representative stated that the endeavour was to create an international and binding *suigeneris* regime, and hopefully a multilateral one. While the elements considered in the document could be part of a possible legal framework they did not exhaust the list. As regards to the policy objectives of the protection, the representative stated that the approach could be double-faceted, where the rights of exclusion as well as protection against undue and unfair use were a minimum platform. In support of the Delegation of Colombia, the representative said that the regimes should not only have a defensive nature but should also promote, develop and help to capture TK. Two additional elements were of the essence for the regime, namely prior informed consent and fair and equitable distribution of benefits, as referred to in article 8j of the CBD. The representative further suggested that paragraph 35 be amended to clearly reflect that it was not the regulation of access to genetic resources that was being sought but rather that there be protection of TK through IPRs. Furthermore, when considering a *suigeneris* regime, any type of TK, without *a priori* exclusions, must be taken into account and the term “traditional knowledge” need not be defined. In addition, the classification of TK in lists that could become arbitrary and incomplete must be avoided. Referring to paragraphs 36 and 37 of said document, the representative agreed with a holistic approach to TK, however, a theoretical distinction between TK related to genetic resources and TK of a cultural nature would be useful. This exercise would show that the TK related to genetic resources possess more urgent problems, such as the identification of its origin and the sanction of biopiracy. Such distinctions should not be interpreted as a means to indirectly regulate access to genetic resources. In this context, consultations with indigenous and local

communities were necessary. As a side, the representative pointed to certain corrections necessary to paragraph 16 of the document dealing with Andean Community Decision 391. This Decision did not regulate TK, not even TK restricted to genetic resources. Instead it was the supranational regime for access to genetic resources in the Andean region and references to TK were only to regulate prior informed consent under a contractual scheme. Regarding the criteria for protection, the representative stated that one should not lose sight of the criterion of novelty. While the document stated that the term traditional knowledge did not mean “old” but had to do more with its creation it did not solve the problem of TK which had already entered the public domain and consequently the loss of novelty. Additionally, paragraph 38 affirmed that disclosed TK cannot be recaptured without affecting legitimate expectations and rights of third parties. The representative contended that such statement could not be proven valid in all circumstances as there was no legitimate right that could be opposed on the grounds of misappropriation or infringement of the law. Thus TK disclosed without the consent of its holders should not be considered in the public domain. Given the difficulties in the use of the concept of novelty, the documents suggested to use the concept of “commercial novelty”. The representative said that while they understood that IPRs were mainly a system to guarantee the commercialization of intangible goods, there were practical problems to *a priori* identify the actual or potential value of certain types of TK, which under such an approach could lead to no protection. On the other hand there was a theoretical link between “commercial novelty” and a temporal limit for the protection which seemed to suggest a lack of conformity with the non-temporal nature of TK. An alternative approach could be to omit any reference to novelty and resort to concepts such as “originality” and/or “imminence”. The first is used in copyright law and the latter is alluded to in the document when mention was made of the necessary link between TK and the community. Such considerations however require further debate. Referring to the issue of ownership, the representative acknowledged that while IPRs focus on physical or natural persons within a system of private rights, a new analysis may lead one to conclude that there may be other types of systems which recognize collective rights. The representative pointed out that “collective rights” should not be confused with the concept of “plurality of ownership”, thus reference to stakeholders of a company was a misconstruction, and the suggested alternative designating the State as the custodian of community rights was unclear. Regarding the notion of exclusivity, it was important to ensure that rights be effectively exercised, and communities be able to choose whether to exercise private, public or collective rights, in accordance with customary laws. With regard to regional TK, the representative disagreed with paragraph 43 where the sharing of rights among two or more communities could be seen as a collusive agreement infringing competition law. Such sharing was a common exercise of a community’s collective right. The representative agreed with what was stated in paragraphs 48 and 49 of the document. Assuming that not only the layout but also the content of the databases were protected, the representative said that databases could be used as a tool for accreditation rather than as a center around which to build a *suigeneris* system. The representative agreed with paragraph 56 of the document. Furthermore, as effective IPRs depended on reciprocity, surveillance and sanctions at the international level, the representative proposed the introduction of a missing element to the list outlined in paragraph 34. The proposal applied, on the one hand, to the enhancement of these elements in existing IPRs in relation to patented inventions having illicitly used genetic resources and/or TK, that is, disclosure of origin should be a requisite for patenting and/or declaring null patents granted, and on the other hand, to the introduction of these aspects in a *suigeneris* regime. Finally, any time frame for protection could be set up. But, given the timeless nature of TK, limited time frames were not appropriate. Time frames were not a substantive element of protection.

241. The representative of UNCTAD pointed out that the greatest value of TK was to the TK-holder themselves. Some 80% of the world's population relies on TK to meet their basic food and health needs. This is particularly true for the poorer and more vulnerable segments of societies. In most of Africa, for example, the ratios of medical doctor to population are in the range of 1:5 - 10,000, whereas the ratios of traditional healer to population are in the range of 1:200 - 500. Hence, an extremely important objective of any system to protect TK was the preservation of TK and promoting its further development. The World Bank's community-to-community TK exchanges were an interesting mechanism in this context. The protection of TK at the national level was also very important. This could raise awareness of the value of TK, promote its preservation and further development, and prevent misuse or unauthorized use domestically. However, it would not prevent unauthorized use in other countries. Thus, eventually, there will need to be discussions on an international framework for the protection of TK. In this regard, it would be quite helpful if, in the revision of document WIPO/GRTKF/IC/3/8, the WIPO Secretariat could include a section on possible modalities for international protection. This could include, for example, a treaty with minimum elements, mutual recognition agreements, and a *suigeneris* databases system comprising either a single global database or linked national and community databases. She noted that bilateral agreements were another option, but that transaction costs tended to be quite high. Therefore multilateral agreements were ultimately preferable. She hoped that the WIPO Secretariat could share their technical expertise and knowledge of other international agreements relevant to this subject. She mentioned that having some idea of the possible modalities for an eventual international framework could help countries currently developing national systems.

242. The Delegation of China stated that in document WIPO/GRTKF/IC/3/8, the conception of a *suigeneris* mechanism included many valuable thoughts which were worth studying and discussing. The Delegation considered that the concept of TK was a relatively narrow concept, parallel to that of folklore, as reflected in the title of the Committee. Therefore, in defining the TK, the Delegation preferred to have a clear delimitation between TK and folklore so as to facilitate the work of the Committee. The Delegation cautioned that otherwise the crossing and overlapping of conceptual connotations would affect the further discussions of the Committee.

243. The Delegation of Colombia stated that for its country one of the most important issues was the concept of the public domain in relation to TK. The Delegation stated the importance of not merely plugging TK into existing systems of IPRs and requesting TK holders to adjust to these systems. Rather, it suggested, the Committee should try to imagine the politically and culturally most responsible way of responding to the needs of countries and communities which were TK holders.

244. The representative of the International Chamber of Commerce (ICC) stated that businesses' contribution to this process was both relevant and useful, and that any resulting *suigeneris* systems should concentrate on practicality if it were to have any value. The representative questioned what the policy objective the Committee was aiming for through a *suigeneris* system and added that solutions should be culturally appropriate. The representative stated that they represented businesses throughout the world both in developed and developing countries. The representative stated that when considering the protection of TK, businesses have a useful contribution to make because they understood IP although they look at it from a business angle. The representative emphasized that a system should be both

practically and theoretically good. The representative stated that the important question was highlighted by document WIPO/GRTKF/IC/3/8 in paragraph 34 with regard to policy objectives. He stated that there were an number of policy objectives but referred mainly to the prevention of biopiracy where he stated that the business community would like more clarity. The representative suggested the Committee take into account of the CBD as one of the policy objective as a *suigeneris* system of protection should be consistent with that of the CBD. The representative suggested that an important policy of a *suigeneris* system should be used as widely as possible and that an international system had to be effective in all cultures. The representative supported the proposal of Canada in trying to divide matters, rather than the holistic approach, and treat each subject-matter differently as already conducted extensively in the IP sphere. He added that it was possible to have discussions on the public domain but things within the public domain generally need to remain there with the exception. The representative concluded that a similar and possibly practical idea was the idea that TK can be protected indefinitely.

245. The representative of the Saami Council reiterated that legal systems designed to protect indigenous genetic resources, TK and folklore, should they be adequate, cannot be elaborated solely from an IP perspective. The representative stated that document WIPO/GRTKF/IC/3/8 thoroughly highlighted what they believed to be a fundamental difference between IPRs and TK; namely the intrinsic connection between TK and the culture and environment in which it was developed, in turn per definition implying that TK vest foremost in the people or community collectively, and not in any individual creator. The representative stated that this distinction between TK and IPRs become evident in the case of indigenous peoples. The representative stated that indigenous cultures were distinct in that they focused on the importance of the collective rather than of the individual and therefore stated that international law acknowledged that indigenous peoples' rights, contrary to other peoples' rights, were collective rather than individual in nature. Forming a vital part of indigenous peoples' collective cultures and identity, for indigenous peoples, TK, per definition, acquires a human right dimension, as indeed acknowledged by the Secretariat in the document under discussion, paragraph 14. The representative commended the Secretariat for this insight, and urged all Members to carefully consider this fact, when discussing how to protect indigenous knowledge as protecting indigenous knowledge was the same as awarding indigenous peoples the right to preserve, and develop, their cultures. He stated that a holistic approach was required when elaborating a system that could protect TK. Referring to the statement of the International Chamber of Commerce, the representative stated that they did not want a system designed that exposed their culture to Europe. The representative recognized that existing IP mechanism could sometimes serve to protect various expressions of TK, and obviously support any effort to enhance the capacity of indigenous people to utilize such mechanisms, he urged the Intergovernmental Committee to start elaborating on a *suigeneris* system for the protection of TK without further delay. The representative joined the Delegation of Colombia, and underlined that TK holders should not be forced to adopt to IP regimes that are not designed to protect TK. He stated that most existing IP mechanisms were limited in time, which meant that even if protected for a limited time cultural expressions would eventually end up in the public domain and that this was inadequate as protection for culture cannot be limited in time and should exist indefinitely. The representative reiterated that indigenous knowledge holders had not developed their knowledge for commercial use. The representative added that a *suigeneris* protection should include also TK already in the public domain, and reiterated that it was crucial to apply the principle of prior and informed consent, when discussing a regime that can protect TK. He added that a *suigeneris* system should include all knowledge that formed part of the relevant people or communities culture, since

the system should be designed to protect the culture and not the knowledge as such. The representative stated that indigenous cultures were oral rather than written oriented and therefore must also be protected, as it is not documented. He concurred with many other delegations that any regime intended to protect TK should respect the customary law of the indigenous peoples and communities in question.

246. The representative of the Inuit Circumpolar Conference (ICC) stated that their goals included the protecting of their cultures and the developing of their economies. The representative stated that they regarded some of their TK as being shared based on their sense of responsibility and obligation to the communities, and that TK was evolving as well as their culture and political systems. Even though Inuits were using the existing IP systems, this did not imply that they were effective and their TK continued to be misused and misappropriated for commercial gain due to the lack of adequate alternative mechanisms. The representative stated that *suigeneris* elements should include the structure of indigenous land claim agreements and self-governments systems as possible models for establishing those types of regimes. The representative did not agree with the position of the International Chamber of Commerce regarding the public domain.

247. The representative of the Indian Movement *Tupaj Amaru* stated that IP like international law has evolved leaving indigenous peoples, their interests and their rights on the sidelines. The representative stated that the concept of IP right is a western one based on private property and individuals. The representative stated that the Durban Conference Against Racism and Discrimination demonstrated the positions of government in the protection of the rights of indigenous peoples. The representative further added that the Committee should recognize the customary laws of indigenous peoples as related to the protection of their TK, their laws, their indigenous technologies as well as ecological knowledge. The representative referred to groups within the United Nations that attempt to deal with the issue of IP as it relates to indigenous peoples. The representative invited the Secretariat and WIPO to participate in these meetings. The representative concluded that the international community must accept that indigenous peoples have their own collective rights and that documents should take into account of customary laws.

248. The Secretariat advised that document WIPO/GRTKF/IC/3/8 was based on an empirical approach, and attempted to record and clarify the range of policy choices and mechanisms that are available. This being the reason for the focus on existing mechanisms which may include established IP mechanisms, national *suigeneris* systems, and customary laws. It stated that the Committee has discussed the expansion of the IPC classification system to take account of TK which in itself was a *suigeneris* form of element. The Secretariat noted with regard to the future of the documents some delegations had requested that document be left open and the questionnaire would be refined under document WIPO/GRTKF/IC/3/7.

249. The Chair concluded that:

- many delegations were still in the process of consulting the present version of the document WIPO/GRTKF/IC/3/8 and that they will continue to do so;
- the Secretariat would receive comments and observations from Members in writing on (i) the contents of *suigeneris* TK systems and (ii) the definition of TK by September 15, 2002;

- the Secretariat should prepare an amended and updated version of document WIPO/GRTKF/IC/3/8, taking account of (i) the differences between the folkloric track or biological resource track; (ii) the integration of the analysis of national *generis* systems that have been implemented as well as their experience; and (iii) the suggestion made by the Delegation of Norway that the Secretariat could discuss whether it would be possible to provide protection for TK along similar lines as in article 10 *bis* of the Paris Convention concerning unfair competition; (iv) taking into account the intricate issue of the interface between *suigeneris* systems and traditional IP law; and
- an amended document 3/8 could be the basis of further discussion in the fourth session.

The Committee agreed with this conclusion.

Operational Definitions – Traditional Knowledge (WIPO/GRTKF/IC/3/9).

250. The Delegation of Fiji stated that it considered the document useful for discussion purposes, and suggested that it be kept open for further discussion, as was the case with document WIPO/GRTKF/IC/3/8. A practical and working definition at international level would need to be broad, and Members could be invited to propose a set of elements for such a definition. The Delegation added that Documents WIPO/GRTKF/IC/3/8 and WIPO/GRTKF/IC/3/9 should be discussed together in future.

251. The Delegation of Venezuela shared the views expressed in paragraphs 7 and 9 of document WIPO/GRTKF/IC/3/9 and believed that a definition of what constitutes TK was not necessary for the development of an appropriate intellectual property system, any more than it had been necessary for the intellectual property instruments. The Delegation stated that the decision on the term to be used, with a view to protection, should reflect the protection objective pursued so as to avoid a situation where it was limited or where the door was left open to abuse of the system. The Delegation also emphasized that differences existed between the concepts of “traditional” and “customary”. “Customary” seemed to be confined to behavior, whereas “traditional” meant those traditions maintained and which encompass spirituality, mysticism, ethics and culture. Furthermore, the TK of communities gives rise to technology for the meeting of their needs that are environmentally appropriate. The Delegation requested the Secretariat of the CBD to inform the Committee on progress in this subject area. The Delegation stressed that TK cannot be disintegrated or fragmented to adapt to different forms of intellectual property protection, which could happen if attempts were made to accommodate it within traditional forms of intellectual property protection. TK embodied elements that were sacred, spiritual and cultural, which all have to be taken into consideration. Any attempt to break TK down into its component parts for separate protection is liable to destroy its very nature. The Delegation reminded the Committee of certain characteristics of TK. They included the following: TK is a collective intellectual creation; it is a creation of the intellect of a people, manifested through knowledge, practices and products; TK is handed down from generation to generation; its holders have received the intellectual creation as a legacy from their ancestors; the biodiversity associated with it has been protected by use without abuse; it may or may not be embodied in a physical medium. Some people have set it down in written or symbolic form, while others have preserved it in oral form; it is linked to the material production, the ethics, the aesthetics and the spirituality of those peoples; it is living knowledge, which is enriched with the intellectual production of

amultitudeofindividualswhoarecumulativelyinnovatingallthetime;itiscollective knowledge that can be administered by entities or individuals, and it constitutes the identity of the people that possess it.

252. The Delegation of Argentina stated that the documents served to animate the debates on the subject of TK but that a broadening of the present scope of protection might lead to the removal of the subject matter to be protected from the public domain. This issue was a matter of concern to Argentina. It considered that, in principle, there was one basic qualification for intellectual property protection that TK did not possess, namely novelty. With regard to the time aspect of protection, as in the case of copyright and related rights, and also in the case of patents, the Delegation considered that protections should be finite. The disclosure involved in intellectual property, which enabled society as a whole to benefit from the knowledge and know-how and the resulting technological innovation, and which in turn enabled the knowledge acquired to be developed further, had been one of the cornerstones in the construction of modern systems of intellectual property protection. Taking into account the various forms of expression that TK could take (rituals, curative practices, medicinal recipes, symbols, designs and religious events, most of which were transmitted by word of mouth, and the exact origin of which in many cases was unknown), the Delegation considered that any attempt to find a definition encompassing all such aspects at the international level would be an extremely difficult exercise. As stated in the document, there was no one definition of “invention,” but rather an enumeration of conditions and requirements (novelty, inventive step, industrial applicability) that allowed such inventions to enjoy patent protection. By the same token, the Delegation considered that it was not necessary at the present stage to direct work toward the adoption of a definition for “traditional knowledge,” but that one should rather concentrate on trying to work out, if possible, conditions for the protection of TK in cases where it was not in the public domain, a subject that in any event would have to be clarified before any work could be done in that connection.

253. The Delegation of Sudan stated that a definition of TK should be global, comprehensive and detailed. The documents should remain on the agenda for discussion at future sessions of the Committee. Finally, the Delegations supported the previous statements made by Venezuela, Egypt and others that the documents of the Committee should be available in all the working languages.

254. The Delegation of the United States of America noted that no real understanding could result from a discussion in which there was no common understanding of the subject at hand. As a first step towards a definition, the Delegation stated that the Committee could agree that by the next meeting, interested Member States identify in writing and with specificity what they meant when they used the phrase TK, including whether folklore was included or not. The Delegation further suggested that any definition make clear that they were distinct issues that must be addressed separately, as suggested by the delegation of Spain on behalf of the European Community.

255. Regarding document WIPO/GRTKF/IC/3/9 on Operational Terms and Definitions, the Delegation of Brazil, in an earlier intervention, agreed with the considerations made by the Secretariat that the absence of a definition of the term “traditional knowledge” did not prevent discussion on a *sui generis* system for the protection of TK, based on the well-grounded arguments that the Paris Convention, for instance, did not provide a definition for patents (as explained in paragraph 9 of document 3/9). Given that TK was intrinsically rooted in local traditional communities, it would be particularly difficult to reach a consensual definition that

could apply to the local reality of different communities. Consequently, it would be more efficient to leave operational terms and definitions for TK for the national legislation.

256. The Delegation of Canada recognized that the process of settling on a uniformly acceptable definition of TK was less significant than considering the underlying subject matter TK was to cover and the form of IP protection it was to be afforded. While the document was useful in its exploration of elements of TK, the multiplicity of national experiences suggested that arriving at a precise definition of TK at the international level would be difficult if not counter-productive at the present time. In this regard, the Delegation agreed with Brazil that any single definition would not be likely to reflect the local realities in which TK was rooted. Nor for that matter, was it necessary to have a definition in order to continue with the rest of the work of the Committee. Finally, the Delegation agreed that the term traditional knowledge should continue to be used by the Committee, recognizing that traditional knowledge included but was not limited to indigenous knowledge.

257. The Delegation of Russia believed that all the definitions in document WIPO/GRTKF/IC/3/9 relating to the domain of TK, folklore, cultural heritage were worthy of consideration. The Delegation stated that the definition of any notion depended on the goal for which this notion was used, and referred to paragraph 34 of document WIPO/GRTKF/IC/3/8. The Delegation was of the opinion that one of the goals in protecting TK as an intellectual property subject matter was to ensure access to genetic resources, TK and folklore and their just benefit-sharing. It stated however, that this neither runs counter to nor diminishes the importance of other goals such as the preservation and development of TK as a cultural heritage. The Delegation concluded that it would be desirable that in the course of selecting the definition of TK, which should not be inflexible, this consideration be taken into account.

258. The representative of the Organization of African Unity (OAU) thanked WIPO for its useful and facilitative role in the development of the African Group position paper presented to the session of the Committee. The OAU urged WIPO to maintain this support. The representative stated that immediate solutions were needed to prevent the misappropriation of TK and folklore and related genetic resources in Africa and other developing countries, and, for this purpose, practical, binding and effective international remedies were necessary. While the introduction and enforcement of domestic laws were important, enforcement in other countries was costly. Therefore, an international system of protection for the protection of TK, folklore and related genetic resources was necessary. Regarding urgent priorities, the representative referred to the need for an agreement on a system for protecting TK and any information that had been or would be documented or archived. Noting the efforts underway to document TK as part of searchable prior art, the representative also recognized that such work may have the subversive effect of accelerating the misappropriation of TK. Therefore, a clear international agreed prohibition on all parties, except the owners, against using or exploiting documented or archived information other than for the purposes and on the terms that the knowledge was documented or archived was necessary. Regarding the status of the Committee it was hoped that the Committee would be streamlined, such as by way of reconstitution as a standing committee. The representative stated that the OAU would look forward to a diplomatic conference at some stage not going beyond the medium term. Despite the importance of TK, there was as yet no precise and generally accepted definition thereof. Similarly, there was no accepted definition of "local or indigenous communities." The representative referred to several definitions of these concepts in both international treaties and processes, including in the African Model Law. The representative stated that a

definition of TK would encompass elements such as: (1) TK includes, but is not limited to, knowledge systems, innovations and adaptations, information, and practices of local communities or indigenous communities as understood within the territory of the Member, relating to any type of medicine or cures, agriculture, use and conservation of biological material and diversity, and any other aspect of economic, social, cultural, aesthetic or other values; (2) TK is not static but continues to evolve and its nature relates to the manner it develops rather than to its antiquity; (3) TK includes folklore unless the context should require otherwise or it is provided otherwise, and “local communities” should include indigenous peoples subject to supplementary definitions that Members may adopt within their domestic laws. The representative noted that the term “indigenous peoples and local communities” was inappropriate within the African context.

259. The representative of the Andean Community referred to her previous comments concerning document WIPO/GRTKF/IC/3/8. The representative stated that the term “novelty” had always within the IP system been used in a relative way and it need not be part of a *suigeneris* system. Regarding the CBD, the work of the Committee was complementary thereto, and appropriate cooperation between WIPO and the CBD was desirable. Regarding ownership of rights, right-holders could be individuals or collectives. The Andean Community raised certain concerns with the Annex I to document WIPO/GRTKF/IC/3/9, which, it appeared, suggested that the terms listed therein were equivalents for TK. However, each of the terms listed had their distinct meanings. Decision 486 of the Andean Community used the term “traditional knowledge, innovations and practices”, as well as the term “intangible component.” There was a need to define TK, but this would be a difficult exercise. A working definition was needed and, perhaps, a descriptive list of examples or elements might be a starting point. TK was holistic, the representative added, and no forms of TK should be excluded. Folklore was also important, and was a normal expression of TK and culture.

260. The representative of UNCTAD stated that a broad working concept of TK and perhaps an non-exhaustive list of examples or elements would be useful. The representative agreed with previous suggestions that Members submit elements of a working definition.

261. The representative of the Indian Movement *Tupaj Amaru* stated that any definition of TK should recognize indigenous peoples as subjects of law. A definition should not limit the right of indigenous peoples to self-determination. The representative referred to various definitions in other contexts, and stated that it was important to determine for whom a definition was being established.

262. The representative of the Health and Environment Programme stated that a definition of TK should include and take into account all the needs and relevant circumstances of indigenous populations.

263. The Delegation of Peru asked for the floor to clarify a previous statement made by the representative of the Indian Movement *Tupaj Amaru*. The Delegation stated that when, in a previous intervention, it had referred to benefit-sharing, it had done so to point out that there were few examples of cases where benefits had been remitted to local communities. The Delegation wished that there be benefit sharing for the benefit of indigenous peoples whenever TK was used, as this was their legitimate right, and in this respect agreed with the representative of the Indian Movement *Tupaj Amaru*.

264. The Secretariat, at the invitation of the Chair, made some general remarks. First, it seemed clear that it was not possible to solve the various issues regarding the protection of TK through identification of a suitable definition alone. Hence the working documents had distinguished between a definition, on the one hand, and the scope of protection, on the other hand. The role of the Secretariat was simply to offer and articulate options for consideration by the Committee. Questions such as the nature of the public domain, the term of protection, whether fixation ought to be a requirement and so on, could be dealt with at a later stage, and would probably be best dealt with in national laws. The Secretariat also drew attention to the working definition of TK that had been used by the Secretariat for purposes of the fact-finding missions (which was repeated in paragraph 25 of document WIPO/GRTKF/IC/3/9). Paragraph 35 of this document sought to set out some elements of a working definition.

265. In response to the comments by the Andean Community, the Secretariat confirmed that the list of terms in Annex I to the document had simply been put forward for information purposes, in the form of a broad lexicon of terms used in different policy contexts. Regarding the availability of documents in the different working languages, the Secretariat confirmed its strong desire to make available the documents as quickly as possible and in as accessible a form as possible. The Secretariat drew attention to the fact that the working documents were also available on WIPO's website.

266. The Chair concluded that the definition of TK was an extremely important issue, and work in this regard would be continued in parallel with work on other issues. It was not necessary to have consensus on a definition of TK at this stage. Some Members and other participants had suggested this matter could be left to national laws. Others had suggested the preparation of a list of elements to be used as building blocks to establish a working definition, as well as enumerating such elements. These had included, the Chair noted, among others, Algeria (on behalf of the African Group), Colombia, the Islamic Republic of Iran, Switzerland, Venezuela, the Andean Community and the OAU. The Chair proposed that, for the next session of the Committee, the Secretariat should prepare a synthesis of the various elements that could make up a working definition of TK, based on document WIPO/GRTKF/IC/3/9 and taking account of comments made at this session, including the information requested by the Delegations of Venezuela and others. The Chair noted that, given the number of documents already requested of the Secretariat for the next session, this synthesis may only be made available near the time of the next session and may only be available in one working language for that session. This approach was approved by the Committee.

ITEM 6: FOLKLORE

Final Report on National Experiences with the Legal Protection of Expressions of Folklore (WIPO/GRTKF/IC/3/10)

267. The Secretariat introduced document WIPO/GRTKF/IC/3/10, noting that it proposed four possible tasks for the Committee's further work on folklore, and added that further responses to the questionnaire were welcomed as stated in paragraph 8 of the document. The Secretariat planned to publish the laws of the countries that had responded and requested the relevant countries to submit their laws. The Secretariat also advised that all the responses to the questionnaire were available on the website and in paper form. Finally the Secretariat was publishing studies on WIPO's website "Minding Culture: Case Studies on Intellectual

Property and Traditional Cultural Expressions”, written by Ms. Terri Jankewich which reflected practical examples of the protection of expressions of traditional culture.

268. The Delegation of Algeria, on behalf of the African Group, said that the Group believed that the existing IPRs, such as copyright, trademarks, certification and collective marks and industrial designs, could provide protection to expressions of folklore in respect of tradition-based creations where the creators of the expression can be identified. The African Group proposed that the Committee should examine the means by which IP registration systems, particularly the trade-mark and industrial design systems, could be adapted to enhance the protection provided to expressions of folklore, without prejudice to the examination of these questions within other organs of WIPO. The Delegation further stated that the African group supported the study of the relationship between customary laws, protocols and practices governing custodianship, use and transmission of expressions of folklore, on the one hand, and the formal IP system, on the other, in relation *inter alia* to the establishment of *suigeneris* systems of protection and so as to ensure that IPRs do not preclude continued customary creation and use of expressions of folklore. They believed that the WIPO/UNESCO Model Provisions, 1982 would provide a useful reference point for the development of effective national, regional and international systems of protection, although these could be updated and improved upon and favored the establishment of a comprehensive international binding instrument on the protection of expressions of folklore, with some form of dispute settlement mechanism either similar to that which is obtainable under the TRIPS Agreement or a mediation process as is provided by the WIPO Arbitration and Mediation Center. The Delegation recommended that WIPO provide greater legal-technical assistance for effective implementation of systems for the protection of expressions of folklore at national and regional levels. Such assistance should include awareness raising, institution building, and training and information for traditional communities on enforcement. In addition, WIPO should conduct empirical studies on the economic effects of the exploitation of tangible and intangible expressions of folklore, particularly handicrafts, in developing and the least developed countries, and particularly in the light of new technologies for the reproduction and dissemination of such folkloric works. The Delegation stated that the African Group was fully aware of the fact that the African States should deploy efforts so that expressions of folklore should enjoy greater and better adjusted protection of folklore to enable the African people to derive the maximum social and economic benefits from such protection. This protection could be embodied in legislation or in the reinforcement of national structures. Finally, the Delegation expressed the African Group's wish to encourage use by their traditional communities of existing IPRs for the protection of traditional culture and expressions of folklore.

269. The Delegation of China provided an overview of their position on the use of the existing IP system and the protection of folklore. In the first instance, the Delegation stated that the protection of folklore, especially in its forms of expression, the way it was used and how to prevent unfair competition, although different from the protection of copyright, was not fundamentally different from copyright protection. The aim of national and international protection should therefore be focused on the utilization and development to prevent inappropriate use. Protection should not have an impact on the normal use and development of folklore. Secondly, for those who discovered and recorded folklore, the Governments should encourage them to discover and make use of folklore but at the same time the Government should regulate the actions to prevent any disrespect or unfair treatment to those communities where the folklore originates. Thirdly, concerning the scope of protection of folklore, copyright law was not completely applicable. However, there were two aspects of protection

which were important. One was the reproduction and distribution and the second was the public performance and broadcasting. Fourthly, concerning the recreation of folklore, those who carry out recreations should respect the religious beliefs, living customs and cultural traditions of the communities where the folklore was from and their sources should be indicated. Fifthly, the difference of folklore protection from copyright protection was that the majority of the protection was not an individual but government authority. The government authority, the authoritative organ, issued licenses and collected fees which would be completely used to develop folklore. On the other hand, it would also exercise administrative sanctions against those violations. Sixthly, the Delegation stated that in discussing folklore issues, a difference should be made between traditional technical skills and folklore expressions. The former belonged to the scope of industrial property and the latter belonged to copyright. At the same time, a distinction should be made between the different characteristics of tangible assets and intangible assets. With regard to the international protection of folklore, the Delegation agreed to actively carry out in-depth discussions and explorations. However, it was emphasized that national protection systems should first be established on the basis of existing systems, and together, learn from experiences of other countries. On these aspects, the Delegation requested the Committee to provide more information. In addition, the Delegation stated that they would give great attention to the discussions on updating the 1982 Model Provisions on folklore. Finally, the Delegation invited the Committee to refer to document WIPO/GRTKF/IC/3/14 on the current status of protection and legislation of national folklore and related fields in China.

270. The Delegation of Spain speaking on behalf of the European Community and its Member States stated that the document was extremely complete and useful for evaluating the different aspects of folklore. The Delegation referred the Committee to document WIPO/GRTKF/IC/3/11 entitled "Expressions of Folklore". With regard to document WIPO/GRTKF/IC/3/10, the Delegation stated that its Members felt it extremely important to give greater assistance for the establishment, strengthening and implementation of systems and measures for the legal protection of expressions of folklore at the national level. The Delegation supported the carrying out of studies on practical cases of the relationship between customary laws and protocols and the formal IP system. Finally, the Delegation stated that its Member States would like to share their experiences with all countries and regions already applying folklore protection.

271. The Delegation of the United States of America stated that it was pleased to have sufficient time to discuss the important topic of folklore, as senior officials of the American Folk Life Center were part of its Delegation. The Delegation then informed the Committee that one of the panels at a two-day Copyright Conference recently organized jointly by the USPTO and the U.S. Copyright Office to celebrate World Intellectual Property Day 2002 had concerned the protection of folklore. This panel had consisted of representatives of the Choctaw Nation (a Native American tribe), the Government of Canada, the Government of Jamaica, the European Commission, the American Folk Life Center of the U.S. Library of Congress, and a New Zealand professor and had discussed many of the issues raised in document WIPO/GRTKF/IC/3/10, such as the challenges of finding solutions in pluralistic societies and immigration-based countries to which traditional societies have moved with their folklore, and the role of Government in the activities of traditional cultures. The Delegation then informed the Committee of a recent event in South Carolina. In order to continue their art, which is an integral part of Charleston's tourism economy, the traditional basket makers of Charleston depend upon a supply of and open access to sweetgrass. In the 1980s, developers building condominiums on these sea islands off the Charleston coast were

both destroying many of the sweetgrass beds in the intercoastal marshes, as well as posting “no trespassing” signs on this important land. Folklorists, anthropologists, developers, ecologists, legislators, tourism officials and the basketmaker themselves met to discuss the problem. Local legislation was passed to balance the interests of the basketmakers with the interests of the developers, ensuring open access to sweetgrass beds for the basketmakers and acknowledging their contributions to the economy and culture of Charleston itself. The Delegation further cited the range of existing legal remedies to protect expressions of folklore currently available in the U.S.A., such as copyright, certification marks, the Indian Arts and Crafts Act and the USPTO’s growing Database of Official Insignia of Native American Tribes. The law of the United States might not be appropriate to be adopted by other countries and urged all countries to consult widely with their indigenous and local communities to determine what legislation might be most appropriate for them. The Delegation mentioned two U.S. government collections that preserved and protected collections of expressions of folklore; namely, the Library of Congress and the Smithsonian Institution. The Library of Congress was currently discussing with scholars of folklore in various countries to facilitate the preservation of material that may otherwise be threatened by conflict. The Delegation continued by noting that folklore collections did not grant exclusive rights but this should not be a reason to underestimate their role in preserving folklore, since such preservation can lead to commercial benefits. For instance, a recent movie, “O Brother, Where Art Thou,” featured a soundtrack of 1920s and 1930s music recorded in the field by rural Delta blues performers, and preserved in the Alan Lomax Archives in New York City. The use of that music netted the performers a financial windfall for recordings they had long forgotten. Alan Lomax’s daughter, now in charge of the collection, continued to search for additional artists from those recordings with whom to share the benefits of successful commercialization. The Delegation concluded by stating that it supported Possible Tasks 1 and 4 in document WIPO/GRTKF/IC/3/10, since they were in keeping with the incremental approach that had marked WIPO’s activities to date, but was unable to support Possible Tasks 2 and 3, on the basis that they were both premature. In relation to Possible Task 1, the Delegation suggested that various U.S. Government resources, particularly those of the Folk Life Center at the Library of Congress, might be available to participate with WIPO in providing legal-technical assistance in the development of folk life preservation and conservation. For instance, the Center was currently undertaking a project with seven major archives across the United States to create an ethnographic thesaurus that could be applied internationally. This would provide nations with a vocabulary and agreed definitions to facilitate the passing of folklore related legislation. In addition, the USPTO Office of Independent Inventors Programs might assist in sharing its experience with the Database of Official Insignia of Native American Tribes. In relation to Possible Activity 4, the Delegation encouraged WIPO to take full advantage of the work done in the context of the previously undertaken Fact-Finding Missions, in the best use of resources.

272. The Delegation of South Africa supported the document and the position of the African Group and China. It should be possible to develop an improved version of an international treaty, and the time was ripe for implementation of an improved treaty. With regard to the WIPO-UNESCO Model Provisions of 1982, the Delegation stated that even with its limitations it was a good starting point to craft a treaty. It went without saying that existing systems and measures at the national level should be strengthened – this meant that the Delegation supported possible tasks 1 (paragraph 156) and 2 (paragraph 162). Furthermore, the Delegation felt that the issue of folklore and TK were intertwined, and cautioned not to compartmentalize the issues. It supported possible task 4, since this is only to improve the possible treaty.

273. The Delegation of Switzerland supported the implementation of Task 1. With regard to paragraphs 162 and 168, notably Task 2 and Task 3, the Delegation stated that they were premature as they were too many preliminary issues still open, such as definitions, the possible classification of rights, the holders and the exercise of these rights. These questions should first be resolved. In addition, the WIPO Performances and Phonograms Treaty (the WPPT) of 1996 already addressed the protection of performers of folklore at the international level. The Delegation believed that it would be necessary at first to examine in a more detailed fashion the application of the Model Provisions at the national level and the WPPT provisions before setting up new mechanisms at the international level. Referring to paragraph 171, the Delegation supported and welcomed Task 4. This task would be useful in answering many of the preliminary questions. Finally, the Delegation supported the proposals and comments put forward by the European Union and its Member States in document WIPO/GRTKF/IC/3/11. In conclusion, the Delegation believed recalled its willingness to find practical, effective and balanced solutions acceptable to all.

274. The Delegation of Tunisia supported the African Group position. The Delegation stated their belief in that folklore was closely related to the protection of TK given that the nature of its collective property and its link with national heritage. The Delegation wished to give special attention to folklore as it contributed to the social and economic development and is a source of creativity and invention. The Delegation stated their interest in copyright highlighted that Tunisia was one of the first eleven countries to have adhered to the Berne Convention. Legislation had been updated and improved to preserve the elements which made up their heritage. The first and sixth articles of the 1966 legislation on copyright law and article 1 and 7 of the Copyright Law of 1994 mentioned the need to preserve and protect folklore and categories inspired from it. This work was done in the framework of protecting literature, artistic heritage, material heritage and intellectual heritage. The Delegation stated that they were putting together a compilation of all the teachings related to folklore in Tunisia. They have given priority to popular poetry, stories and had applied scientific methodology to fixed music on hard copy, tapings or recordings. Tunisia had a Center with a Museum for traditional musical instruments, which also had a recording studio which could be used commercially upon authorization of the Ministry for Culture. Assistance would be given to musicians and performers who were going through difficult times. Protection therefore meant that there must be a clearly defined definition of concepts. A National heritage and the difficulties inherent in its protection in developing countries demonstrated the efforts required for protection. In this respect, the Delegation stressed the need to provide technical assistance from both UNESCO and WIPO who had an interest in cultural heritage. The Delegation thus supported Task 1. Furthermore the Delegation believed that an international legislative framework for the protection of folklore was necessary given that protection through current systems of IP proved insufficient. In addition, the Delegation supported Task 2 as they had already stated in their answer to the questionnaire.

275. The Delegation of Senegal stated that Senegal had, since 1973, applied the provisions of Article 15 of the Berne Convention under their copyright law and had incorporated the notion of *domaine public payant*. The *Bureau sénégalais du droit d'auteur* (BSDA) was charged with the administration of copyright and thus the protection of folklore. With regard to Article 15, the Delegation explained that preference was for a non-paying *domaine public* system. Senegal wished to embody it in their national legislation. Given the promotion of the protection of folklore and having stressed the important role of folklore in Senegal's economic and social development, several traditional communities were able to benefit. The

Delegation then provided information on activities carried out by Senegal, namely the establishment of a database to assist musicians, the organization of concerts, both inside and outside of Senegal, the encouragement and training of artists to reinforce their expression of folklore and to slow the “brain drain”.

276. The Delegation of Egypt supported the position expressed by the Delegation of Algeria on behalf of the African group. The theoretical and practical problems presented could not come to an end and there should be a level of general consensus on what exactly one wanted to protect, whether it be linked to expressions of folklore or TK, that was to agree on the things and material requiring protection. In this context the Delegation stated that the Model Provisions were valid as a basis on which to build a *suigeneris* framework for the protection of expressions of folklore at the national level. Thus the Delegation supported Task 2 found in paragraph 162. Furthermore, in order to set up an international draft treaty which defined the obligations of all parties concerned, the Delegation referred to Task 3 and invited the Secretariat to prepare a document on the possible elements for an international framework for the protection of expressions of folklore. The Delegation felt that the means of protection should be of an international nature. They did not agree with the term extra-territorial found in paragraph 168. The term was contrary to the regionally, territoriality of the application of laws, and national law could be applied outside of the territory of the country concerned. Thirdly, the Delegation stated that the Rome Convention and its Annexes could guide one in order to provide protection of some aspects of TK and expressions of folklore, in accordance with the popular usage of the current terminology. The Delegation stated that the terminology would be entered as folk traditions. Fourthly, the Delegation suggested to redraft the term or concept of performers found in the Rome Convention, which could comprise performers who carry out folkloric art, whatever the form or shape of performance. This would entail a change in national legislation where upon a more flexible term could be used in line with the social and cultural framework of each society. Fifth, the Delegation stated that there was the need to have a precise determination of forms of folk traditions and documenting them through setting up of comprehensive inventories for these forms. National laws should define the forms which required protection by setting up inventories or databases which defined and described these forms in accordance with clearly defined and agreed upon criteria. Sixth, the developing countries, including Egypt, were in dire and real need of material and technical assistance to carry out these inventories and databases, thus Task 1 was supported. In the field of folk traditions or folklore, the Scandinavian countries' experience and that of other European countries could be very useful. In this context, the Delegation extended a request to them for assistance. The Delegation referred the Committee to some examples, notably the Finnish Folklore Inventory, the Nordic Institutes of Folklore, the Uppsala Inventory in Sweden, the Ethnographic Museums in Sweden, Norway and other countries, the Roman Folklore Inventory and other prominent inventories in a number of countries.

277. The Delegation of Cote d'Ivoire referred to discussions on document WIPO/GRTKF/IC/3/9 and observed that a “door was left open” on the pertinence or not of the use of the concept of folklore. The Delegation stated that this “open door” was the basis on which their comments rested. The Delegation stated that were the concept of folklore to be substituted by another concept then the Delegation would be prepared to favor the report as its contents covered the essential values of their traditions and civilizations in relation to expressions of TK. These semantic forms could lead to confusion between the two systems of protection being sought. This concept had in the third session seemed to achieve a clear definition. The Delegation referred the Committee to the third part of document WIPO/GRTKF/IC/3/10, paragraph 155 and the publication on a “How to” guide based on

case studies. The Delegation felt that this guide would be an instrument for reference which would enable legislators, States, grassroots communities and researchers to fine tune the mechanism which was envisaged. The Delegations supported the initiatives of a study based on the report, of a study on IP systems and customary law, as well as the updating of the Model Provisions, despite their limitations. Finally, the Delegations supported the declaration of Algeria on behalf of the African group.

278. The Delegation of Australia stated that document WIPO/GRTKF/IC/3/10 provided a helpful context and a significant resource to better understand the context in which the work of this Committee was being done. The Delegation pointed to some aspects that seemed to be of particular note. First, the Delegation observed that there were a complexity of issues concerned with the particular circumstances of respondent countries, their social and legal history, the availability or lack of practical mechanisms for exercising rights, lack of knowledge, views and the forms of application of other laws. The subject matter was diverse, as indicated in paragraphs 90 and 92 of the report. These suggested that if future progress in the area was to be made, then an understanding had to be reached on the scope and meaning of the term “expression of folklore”. While a precise definition might not be necessary, there was a primary need to identify the criteria that should be met as a condition for protection by IPRs. With regard to paragraph 120, the Delegation noted the diversity of owners or custodians of folklore but that the vast majority of States indicated that they regarded expressions of folklore as the property of the country as a whole. The Delegation noted that the issue of rights holders also needed to be resolved. With regard to the issue of scope of protection, the Delegation referred the Committee to paragraphs 108 and 109. These paragraphs highlighted the potential of over-protection, where cultural preservation might be frozen and the public area for creation reduced. Protection should be aimed to allow inspiration from traditional cultural expressions while respecting the boundaries between unfair use and legitimate inspiration. The Delegation noted that the European Community position papers also reflected such a concern. Given this concern the Delegation nevertheless believed that under some systems there were mechanisms for providing for a level of protection to at least creations deriving from traditional expressions of folklore. By providing protection to the creations themselves, as for example under copyright, there was a measure of protection while yet allowing the continued growth and protection of such expressions in dynamic and living manner. The report made it clear that protection of expressions of folklore was multifaceted. That meant that effective protection almost certainly did not lie solely within the realm of IP but in practice, through action on a range of measures, practical and legal, including capacity building, awareness raising and education. Paragraph 153 discussed some of those matters at some length. As for the tasks, the Delegation believed that there would be practical value and utility in adopting Task 1. Task 4 was also seen as a useful way in which to better expand understanding of the interaction of customary law and the international IP norms.

279. The Delegation of Ukraine stated that it had responded to the questionnaire and regretted that it had not been received by the Secretariat. This documentation was now submitted. It was due to the efforts of their citizens that folklore could be developed. The Delegation provided an example of such folklore where special experts, in Transcaspian, western Ukraine, made attempts to record elements of musical folklore which were not kept in museums. This musical folklore had been kept for the everyday use of the community. The Delegation noted that one was able to hear the singing of popular folklore music in every household as the expression of music was considered very important. Protection was available and administered by the competent authorities. Special guide books were made and

indicated that expressions of folklore were considered as national creations. Special authorizations were not needed. The Delegation stated that folklore should continue to evolve and obstacles must not be placed to prevent its development. The mere fact that the Committee met was further evidence that there were obstacles and these prevented one from handing over the heritage from generation to generation. The Delegation believed that the Committee should be cautious as folklore could be protected. The question could be resolved thanks to the system of copyright and related rights. Where the subjects of copyright and related rights were physical persons, and where in some countries they could be both physical and legal persons, very often it was the State. Yet the question concerning communities and whether the community could become a legal entity had not yet been defined. The Delegation stated that document WIPO/GRTKF/IC/3/10 prompted the following conclusion, that there was protection for the expressions of folklore but in a majority of cases performers were not individual persons. More often than not they were communities, groups of people, and they needed to become the subject of copyright and related rights. The Delegation believed that resolving this issue could assist in the protection of national traditions.

280. The Delegation of Kenya supported the views expressed by the Delegation of Algeria on behalf of the African Group. The Delegation stated that folklore, from time immemorial, had been an educational tool in their traditional societies. Together with TK, folklore had served their societies both spiritually and physically. With reference to paragraph 94, the Delegation stated that it recognized that folklore was a form of TK and therefore placed great importance on TK being extended to folklore. The Delegation also stated that the paragraph also highlighted the linkages between folklore and the environment, ecosystems and the total identity of a community. The Delegation noted that they looked forward to the outcome of the current meetings, as their law had already been adjusted to accommodate a measure of protection of folklore. The Delegation said that they participated in the questionnaires and provided information on the measure taken thus far under their copyright law. Based on those experiences, the Delegation supported Task 1. The Delegation further endorsed paragraph 106 on the scope of protection. In that respect, the Delegation wished to place emphasis on protecting performers, recorders and archivists of expressions of folklore. The Delegation supported the establishment of an international instrument that would be holistic in both protecting folklore and allowing its continued use.

281. The Delegation of Canada submitted that it could support Tasks 1 and 4 but not Tasks 2 and 3. As regards Task 1, the Delegation agreed with the proposal that the WIPO Secretariat provide, upon request, enhanced technical and legal assistance to States, peoples and communities to establish, strengthen and implement systems and measures at the national level, subject to existing budgetary limitations. With regard to Task 2, the Delegation believed that it was premature to consider updating the Model Provisions. As the final report itself indicated, there were few countries where laws, designed to protect expressions of folklore, were actively utilized and functioning effectively in practice. In light of this, it was unclear as to what value would come from pursuing the exercise until greater experience was gained at the national level. The Delegation believed that Task 3 was also premature. As in the case of *suigeneris* systems for TK protection at the international level, there needed to be more knowledge and experience with developing and implementing protection at the national level, before useful discussion could take place. Finally, the Delegation supported Task 4. The further practical study of the relationship between customary laws and protocols and the formal IP system would be useful. There were many uncertain issues to be addressed regarding these relationships thus further study would allow the Committee to develop a better understanding of the complexities involved in reconciling the various systems.

282. The Delegation of the Islamic Republic of Iran stated that folklore was the cultural heritage and national identity of all nations and its protection, particularly for the developing countries, was of such great importance. The Delegation stated that they, like developing countries, possessed valuable folkloric cultural heritage and stated that WIPO was the most suitable organization for provision of reasonable and fair solutions in respect of the problems relating to IP aspects of folklore. The Delegation suggested that some steps should be taken to create, reinforce, and effectively exercise national protection systems with due consideration of various legal, legislative, contextual, structural and administrative needs of these countries. In this regard the Delegation stated that it was particularly important that WIPO provided these countries with the relevant required technical and legal assistance for improvement or establishment of new effective national systems for protection of expressions of folklore. The Delegation named a few principles on which the technical and legal assistance should be based on, namely; (i) the maximum use of existing IP right systems; (ii) the necessity of designing certain training courses and plans to increase awareness and knowledge; (iii) the establishment and reinforcement of relevant basic structures for the implementation of laws and regulations; (iv) the necessity of identification, documenting, classification and registration of expressions of folklore in data banks in a standard form with due consideration of the necessary steps to be taken for prevention of likely future misuse; (v) due to the technological advances and discovery of new forms of commercial exploitation of expressions of folklore, updating the 1982 Model Provisions would be a suitable starting point to effectively assist in the establishing, reinforcing and implementation of a national protection system. The Delegation stated that the need for more effective protection at the national level did not imply that the expressions of folklore should not be protected beyond the borders of the country. On the contrary, the Delegation stated that the formation of efficient local systems would in turn facilitate cross-border protection of expressions of folklore on the basis of principles such as national treatment. The Delegation added that folklore and an innovative work on the basis of folklore were protected under the Iranian Copyright Law dated 1969. Although the Law had been passed and implemented before the Model Provisions of 1982, the Delegation stated that some aspects of the Model Provisions could be found in their Law.

283. As an initial reaction, the Delegation of Peru supported the four possible tasks outlined by the Secretariat. The Delegation, especially with regard to Task 1, supported paragraph 155 where they stated that the idea of this paragraph seemed extremely useful to them. With regard to Task 2, the Delegation supported paragraphs 160 and 161 and insisted that the Committee not simply update the Model Provisions because of technological changes but review the Model Provisions taking into account that which was stated in paragraph 160 and 161 in a more integrated way. With regard to Task 3, the Delegation supported paragraphs 152 to 167, and stated that regional issues deserved special attention. The Delegation also supported Task 4.

284. The Delegation of Morocco stated that they had recently adopted a new law (Law 2-00) concerning copyright and stated that within this law articles concerning expressions of folklore had been included and taken into consideration the system of *domaine public payant* as mentioned in paragraph 153 (e). The Delegation stated that they also had protection with regard to tangible assets. The Delegation endorsed the statement of the Delegation of Algeria on behalf of the African Group and believed that the reinforcement and implementation of measures for the protection of expressions of folklore at national level were necessary. The classification, fixation and recording of expression of folklore were indispensable before

dealing with any question concerning the protection of expressions of folklore. The Delegations supported paragraph 153, and stated that, despite the existence of national legislation, the applications of the Model Provisions faced numerous obstacles. The Delegations supported Possible Task 1 and Possible Task 2 as they believed that the Model Provisions should be updated in view of progress achieved in the technological areas and the new legal issues that have arisen concerning the protection of expressions of folklore.

285. The Delegation of New Zealand expressed reservations in their response to the questionnaire concerning the use of the term folklore which might be considered offensive or inappropriate in a number of cultures and the separation of the artistic expression from the TK underlying that expression. The Delegations suggested that this was not consistent with the holistic view of many indigenous peoples. The Delegation noted that this issue was acknowledged in paragraph 20 of document WIPO/GRTKF/IC/3/9 and that in paragraph 22 it was suggested that the term folklore continued to be used as a subset of the more general term TK. The Delegation noted the comments of other States that it may be necessary in practice to use or develop different mechanisms for the protection of different aspects of TK. With regard to Task 1, the Delegations supported the task and agreed with the comments of the Secretariat in paragraphs 149 and 151 of document WIPO/GRTKF/IC/3/10 and noted that benefits would accrue to states other than those principally involved, through the sharing of national experiences. The Delegation did not favor Task 2 as they stated that the resources would be better allocated to Task 1. The Delegation, with regard to Task 3, considered that the time was not right to embark upon the development of frameworks for extra-territorial protection. The Delegation agreed with the comments in paragraph 163, and stated that it was important to fully consider domestic solutions before moving to the question of whether an international agreement was required. The Delegation did not object to the examination of certain existing mechanisms. The Delegations supported Task 4 and agreed that the issues identified in paragraph 170 merited further consideration. The Delegation stated that a key focus should be the effect any new solutions would have on the traditional decision-making structures of indigenous peoples and local communities charged with the protection of their TK and expression of it.

286. The Delegation of Venezuela stated that with regard to the action plan referred to in paragraph 36, the Delegation wished to include expressions of folklore at a national and regional level. On paragraph 68, which dealt with handicrafts and referred to the recommendations from the World Customs Organization (WCO) on these products, the Delegation stated that they had made efforts in this area with the establishment of an inventory in which not only the handicrafts were registered but also the producers of the handicrafts. The Delegation stated that within the WCO the possibility exists of having technical assistance for member countries in this regard and suggested that WIPO take into account this code to improve protection systems. With regard to paragraph 74, the Delegation stated that there were two international instruments with regard to indigenous and local populations that exist in the International Labor Organization (ILO). The Delegation stated that local communities must be included, as they are holders of TK and deserved protection. On paragraph 86(B) section (c), the Delegation felt that an exchange of information on the measures adopted by countries with such protection measures shall be included. The Delegation further stated that Venezuela, through the Institute of Cultural Heritage, had a model for an inventory of products within their country and that they could look at contents of the inventory in order to modify it if necessary. The Delegation referred to paragraphs 89, 90 and 91 to be closely tied to document WIPO/GRTKF/IC/3/9. The Delegation stated that it was extremely important to establish conceptual elements, which were clear on expressions of folklore and the different

types of expressions so as to contribute to the suggestion in paragraph 88. With regard to the proposed tasks, the Delegation agreed with them in principle but suggested another task, as a possible substitute for Task 1 or conducted prior to Task 1, which concerned the identification of types of expressions of folklore already protected under existing systems. The Delegation stated that the conclusion of this task would make the process for conducting the remaining task easier. The Delegation stated that the next sessions should take into account experiences on the protection of expressions of folklore by countries and demonstration thereof as it would be useful for the discussions. The separation of folklore from TK was a simple methodological device for dealing with these complex subjects, but it had to be clear that one was not speaking of two separate entities.

287. The Delegation of Panama reported that Panama had already developed its own legal framework for the protection of collective rights which included expressions of folklore, and hoped that this system would work in practice as they had experienced difficulties. It was necessary to strengthen protection by applying laws at a national level immediately in traditional IP systems, where interested parties presented themselves to competent officers to request protection. In this case, it was necessary to effectuate broad diffusion of the protection available. The Delegation stated that Panama was currently attempting to implement a new strategy for special laws and had contemplated the development of an indigenous project which would address gender issues with regard to expressions of folklore of specific groups. The Delegation fully supported the activities proposed, especially Task 1, and stated that they would ask for assistance and advice to set up a system and look at the legal measures for the protection of folklore at national levels. The Delegation stated their interest in the evaluation of the systems of collective rights and how they related to specific components of expressions of folklore. With regard to databases and registers, the Delegation felt that this was important and supported the idea of the need to review databases with regard to folklore. The Delegation insisted upon support for the remaining 3 activities, and although it stated that it would be premature to look at extraterritorial protection, the Delegation believed that the Committee could lay the basis for the beginnings of efforts for protection at an international level. The Delegation concluded that information from other states would enrich discussion at the Committee.

288. The Delegation of Jordan stated that effective protection of folklore should come from relevant conviction of Members and that all legislation should be acceptable and guarantee the required protection. The Delegation stated that they preferred to study this within the framework of the copyright holder whether it be TK or folklore. The Delegation stated that developing countries needed financial and technical assistance.

289. The representative of OAPI pointed out a few corrections to document WIPO/GRTKF/IC/3/10. The representative referred to paragraph 170 and suggested that the Committee study under what conditions customs gave rights to communities, social professional groups, families or individuals. The representative stated that African States shall draw up an inventory of the expressions of folklore. The representative stated that during the discussion on TK, several delegations highlighted the impossibility of applying the customary laws of the communities and that this would also apply to expressions of folklore. The representative suggested that WIPO take into account the results of the symposium held in Phuket, Thailand in 1997, the 1999 regional consultations and the fact-finding missions in undertakings such as study. The representative supported the remaining tasks.

290. The representative of UNESCO referred to the activities conducted recently which concerned the elaboration of a normative international instrument concerning the material of intangible cultural heritage. The representative stated that a resolution was adopted at their General Conference in 1999 and that it was decided that the most appropriate instrument would be an international convention and the first draft would be examined at their General Conference in 2003. Several of their Members States had emphasized the importance of avoiding any duplication with related activities of other organizations, particularly WIPO. The representative referred to the program concerning the proclamation of the oral and intangible heritage of humanity which they had already carried out locally due to a revitalization of the relevant cultural heritage. The representative referred to their initial meetings held on the drafting of the international convention and quoted the proposed definition of intangible cultural heritage which had been drafted by their group of experts and which could possibly be covered by the draft international convention.

291. The representative of the Secretariat to the Pacific Community (SPC) drew attention to document WIPO/GRTKF/IC/3/9, which referred to the UNESCO Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands. This Symposium was initiated by the Secretariat to the Pacific Community (SPC) and jointly hosted by them and UNESCO. The Secretariat to the Pacific Community was concerned about the increasing exploitation of the Pacific Island tangible and intangible cultural heritage much of which was not yet in the public domain and had the Symposium examine existing IP mechanisms, including the Model Provisions to protect Pacific Island TK. The representative noted that this had revealed that existing legal systems did not address the issue of protection against the improper use of their traditional heritage, resulting in the development of the Pacific Regional Framework which she described. Forum Trade Ministers had mandated SPC, Pacific Forum Secretariat (ForSec), UNESCO, and WIPO to assist Forum Island countries. The representative therefore supported Task 1 and noted, as mentioned by the Delegation of Venezuela, that regional measures should be included.

292. The representative of the International Publishers Association (IPA) stated that Task 2 seemed to view the *domaine public payant* system as a viable form of *sui generis* protection for TK. The representative opposed this form of protection and stated that it could hinder the dissemination and creative adaptation and transformation of TK and especially expressions of folklore. The representative stated that in preventing aged knowledge and expressions from falling into the public domain after a protection term or defined period of time, the *domaine public payant* system would undermine their publishing members' efforts to develop viable industries. The representative stated that with regard to Task 2 the Committee should not take as its point of departure the *domaine public payant* system. The representative supported the development of and search for more appropriate forms of protection and encouraged WIPO to take on Tasks 1 and 4 with a view to use existing protection systems effectively and to develop and search for alternative mechanisms of protection that designated, involved and empowered beneficiaries of a possible international protection scheme more directly and strongly than would be the case under a *domaine public payant* system.

293. The Secretariat noted that with regard to matters relating to Tasks 2 and 3, there was a need to clarify and refocus the ideas within the proposed tasks. The Secretariat stated that the focus was clearly on national experience and making existing systems more effective, and that the Secretariat would retain an empirical focus when looking at information about existing systems and their use. Noting that the work on making systems more effective at the national level inevitably meant taking some account of international and regional developments and

means of interaction between national legal systems. In this regard, the Secretariat referred to the WPPT, recently enforced and which provided protection for performances and expressions of folklore, and stated that this would have some implications for national systems including those based on the 1982 Model Provisions. The Secretariat noted the hesitation with regard to Tasks 2 and 3, and stated that the Secretariat would further explore and better document the background to these issues. The Secretariat noted further that there was a need for WIPO to work closely with other organizations as mentioned by the Secretariat to the Pacific Community (SPC), given the importance of such regional developments for the work of the Committee.

294. The Chair concluded that proposed Tasks 1 and 4 had been adopted and approved by the Committee. However, no consensus was reached regarding Tasks 2 and 3 for the present time. The Chair suggested that on the basis of document WIPO/GRTKF/IC/3/10 the Secretariat should prepare an analytical and systematic document on national experiences of protection of folklore either by means of traditional IP or by means of sui generis legislation, and the implementation of such legislative frameworks, including the role of customary law and forms of interaction with legal systems in other countries, as a basis for further discussions at the fourth session of the Intergovernmental Committee. It was so decided by the Committee.

ITEM 7: FUTURE WORK

295. At the request of the Chair, the Secretariat advised that the fourth session of the Committee was scheduled for December 9 to 17, 2002.

296. The Delegation of Sudan requested that the report of the meeting contain the request made by several Members that documents of the Committee be made available in all six United Nations languages.

297. The Delegation of Venezuela stated that the third conclusion of the Chair regarding document WIPO/GRTKF/IC/3/8 should be affirmed. Second, the Delegation recalled that the Delegation of the Dominican Republic and others had requested a report on the relevant discussion taking place within the Standing Committee on Patents (SCP).

298. The Delegation of Australia stated that, with regard to the next year's work of the Committee, particular notes should be taken of the various technical cooperation activities that had been approved during the session. For example, the Delegation referred to the IP documentation "toolkit" and assistance to Members with regard to the establishment of a database of contractual clauses relating to access to genetic resources. The Delegation added that the Committee could consider public outreach activities for education and awareness raising concerning the effective use of IP rights for TK and folklore protection and access to genetic resources. The Delegation stated that such activities would be a valuable use of resources, to which Australia was prepared to contribute in accordance with its usual arrangements with the International Bureau. Regarding WIPO and other agencies, Australia believed in continued and enhanced cooperation, with the objectives of optimizing the effectiveness of work programs, elimination of duplication, recognition of complementarity and maintenance of coherence. This, the Delegation added, applied also to coordination with other committees within WIPO, such as the SCP and SCT.

299. The Delegation of the Dominican Republic expressed concerns about the future work of the Committee. The Delegation referred to the large number of highly technical documents that Delegations, particularly those from smaller countries, had difficulty in dealing with. For the next session, the Secretariat was requested to dispatch documents in Spanish earlier, and to finance the participation of experts from the capitals. The Delegation did not agree that elements of a definition of TK ought to be synthesized into a working document as had been suggested by the Chair. This would prejudice a definition. It was more important, the Delegation stated, to concentrate on elements of a *suigeneris* system for TK protection.

300. The Delegation of Peru stated that it was for practical reasons necessary to address genetic resources and associated TK, on the one hand, and folklore, on the other hand, separately. The Delegation added that for the next session, experiences of other countries with *suigeneris* systems should be disseminated.

301. The Delegation of Switzerland stated that it was crucial first and foremost to reach clarity on the purposes and aims of TK and folklore protection. Therefore, the Secretariat should prepare a document setting out various possible purposes and aims. Only thereafter would it be possible to fully assess the appropriateness of existing of IPRs and *suigeneris* systems. Second, the Delegations supported strongly further cooperation with other fora, notably the CBD and the FAO. The Delegation referred to the study requested of WIPO by the Sixth Conference of the Parties to the CBD. However, there were also other IP questions and matters raised in other decisions of the COP, and the Delegation proposed that the Secretariat prepare a document setting out all the decisions of COP VI relevant to IP and propose how the Committee could deal with these matters. Regarding the FAO, the Committee should recommend that WIPO continue to provide its assistance to the relevant processes of the FAO.

302. At the invitation of the Chair, the Secretariat undertook to prepare the document on work relevant to the CBD decisions, as requested by Switzerland, in cooperation with the CBD Secretariat and in line with the recently signed MoU. The Secretariat advised also of ongoing consultations with the FAO and that it undertook to report thereon at the next session of the IGC. The representative of the CBD stated that she had taken into account the previous comments regarding the CBD and that the Secretariat of the CBD would continue to work closely with WIPO. The Secretariat of WIPO also stated that for the next session of the Committee it would prepare a report on relevant discussions within the WIPO Standing Committee on Patents, as had been requested. Further information on the possible purposes and aims that the protection of TK and folklore might have, as proposed by Switzerland, would also be incorporated in the relevant further working documents, as proposed by Switzerland.

303. The Delegation of Egypt stated that while it agreed that Proposed Tasks 2 and 3 regarding folklore had not been the subject of consensus because some delegations had expressed reservations about them, this should not prevent their examination in future. Lack of consensus on the need for a *suigeneris* system for TK protection had not prevented the Secretariat from preparing a document on elements of a *suigeneris* system. Therefore, the Delegation reserved its right to return to proposed Tasks 2 and 3 in future because they were an important part of future work. The Delegation envisaged in future a document on the matters raised in Task 3, and it would return to this matter in the future. The Delegation reserved its right to raise these issues again within another WIPO Committee or other organizations. Finally, the Delegation endorsed the statements by Venezuela and the

Dominican Republic to the desirability of a report on relevant discussions within the Standing Committee on Patents.

304. The Chair agreed with the statement by the Delegation of Egypt, and stated that although there was at present no consensus on Tasks 2 and 3 in document WIPO/GRTKF/IC/3/10, these matters may be returned to in the future.

305. The Delegation of Colombia affirmed the importance of coordination with other bodies, particularly the CBD and the FAO, and the need for coherence between different instruments. The Delegation referred to the Bonn Guidelines regarding access to genetic resources and benefit sharing and the concept of "farmers rights" which should be operationalized within the work of the Committee.

306. The Delegation of Algeria, on behalf of the African Group, also confirmed the importance of cooperation between WIPO, the CBD and the FAO, and further coordination between the Committee and other WIPO bodies. The Delegation requested the assistance of WIPO to facilitate the participation of African countries, especially LDCs, in sessions of the Committee. The Delegation emphasized the importance of folklore and that similar level of attention should be paid to all three of the themes within the Committee's mandate. Finally, the Delegation also requested that Members receive the working documents in good time and in all the working languages.

307. The representative of UNCTAD drew attention to a briefing session being organized by UNCTAD in September 2002 on the implications of the recent FAO Treaty for Geneva-based negotiations.

308. Referring also to his previous conclusions under the respective agenda items, the Chair stated that for the next session the Secretariat would prepare, *inter alia*:

- (a) a report on the database of existing contractual clauses relating to access to genetic resources, including on responses to the questionnaire that the Secretariat would issue in relation to its compilation;
- (b) a draft of the technical study which the recent CBDCOP had invited WIPO to prepare;
- (c) a short report on the activities relating to the use of the inventory of TK journals;
- (d) a report on the use of the inventory of existing TK databases, with particular reference to paragraph 22(b)(i) to (iii) of document WIPO/GRTKF/IC/3/6;
- (e) a short report on the decision taken by the WIPO Program and Budget Committee and WIPO Assemblies, at their meetings scheduled for September and October 2002, regarding participation in the sessions of the Committee by indigenous peoples and local communities; and
- (f) a report on relevant discussions within the WIPO Standing Committee on Patents.

309. The Chair then referred to further working documents that would be prepared by the Secretariat. Regarding TK, Members were invited to pass any comments on the questions posed in the survey of existing IP protection of TK (WIPO/GRTKF/IC/2/5) by the end of June and the Secretariat would then circulate a streamlined set of questions taking account of these comments. Based on responses and other input, the Secretariat would then prepare an updated version of document WIPO/GRTKF/IC/3/7.

Document WIPO/GRTKF/IC/3/8 (elements of a *suigeneris* TK system) would be revised, and Members were invited to submit further input on it by September 15, 2002. Based on document WIPO/GRTKF/IC/3/9 (TK terms and definitions), a document would be prepared comprising a synthesis of elements that could make up a working definition of TK. Regarding folklore, the Chair noted that the Secretariat, for the next session, would produce a document comprising a further synthesis of national experiences with regard to the legal protection of expressions of folklore. The Chair also confirmed that the requests for specific reports and other comments made by Members (as outlined in the earlier discussion of this agenda item) would also be taken into account in setting the future work of the Committee.

ITEM 8: ADOPTION OF THE REPORT

310. The Committee reviewed the draft reported (circulated as document WIPO/GRTKF/IC/3/17 Prov.) and adopted it, including the summaries by the Chair, subject only to any notification by participants of the Committee to the Secretariat of amendments required to the summary of their own interventions as recorded in document WIPO/GRTKF/IC/3/17 Prov. The present document incorporates any such requested amendments received by the Secretariat.

ITEM 9: CLOSING OF THE SESSION

311. The Chair closed the Third Session of the Committee on June 21, 2002, after the Committee had agreed to hold its Fourth Session from December 9 to 17, 2002.

[Annexes follow]

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[L'annexe II suit/Annex II follows]

ANNEXII

POSITIONPAPER
OFTHEAFRICANGROUP

Presentedtothe
ThirdSessionoftheWIPOIntergovernmentalCommitteeonIntellectualPropertyand
GeneticResources,TraditionalKnowledgeandFolklore
(June13to21,2002)

I. INTRODUCTION

This position paper of the African Group, presented to the third session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), flows from the “Decision on Intellectual Property, Genetic and Biological Resources, Traditional Knowledge and Folklore in Africa” taken by the Council of Ministers and adopted by the Heads of African States at the Seventy -fourth Ordinary Session/Ninth Ordinary Session of the African Economic Community of the Organization of African Unity (the OAU) (July 5 to 8, 2001, Lusaka, Zambia), and is the synthesis of views and proposals developed by African States at several meetings held in Africa and within the context of the IGC. In this context, the paper refers to the “Proposal Presented by the African Group to the First Meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” (WIPO/GRTK/IC/1/10) and the paper entitled “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” presented by the delegation of Zambia (WIPO/GRTK/IC/1/12).

II. PREAMBLE

The African Group:

(1) recall the “Decision on Intellectual Property, Genetic and Biological Resources, Traditional Knowledge and Folklore in Africa” adopted by the Council of Ministers and endorsed by the Heads of African States at the Seventy -fourth Ordinary Session/Ninth Ordinary Session of the AEC of the Organization of African Unity (July 5 to 8, 2001, Lusaka, Zambia), according to which:

“(The) Council (of Ministers):

- (1) COMMENDS the Secretary General on his initiative and efforts in developing the draft African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, as well as the draft African Model Law on Bio -Safety and an Africa -wide Bio-Safety System;
- (2) SUPPORTS the convening of the proposed experts meetings intended to further examine the draft model laws within the framework of the African

common positions on intellectual property, generally, and the Trips Agreement in particular; and

URGES MEMBER STATES TO:

- (i) Participate effectively in the two on-going processes of developing model laws and to use these models as a basis for finalizing their national legislations by adapting their provisions to the national context and within the framework of the WTO negotiations, whilst maintaining, as much as possible, the principle of uniformity of national laws of integrating African economies;
 - (ii) Examine ways and means of raising awareness about the protection of genetic resources, indigenous knowledge and folklore, taking into account the need to protect the rights of local communities;
 - (iii) Identify, catalogue, record and document the genetic and biological resources and traditional knowledge, including expressions of folklore held by their communities, within the framework of national laws, with a view to guaranteeing them protection against misappropriation;
 - (iv) Exchange information and experiences and continue, within the framework of the OAU, with the search for joint solutions of common concern, and, with the efforts aimed at developing common positions, policies and strategies in relation to these issues.”
- (2) recall the decision of the OAU proclaiming 2001-10 as the Decade for Traditional Medicine;
 - (3) takes note of the draft African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources adopted by the OAU;
 - (4) emphasizes that the protection of genetic resources, traditional knowledge and expressions of folklore is of great importance to African States. The African region is rich in genetic resources, traditional knowledge and expressions of folklore, which are an important part of the cultural and natural heritage of Africa's peoples;
 - (5) believes that the need for the protection of genetic resources, traditional knowledge and expressions of folklore should be viewed and understood within the context of larger socio-economic, cultural and political processes in Africa striving for sustainable development, socio-economic uplift of particularly rural communities, people-centered development, scientific and cultural endeavors, and the respect for the human dignity and cultural identity of traditional and traditional communities;
 - (6) believes that WIPO has a significant role to develop internationally acceptable and equitable solutions to the *intellectual property issues* related to genetic resources, traditional knowledge and expressions of folklore;
 - (7) notes that issues pertaining to genetic resources, traditional knowledge and expressions of folklore should be addressed equitably by the IGC with due regard to their equal importance;

(8) notes the desirability of coordination and synergy between action taken at the national, regional and international levels;

(9) believes that there is a need to develop *suigeneris* rights and systems to provide protection not adequately available under current rights and systems, despite the protection provided in some cases to traditional knowledge associated with genetic resources and expressions of folklore by current intellectual property systems;

(10) notes that States and traditional communities have difficulty in implementing and making effective use of existing rights and systems for the protection of traditional knowledge and expressions of folklore;

(11) affirms the sovereignty of States over their genetic resources, and recognises the principle of fair and equitable sharing of benefits arising from the use of such resources;

(12) notes that the use of genetic resources is inseparable from and an integral part of traditional knowledge.

III. AFRICAN POSITION ON SPECIFIC AGENDA ITEMS OF THE IGC

Access to Genetic Resources and Benefit -Sharing

(1) In view of the alarming rate of loss and misappropriation of genetic resources, States are urged to put in place legislative, administrative and strategic policy measures and mechanisms for the conservation and sustainable use of biological diversity, while protecting the rights of the owners and users of genetic resources. Such measures and mechanisms should include:

(a) the preparation of national laws on the protection of the rights of local communities in respect of their genetic resources;

(b) the development of national policies and laws on the protection, conservation, preservation and sustainable use of genetic resources;

(c) the creation of a competent national authority responsible for the regulation, monitoring and coordination of developmental activities, including access to and the fair and equitable sharing of benefits in respect of genetic resources and all other matters relating to traditional knowledge;

(d) regional cooperation among genetic resources supplier States, and the drafting of harmonized regional legislation on the management of genetic resources that are multi-cultural in nature and cut across national borders within regionaleconomic integration areas, such as the draft African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources;

(e) the promotion and recognition of research and development of genetic resources and associated traditional knowledge, and the responsible dissemination of the results of such research;

(f) the design, implementation, monitoring and evaluation of programs of information, education, communication and awareness, particularly at the local community level;

(g) consolidation of regional coordination efforts;

(h) African States, particularly those less developed, should benefit, in case of need, from the assistance of intergovernmental organizations for capacity building and in the areas cited above.

(2) The African Group considers as an important stage the development by the IGC of “guide contractual practices”, guidelines and model intellectual property clauses for contractual agreements on access to and use of genetic resources, and the fair and equitable sharing of benefits. In this regard:

(a) contractual arrangements on access to genetic resources should take into account the following points and principles:

(i) any access to genetic resources for industrial, commercial or research purposes should be the subject of a prior request in writing addressed to the competent national authority or any other relevant body responsible for genetic resources, in accordance with national laws;

(ii) adoption of the principle of prior informed consent in the process of access and the fair and equitable sharing of benefits;

(iii) the subject matter of each contract, the rights and obligations of all parties, the nature of the benefits and the method of their distribution, and the identity of the beneficiaries must be clearly specified;

(iv) the protection of the supplier's interests, subject to assurance of the preservation and permanency of the genetic resource for present and future generations.

(b) the African Group supports enhancing, nationally, regionally and internationally, the negotiating capacity of traditional communities and governmental and research institutions, by, for example, creating awareness, information sharing, and providing targeted legal education.

(c) the African Group supports putting into place national and international regulatory mechanisms and frameworks for monitoring the compliance by the parties of the terms and conditions of contracts relating to access to genetic resources and the fair and equitable sharing of benefits.

(3) In respect of the protection of biotechnology and biological resources, there should be:

(a) in accordance with the precautionary principle, endeavours for respect for the right of biotechnology inventors and innovators, with due regard to the rights of the owners of genetic resources;

- (b) the protection of all inventions and innovations with due regard to the rules of bio-ethics;
- (c) the establishment of national biosafety regulatory frameworks;
- (d) assistance to researchers and innovators in the protection of their inventions.

Traditional Knowledge

(1) The African Group believes that in considering *suu generis* forms of protection for traditional knowledge, attention should be paid to determining and identifying the subject matter of protection; the type of protection desired; the content of the rights to be granted; the duration of rights granted; and, the identity of the owners of the rights. In this respect:

(a) in developing effective national, regional and international systems of protection, it is necessary to develop flexible *suu generis* systems that take customary laws, protocols and practices into account, to provide protection not adequately provided by existing rights and systems;

(b) strategies for identifying the subject matter to be protected could inter alia include compiling inventories of traditional knowledge and the natural heritage, with the assistance of ethics committees; the better organization of the sector comprising traditional knowledge; cooperation between traditional medicine and modern medicine suppliers; and, the teaching of traditional knowledge at primary, secondary and tertiary levels. National authorities should be continuously and fully involved in all phases of the development and implementation of these activities;

(c) the owners of traditional knowledge are at the outset the individuals, families and/or local communities from which the knowledge has come. If these cannot be identified, then the States should stand in for them.

(2) In respect of the IGC, the African Group:

(a) favors the development of a legally binding international instrument that recognizes, protects and rewards traditional knowledge and innovations;

(b) supports the development by the IGC of a working definition of "traditional knowledge" that is illustrative and inclusive, and which establishes its characteristic features and the criteria according to which it should be protected;

(c) supports the compilation of an inventory of documents related to traditional knowledge for inclusion in the minimum documentation list of the Patent Cooperation Treaty (the PCT), and the classification of relevant traditional knowledge documentation for patent search purposes;

(d) notes with interest this step of the development and publication of appropriated databases of traditional knowledge that is already in the public domain, taking into account, however, the characteristics and needs of African Traditional Knowledge Systems, which are largely orally held, as well as the use of databases to

provide positive protection for traditional knowledge, particularly “secret knowledge.” Further, the Group encourages African States to establish traditional knowledge databases and make them available, in cases where “defensive protection” of disclosed traditional knowledge is desired. The Group also calls upon WIPO to provide intellectual property assistance to African documentation initiatives in this regard, particularly in respect of the intellectual property implications of such documentation.

(3) More generally, States should:

(a) speed up the formulation of national policies and legislation in regard to the recognition, preservation, development and popularization of the inherent elements of traditional knowledge which impact on the life of the people and the environment;

(b) create national competent authorities for the management and promotion of traditional knowledge;

(c) intensify efforts to create public awareness among all stakeholders on all issues relating to the development, promotion and protection of traditional knowledge;

(d) translate regulatory texts linked to traditional knowledge into the local languages with a view to the involvement of all the communities.

(4) The African Group also believes that traditional communities have a key responsibility for identifying, preserving, and promoting their knowledge systems, and national governments should support and assist them in these endeavours.

Expressions of Folklore

(1) The African Group believes that existing intellectual property rights, such as copyright, trademarks (including certification and collective marks), and industrial designs, may provide adequate protection for expressions of folklore in respect of tradition-based creations where the creator (or creators) of the expression is (or are) identifiable. In such cases, the creator should be the owner and beneficiary of the rights. On the other hand, where there is no identifiable creator, recourse should be had to a *suigeneris* intellectual property system, which should provide for the State to hold the rights. In such cases, the States should pay any financial proceeds either to the relevant community or to a fund for the promotion of cultural heritage.

(2) In respect of the IGC:

(a) the IGC should examine the means by which intellectual property registration systems, particularly the trademark and industrial design systems, could be adapted to enhance the protection provided to expressions of folklore, without prejudice to the examination of these questions within other organs of WIPO.

(b) the African Group supports the study of the relationship between customary laws, protocols and practices governing custodianship, use and transmission of expressions of folklore, on the one hand, and the formal intellectual property system, on the other, in relation *inter alia* to the establishment of *suigeneris* systems of protection and so as to ensure that intellectual property rights do not preclude continued customary creation and use of expressions of folklore;

(c) the WIPO/UNESCO Model Provisions, 1982 provide a useful reference point for the development of effective national, regional and international systems of protection, although they could be updated and improved upon;

(d) the African Group favors the establishment of a comprehensive international binding instrument on the protection of expressions of folklore, with some form of dispute settlement mechanism either similar to that which is obtainable under the TRIPS Agreement or a mediation process as provided by the WIPO Arbitration and Mediation Centre.

Specific recommendations to WIPO

(1) WIPO should provide greater legal -technical assistance for the putting in place and effective implementation of systems for the protection of expressions of folklore at national and regional levels. Such assistance should include awareness -raising, institution -building, and training and information for traditional communities on enforcement.

(2) WIPO should conduct empirical studies on the economic effects of the exploitation of tangible and intangible expressions of folklore, particularly handicrafts, in developing and the least developed countries, and particularly in the light of new technologies for the reproduction and dissemination of such folkloric works.

Specific recommendations to African States

(1) As a matter of urgency, expressions of folklore should receive more effective and appropriate protection at national levels, in order that African peoples derive the maximum social-economic benefits from such protection. In this regard:

(a) appropriate national legislation, institutions and structures should be put in place, to ensure protection of expressions of folklore as a strategy for cultural development;

(b) national measures and systems for the protection of expressions of folklore should take into account the WIPO -UNESCO Model Provisions, 1982 as a useful possible starting point;

(c) African States should also explore and encourage use by their traditional communities of existing intellectual property rights for the protection of traditional culture and expressions of folklore;

(d) African governments should devote more attention and resources to folklore issues and to intellectual property generally, and involve relevant communities and civil societies in raising awareness of the value of expressions of folklore and the importance of protecting them;

(e) African States should devote attention to the urgency of creating an African Regional framework for the preservation, protection, and maintenance of the integrity of expressions of folklore, including the establishment of national and regional documentation centers.

General Statements

The African Group:

- (a) encourages the continued coordination of the work of WIPO with the ongoing processes underway in the Secretariat of the Convention on Biological Diversity (the CBD), the Food and Agricultural Organisation (the FAO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to enhance synergies;
- (b) remains convinced of the necessity for the establishment of a WIPO Standing Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in order that these important issues be taken into account within a framework designed to achieve specific results, in line with how other substantive issues are dealt with by WIPO;
- (c) considers that the mandate of the IGC be continued beyond the WIPO Program and Budget for 2002-03 and that consideration be given to constituting it as a Standing Committee at that time, if not before;
- (d) calls upon WIPO to continue to support and make possible the full and well-informed participation of developing and least developed countries in the various meetings and consultation process in this regard;
- (e) requests the WIPO Program and Budget Committee to approve and expedite the funding of the participation of traditional communities at the IGC sessions;
- (f) strongly encourages officials from African States, through the coordination of the OAU, and in consultation with their correspondences from other developing countries, who participate in IGC sessions and other meetings relating to intellectual property and genetic resources, traditional knowledge and folklore, to report back to and consult with all relevant governmental and non-governmental stakeholders so as to enrich the participation of developing countries in such meetings;
- (g) encourages WIPO to enhance cooperation with sub-regional and regional organizations involved in intellectual property rights;
- (h) expresses its deep gratitude to WIPO for the assistance provided to African States and requests that it continue to provide opportunities to African and other developing countries to engage with and contribute meaningfully to the IGC process.

IV. CONCLUSION

The African Group intends to continuously refine and build upon these proposals as the work of the IGC and national, regional and other international processes develop. The African Group looks forward to working with the other regional groups in the IGC to ensure the positive protection of genetic resources, traditional knowledge and folklore.

[End of annexes and of document]