

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

**Thirty-Fourth Session**  
**Geneva, June 12 to 16, 2017**

REPORT

*Adopted by the Committee*

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Thirty-Fourth Session (“IGC 34”) in Geneva, from June 12 to 16, 2017.
2. The following States were represented: Algeria, Angola, Argentina, Armenia, Australia, Austria, Bahamas, Bolivia (Plurinational State of), Brazil, Cameroon, Canada, Chile, China, Cyprus, Colombia, Congo, Cuba, Czech Republic, Democratic People’s Republic of Korea, Denmark, Egypt, El Salvador, Ecuador, Estonia, Ethiopia, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Ghana, Guatemala, Hungary, India, Indonesia, Lao People’s Democratic Republic, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kyrgyzstan, Lebanon, Lithuania, Malawi, Mexico, Morocco, Mozambique, Namibia, New Zealand, Niger, Nigeria, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Republic of Korea, Republic of Moldova, Saudi Arabia, Senegal, Slovakia, Somalia, South Africa, Spain, Sri Lanka, Switzerland, Tajikistan, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Viet Nam, Yemen and Zimbabwe (87). The European Union (“the EU”) and its Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: African Intellectual Property Organization (OAPI); European Patent Organization (EPO); General Secretariat of the Andean Community; Organisation internationale de la francophonie (OIF); Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office); and South Centre (SC) (6).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: ADJMOR; Agencia Internacional de Prensa Indígena (AIPIN); Assembly of Armenians of Western Armenia; Australian Centre for Intellectual Property in Agriculture (ACIPA); Association for the International Collective Management of Audiovisual Works (AGICOA); Brazilian Association of Intellectual Property (ABPI); Center for Multidisciplinary Studies Aymara (CEM-Aymara); Centre for International Governance Innovation (CIGI); Centre for Support of Indigenous Peoples of the North/Russian Indigenous Training Centre (CSIPN/RITC); Civil Society Coalition (CSC); Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); CropLife International (CROPLIFE); CS Consulting; France Freedoms - Danielle Mitterrand Foundation; Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH; Health and Environment Program (HEP); Himalayan Folklore and Biodiversity Study Program IPs Society for Wetland Biodiversity Conservation Nepal; Independent Film and Television Alliance (I.F.T.A); Indian Movement - Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); Indigenous World Association (IWA); International Association for the Protection of Intellectual Property (AIPPI); International Federation of Library Associations and Institutions (IFLA); International Publishers Association (IPA); International Trade Center for Development (CECIDE); International Trademark Association (INTA); International Video Federation (IVF); Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi); Maasai Cultural Heritage Foundation (MCHF); MALOCA Internationale; MARQUES - The Association of European Trademark Owners; Native American Rights Fund (NARF); Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España); Sámi Parliamentary Council (SPC); Società Italiana per la Museografia e i Beni Demoetnoantropologici (SIMBDEA); Tebtebba Foundation - Indigenous Peoples’ International Centre for Policy Research and Education; Tulalip Tribes of Washington Governmental Affairs Department; and University of Lausanne (38).

6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/34/INF/2 provided an overview of the documents distributed for IGC 34.
8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions.
9. Mr. Wend Wendland of WIPO was Secretary to IGC 34.

#### **AGENDA ITEM 1: OPENING OF THE SESSION**

10. The Chair of the IGC, Mr. Ian Goss from Australia, opened the session.
11. The Assistant Director General, Mr. Minelik Alemu Getahun, on behalf of the Director General, Mr. Francis Gurry, delivered opening remarks. He recalled that, in October 2015, the General Assembly (“GA”) had renewed the IGC’s mandate for the 2016/2017 biennium. The work program for the IGC for the biennium included two sessions on genetic resources (“GRs”) in 2016, two sessions on traditional knowledge (“TK”) in 2016 and two sessions on traditional cultural expressions (“TCEs”) in 2017. The Secretariat had been requested to organize seminars to build regional and cross-regional knowledge with a focus on unresolved issues. Accordingly, on June 8 and 9, 2017, a Seminar on Intellectual Property and Traditional Cultural Expressions (“the Seminar”) had been organized. He expressed his gratitude and thanks to the knowledgeable and experienced moderators and speakers at the Seminar for their valuable contributions. He thanked the rapporteurs who would report on the Seminar later. He hoped that the participants had benefited from the exchange of experiences and discussions. He acknowledged the tireless work by the Chair between the sessions and the contributions of the two Vice-Chairs who worked very closely with the Chair, namely, Ambassador Robert Matheus Michael Tene from Indonesia and Mr. Jukka Liedes from Finland. The Regional Coordinators and many Member States had also remained engaged during those intersessional activities with the Chair and the Vice-Chairs and continued to play a critical role. IGC 34 had a dual mandate: TCEs and stocktaking. He recalled that IGC 33 had advanced the work on the draft articles, discussed core issues identified in the mandate and agreed on an Indicative List of Outstanding/Pending Issues to be Tackled/Solved (document WIPO/GRTKF/IC/34/7). A lot of work needed to be taken for further convergence on outstanding and pending issues. He called upon Member States to show flexibility and pragmatism and urged them to make an effort in the sense of compromise so that the long-standing item could be brought to a successful conclusion. He acknowledged the excellent contributions that indigenous experts continued to make in the process and encouraged them to participate as directly and effectively as possible. IGC 34 was the last session under the current mandate. Pursuant to that mandate and the work program adopted by the GA, IGC 34 would also be a stocktaking session. The IGC was invited to submit to the GA the results of its work on an international legal instrument(s) relating to IP, which would ensure the balanced and effective protection of GRs, TK and TCEs. The IGC was also invited to consider the conversion of the IGC into a Standing Committee, and, if so agreed, make recommendations to the GA. As a next step, the GA in October 2017 would take stock of the progress made and decide on whether to convene a diplomatic conference or continue its negotiations. It would also consider the need for additional meetings, taking account of the budgetary process. He acknowledged the Government of Australia’s donation to the WIPO Voluntary Fund at IGC 33, which ensured that the voices of indigenous and local communities (“ILCs”) could be delivered in person at the IGC. He encouraged other Member States to identify ways to raise contributions to the Fund. Delegations were reminded to ensure the participation of indigenous peoples and local communities (“IPLCs”) within the IGC negotiations and to enhance the importance of the Fund in facilitating that active participation. The theme of

the Indigenous Panel for IGC 34 was “Outstanding/Pending Issues in the IGC Draft Articles on the Protection of Traditional Cultural Expressions: Indigenous Peoples’ and Local Communities’ Perspectives”. The keynote speaker was Mr. S. James Anaya, Dean and Thomson Professor of Law, University of Colorado Law School, United States of America, who continued to play a very active role, including with the submission of his technical assessment before the IGC (document WIPO/GRTKF/IC/34/INF/8). The two respondents were Ms. Aroha Te Pareake Mead, a member of Ngati Awa and Ngati Porou Tribes in New Zealand and Ms. Jennifer Tauli Corpuz, a member of Kankana-ey Igorot People of Mountain Province in the Philippines.

12. The Chair thanked the Vice-Chairs for their assistance, support and valuable contributions. They worked as a team and he regularly sought their guidance. He thanked the interpreters and the Secretariat, which worked quietly behind the scenes yet had no small part in contributing to the success of the meetings. He also thanked the Member States who had provided the facilitators to help progress the IGC’s work. The efforts of the facilitators to try and narrow gaps could not be underestimated. He had consulted with Regional Coordinators at the beginning of the session and he thanked them for their constructive guidance. They would also help to have a constructive working session. He recalled that the session was on live webcast on the WIPO website, which further improved openness and inclusiveness. All participants were required to comply with the WIPO General Rules of Procedure. The meeting was to be conducted in a spirit of constructive debate and discussion in which all participants were expected to take part with due respect to the order, fairness and decorum that governed the meeting. As the Chair of the IGC, he reserved the right, where applicable, to call to order any participant who might fail to observe the WIPO General Rules of Procedure and the usual rules of good conduct. In recent months, there had been increased media interest in the work of the IGC. The WIPO Press Office was responding positively to requests from journalists to cover the IGC in Geneva. That might lead to journalists coming to film or take photographs of the IGC at work, during plenary, to illustrate their news stories. Any journalist would be accompanied by WIPO’s press and media staff. The filming would be discrete and would not include audio without the explicit permission of the delegation concerned. For example, at the session, a camera crew from the Canadian Broadcasting Corporation would do some short and discrete filming during the IGC plenary. This was a five-day session. He intended to use all of the time allocated as fully as possible. Pursuant to the current mandate and under Agenda Item 7, IGC 34 should undertake negotiations on TCEs with a focus on narrowing existing gaps, reaching a common understanding on core issues and considering options for a draft legal instrument. In addition, as detailed in the work program, under Agenda Item 8, IGC 34 should take stock of the progress made in the 2016/2017 biennium and make a recommendation to the GA. As agreed in the methodology for the session, Agenda Item 8 would be opened first, followed by Agenda Item 7. Under Agenda Item 2, opening statements of up to two minutes would be allowed by Regional Groups, the EU, the Like-Minded Countries (“the LMCs”) and the Indigenous Caucus. Any other statements could be handed to the Secretariat in writing or be sent by email and they would be reflected in the report. Member States and observers were strongly encouraged to interact with each other informally, as this increased the chances that Member States would be aware of and perhaps support observers’ proposals. He acknowledged the importance and value of indigenous representatives, as well as other key stakeholders such as representatives of industry and civil society. The IGC should reach an agreed decision on each agenda item as it went along. On Friday, June 16, the decisions as already agreed would be circulated for formal confirmation by the IGC. The report of the session would be prepared after the session and circulated to all delegations for comment. It would be presented in all six languages for adoption at the next session of the IGC. The Chair noted that he had prepared three notes on: (1) TCEs which followed on his previous note prepared for IGC 33; (2) the stocktaking and making a recommendation to the GA; and (3) the methodology for the meeting. The first two notes were provided to assist preparations. However, they had no status and did not prejudge any Member State’s positions. The third note had been discussed with and agreed on by Regional Coordinators and interested members. He congratulated the Secretariat, the moderators and the presenters of the Seminar. It had provided an excellent forum to discuss

the issues to be dealt with in the IGC. Last, he mentioned the informal LMCs Roundtable on the Protection of Traditional Cultural Expressions (“the Roundtable”). He strongly supported those activities because it was often at those meetings that the real work was done, particularly establishing a shared understanding of different positions. A shared understanding was critical if the IGC was to deliver an outcome that balanced the interests of all Member States and those of the key stakeholders, in particular IPLCs and users.

## **AGENDA ITEM 2: ADOPTION OF THE AGENDA**

### *Decision on Agenda Item 2:*

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/34/1 Prov. 2 for adoption and it was adopted.*

14. The Chair opened the floor for opening statements.

15. [Note from the Secretariat: Many delegations thanked the Chair, Vice-Chairs and Secretariat and expressed their gratitude for the preparation of the session and of the Seminar, as well as for the preparation of the documents. These statements are not included in this report]. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, supported the methodology and the work program. It appreciated the Chair’s Information Note on TCEs, as well as the Information Note regarding the discussions under Agenda Item 8. Apart from undertaking negotiations on the TCEs text, IGC 34 would also take stock of the progress made in the current mandate. With regard to the TCEs text, it favored discussions on the core issues in order to arrive at common landing zones on the issues of objectives, beneficiaries, subject matter, scope of protection, and exceptions and limitations. How TCEs would be defined would lay down the foundation of the IGC’s work. Most of the Group’s members believed that the definition of TCEs should be inclusive and comprehensive, capture the unique characteristics of TCEs, and not require separate eligibility criteria. Most of the Group’s members were also in favor of a differential level of protection for TCEs and believed such an approach offered the opportunity to balance the relationship with the public domain as well as balance the rights and interests of owners, users and the wider public interest. But some members had a different position. The rights based on the characteristics of the TCEs could be a way forward towards narrowing existing gaps with the ultimate objective of reaching an agreement on an international instrument that would ensure the balanced and effective protection of TCEs in addition to the protection of GRs and TK. On the issues of beneficiaries, the main beneficiaries of the instrument were ILCs. Though some members of the Group had a different position, most members were of the view that it was pertinent to address the role of other beneficiaries in accordance with national law, as there were certain circumstances in which TCEs could not be specifically attributable to a particular ILC. On the scope of protection, most of the group was in favor of providing maximal possible protection for TCEs depending on the nature and characteristics of the TCEs, where both economic and moral rights-based models could be appropriate for various TCEs. But some members had different positions. On exceptions and limitations, it was of fundamental importance that the provision should be considered in a balanced way between the specific situations of each Member State and the substantive interests of TCE holders. Given differing national circumstances, there should be flexibility for Member States to decide on appropriate limitations and exceptions. With regard to Agenda Item 8, though some members had a different position, most members of the group reiterated that there was a need for a legally binding instrument(s) providing effective protection to GRs, TK and TCEs. It hoped to be able to come up with a recommendation to the GA that would guide the future work of the IGC based on the progress made under the current mandate. It assured of the Group’s full support and cooperation in rendering the meeting a success. It

remained committed to negotiating constructively for a mutually acceptable outcome. It was hopeful that discussions would lead to visible progress in the work of the IGC.

16. The Delegation of Senegal, speaking on behalf of the African Group, looked forward to the discussion under Agenda Item 8. IGC 34 was at a particularly important turning point because it was not just taking stock of the progress made on three issues but also looking at new recommendations to the GA. Under Agenda Item 6, the Group took note of document WIPO/GRTKF/IC/34/INF/4 on the Voluntary Fund and thanked the delegations for their contributions. Under Agenda Item 7, it hoped that IGC 34 would help resolve pending issues and ensure convergence of opinions on key articles. It underscored the importance of the regular work of the IGC on substantial questions concerning GRs, TK and TCEs. That heritage was deeply linked to the social identity of communities and was not just an intrinsic social and economic value but also a rich form of innovation. Thus that heritage was recognized across the world in terms of human rights and biological diversity, and it had to be preserved and, therefore, it required strong IP protection. Legally binding instruments were the most appropriate to achieve optimal protection. The Group recommended that the IGC convene a diplomatic conference. In order to allow the IGC to focus on the substantive issues rather than the mandate, the Group wished to make the IGC a Standing Committee, as stipulated in document WO/GA/47/16. It promised to work constructively and actively for the success of IGC 34.

17. The Delegation of Colombia, speaking on behalf of the Group of Latin American and Caribbean Countries (“GRULAC”), said that the proposed working methodology would ensure that IGC 34, which had a thematic and evaluation character, be as productive as possible. It recognized that activities such as the Seminar and the Roundtable contributed to building knowledge and consensus on issues relating to TCEs. IGC 34 would complete the mandate for the 2016/2017 biennium with the continuation of the consideration of the core and outstanding issues in the area of TCEs, and taking stock of the progress made and drafting a recommendation to the GA. The IGC had to present the results of the work on one or several international legal instruments relating to IP, which would ensure the effective and balanced protection of GRs, TK and TCEs. It highlighted the usefulness of the Chair’s Information Notes, which would facilitate the work during the week. In the Information Note on Agenda Item 8, the Chair had provided a number of issues for reflection. The Group recalled all the efforts, background and achievements at the multilateral level in the fields of GRs, TK and TCEs which had been under discussion since the 1960s. When the IGC had been established in 2000, delegations had made the commitment to consider the IP issues that arose in those areas with the aim of reaching an agreement on one or various international legal instruments to ensure their protection. For GRULAC and all its members, the negotiations were of vital importance, bearing in mind the environment, biodiversity, culture and wealth of TK and TCEs that required protection. It was of great importance that the text-based negotiations should continue under a renewed mandate, which should include an action plan with indicative dates and detailed activities to allow streamlining the work and the negotiations underway, and should indicate to the GA the text(s) that would be presented with the aim of deciding on whether to convene a diplomatic conference. The work of the facilitators was extremely valuable and it was pleased to see Ms. Margo Bagley of Mozambique and Ms. Marcela Paiva of Chile in those positions again. It welcomed Ms. Ema Hao’uli of New Zealand as a new facilitator. The experience and professional qualities of all three facilitators would continue to contribute to the work of the IGC. It was important to build on the work already carried out by the IGC. It assured of its commitment to make progress.

18. The Delegation of Tajikistan, speaking on behalf of the Central Asia, Caucasus and Eastern European Countries Group (“CACEEC”), recognized that it was very important to come up with an IP-related international legal instrument to ensure the balanced and effective protection of TCEs. It had high expectations and firmly believed that, under the Chair’s skillful guidance and leadership, Member States would find common grounds on core issues by

narrowing existing gaps. It stood ready to discuss the Draft Articles on TCEs with a focus on addressing unresolved issues and considering options for a draft legal instrument. It hoped that the work of the IGC would be productive and deliver recommendations to the GA. IGC 34 had a substantive agenda. The members of the Group would make interventions in their national capacity in the course of the session. It assured of the Group's engagement in a constructive manner for a successful completion of the work.

19. The Delegation of Georgia, speaking on behalf of the Central European and Baltic States Group ("CEBS"), said that IGC 33 had restarted discussions on the core issues regarding the balanced and effective protection of TCEs. Nevertheless, a common understanding had not been achieved. In the framework of WIPO, the IGC had to find a common understanding on the overarching objectives and on what was realistically achievable in order to have a focused and productive discussion on elements such as beneficiaries and subject matter. It favored an evidence-based approach so as to draw lessons from the experiences and discussions that had taken place in various Member States while elaborating legislation protecting TCEs at the national level and also from existing efforts to safeguard TCEs at the international level. Potential consequences and crucial aspects such as legal certainty and economic, social and cultural impacts should be carefully considered before reaching an agreement on any particular outcome. The Seminar had been very interesting in light of active exchanges of views during the roundtables, which would fuel evidence-based discussions.

20. The Delegation of China said that IGC 34 was the sixth and last session under the current mandate. During the past five meetings, all parties had conducted useful text-based negotiations on GRs, TK and TCEs. Those discussions had narrowed the gaps. Related work had been pushed forward and progress had been made. It was convinced that those efforts and work would be very useful to reaching consensus on key issues and to push forward to establish international legally binding instruments. IGC 34 would continue the discussion related to TCEs in order to narrow gaps and reach consensus. At the same time, the meeting would also evaluate the progress made and discuss future work. In the area of TCEs, in 2014, China had drafted a provisional regulation on copyright protection of folk literary and artistic works. Public consultations had been conducted. The Delegation was ready to work with all delegations to conduct substantial discussions on the Draft Articles on the TCEs in the spirit of cooperation, inclusiveness, flexibility and pragmatism in order to narrow gaps and reach consensus. It was convinced that IGC 34 would successfully finish all agenda items.

21. The Delegation of Japan, speaking on behalf of Group B, noted that the Seminar had contributed to sharing national experiences in an evidence-based approach and to understanding core issues. Since the webcast was available online, it hoped that it would constitute resourceful materials for all stakeholders. It encouraged the IGC to focus on substantive TCE discussions with the aim of gaining a common understanding of core issues and to work cooperatively under Agenda Item 8. The IGC's work should be designed in a meaningful and practical manner by supporting innovation and creativity and ensuring legal certainty while highlighting the unique nature of GRs, TK and TCEs. At the same time, there was some overlap between those topics. Therefore, the IGC should avoid developing divergent approaches between the overlapping issues within the three texts. It was hopeful that Member States would develop a common understanding on core issues supported by an evidence-based approach so that meaningful advancement could be achieved. Sharing experiences contributed to achieving a common understanding on core issues and their relationship with existing IP systems. It was confident that the IGC would be able to make progress on TCEs. The Group remained committed to contributing constructively toward achieving a mutually acceptable result.

22. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the objectives for IGC 34 were clear: (1) to hold further discussions on TCEs and (2) to engage in stocktaking discussions on recommendations on the future of the IGC. In line with the

methodology, it welcomed that there would be no overlap between the formal and informal discussions on Agenda Items 7 and 8. It strongly encouraged delegations to engage on the subject of TCEs based on facts and best practices, and it welcomed concrete examples as a very helpful contribution to the debate. In order to enable and inform a substantive debate that furthered mutual understanding of the facts and information available and its relevance to the IGC's mandate, it had in previous sessions submitted a working document which requested the WIPO Secretariat to undertake a study of recently adopted legislation and initiatives on TCEs in general in the Member States of WIPO. That proposal should be taken into consideration when discussing the future mandate of the IGC. It recalled that the content of TCEs might already be protected by copyright and related rights, geographical indications and trademarks. Those existing IP systems were readily available for potential beneficiaries. Member States should support awareness-raising activities, encourage the use of those existing legal frameworks and improve access to those frameworks. It welcomed discussions on those topics.

23. The Delegation of Indonesia, speaking on behalf of the LMCs, said that the IGC could narrow existing gaps and reach a common understanding on the issues at hand. It supported the working methodology and work program proposed by the Chair. It assured of its full support and cooperation in rendering the session a success. It reaffirmed its commitment to engage constructively for a mutually acceptable outcome. It extended its appreciation for the participation and valuable contributions from all Member States and regional groups that had participated in the Roundtable, the objectives of which had been achieved. It thanked the Secretariat for the successful convening of the Seminar that provided much useful insights on the issues, including discussion on core issues, practical experiences and reflections on the way forward. The issue discussed by the IGC was important not only for all Member States but also for ILCs that created and developed TK and TCEs as well as innovation long before the modern IP system had first been asked of it. All communities had the right to maintain, control and develop IP over their cultural heritage. The IGC needed to push for greater recognition of both moral and economic rights on traditional and cultural heritage, including GRs, TK and TCEs. Substantial and significant progress had been made within the IGC on GRs and TK at the previous sessions within the biennium. It was confident that IGC 34 would build on the progress made at IGC 33 and would also yield progress towards TCEs. The IGC had to not only undertake negotiations on the Draft Articles on TCEs but also to take stock and make recommendations to the GA. At the conclusion of IGC 34, the IGC would have completed its work program approved under the current mandate. It hoped that the session would be able to come up with recommendations to the GA that would guide the future work of the IGC based on the progress made under the current mandate. Noting the importance of effective protection for GRs, TK and TCEs, the IGC should move forward together taking the next step with a view to adopting a legally binding instrument(s), providing effective protection of GRs, TK and TCEs, and convening a diplomatic conference.

24. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, was pleased to report that the number of indigenous representatives had increased. She thanked the Government of Australia for its generous contribution to the Voluntary Fund as well as the efforts of the Secretariat to enable their participation in IGC 34 and in the Seminar. She thanked all the governments that had contributed to the Voluntary Fund in the past and hoped that they could contribute again. The Indigenous Caucus had been able to spend one whole day for preparations instead of the half-day usually allotted. She hoped that the support extended for a whole day of discussions would be a continuing practice for future IGCs. The IGC had a very dense work program. Indigenous representatives were ready to engage constructively in the plenary and informals, as well as in the contact groups that might be formed in order to achieve the objectives of narrowing existing gaps and reaching an agreement on a legally binding instrument(s) that effectively protected GRs, TK and TCEs from misappropriation. She recalled the strong leadership of the LMCs at IGC 33 and their careful consideration and critical support for indigenous peoples' positions and proposals. She hoped that that could be maintained and looked forward to continued support for the proposals of



indigenous representatives, who had undertaken extensive consultations with their peoples during the intersessional period and would be pleased to put forth their written proposals under Agenda Item 7 and comments under Agenda Item 8. Indigenous peoples viewed their GRs, TK and TCEs in a holistic manner and hoped that the three draft texts could be likewise treated holistically and with consistency as the IGC moved towards the conclusion of its negotiations. She called for consistency in the use of terms across the three instruments, particularly the use of “indigenous peoples” when referring to the owners of GRs, TK and TCEs. The IGC had made significant progress in developing the draft texts. It was important that the mandate be renewed with a view to convening a diplomatic conference within the following two years. The IGC needed to conclude its work so that the alarming rate at which misappropriation of TK had been taking place could be effectively addressed. 2017 was the tenth anniversary of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). She recalled the core principles for indigenous peoples, which she hoped could contribute to the discussion on core issues: (1) Indigenous peoples had the right to self-determination. (2) Indigenous peoples had the right to own and control both disclosed and non-disclosed GRs, TK and TCEs. They had the right to uphold their responsibilities with respect to their GRs, TK and TCEs, and to non-diminution of their rights and also the right to be provided redress through effective mechanisms, including restitution and criminal penalties.

25. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of Japan said that the IGC had been discussing the issue of TCEs over the years. Due recognition had to be given to the progress made so far. Nevertheless, even with many years of discussion, the IGC had not been able to find a common understanding on the fundamental issues, namely, objectives, beneficiaries, subject matter and scope of protection, because many gaps still remained in States understanding those issues. In order to resolve that situation, it welcomed the opportunity to deepen the understanding of the core issues detailed in the current mandate. Sharing concrete examples of national experiences and practices could help draw a line between “traditional” cultural expressions, on the one hand, and “contemporary” cultural expressions, on the other. It fully supported the discussions on the proposal made by the Delegation of the United States of America (“USA”) in document WIPO/GRTKF/IC/34/12. That kind of exercise could complement and even facilitate the text-based negotiations. The Delegation was ready to engage with a constructive spirit.

26. The Delegation of the Republic of Korea said the Chair’s effort would greatly help navigate different views and positions of Member States and interested parties. It welcomed the opportunity to gather and discuss key issues once again with other Member States and hoped that the IGC would achieve mutual understandings in those areas in order to understand the current status of existing IP systems.

### **AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE THIRTY-THIRD SESSION**

#### *Decision on Agenda Item 3:*

*27. The Chair submitted the draft report of the Thirty-Third Session of the Committee (WIPO/GRTKF/IC/33/7 Prov. 2) for adoption and it was adopted.*

28. The Chair reminded participants that IGC reports were not verbatim reports. They summarized the discussions without necessarily reflecting all the observations in detail.

29. The representative of the Assembly of Armenians of Western Armenia stated that the report of IGC 33 did not include a statement she had made at that session. [Note from the

Secretariat: the statement referred to was made by the representative during the Indigenous Panel, the report of which was prepared, as usual, by the Panel's Chair (see below). The Panel reports are summaries and not verbatim.]

#### **AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS**

##### *Decision on Agenda Item 4:*

30. *The Committee unanimously approved the accreditation of the five organizations listed in the Annex to document WIPO/GRTKF/IC/34/2 as ad hoc observers, namely: Federación Indígena Empresarial y Comunidades Locales de México, Asociación Civil (CIELO); Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT); DAGBAKA Action pour un Monde Equitable (DAPME) NGO; Promotion des Yaelima de Dekese (PROYADE); and Social Economic and Governance Promotion Centre (SEGP).*

#### **AGENDA ITEM 5: REPORTING ON THE SEMINAR ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS (JUNE 8 AND 9, 2017)**

31. The Chair invited the rapporteurs from the Seminar to deliver their reports.

32. Mr. Ahmed Al-Shehhi, Specialist of Organizations and Cultural Relations, Ministry of Heritage and Culture, Muscat, Oman, reported on the Keynote Address "Existing International Intellectual Property Instruments and Traditional Cultural Expressions: Which Gaps Exist and Which, If Any, Should be Filled?" and Roundtable 1 "Key Policy Issues on Intellectual Property and Traditional Cultural Expressions: Session One" as below:

"Prof. Peter Jaszi presented a keynote speech on 'gap-filling' in the domain of the international legal protection for TCEs. He prefaced the identification of gaps with three caveats: first, the general rule that, especially in IP, not every identified 'gap' in the law's coverage necessary should be 'filled'; second, the principle that, while national legislation and international law were closely intertwined, adequate protection for TCEs must be addressed multilaterally, since so many of the specific problems raised by demandeurs occur in the global information economy; and, third, his choice not to prejudge the question of whether and to what extent a new instrument that specifically addressed TCEs might be an essential part of the solution. After pointing to some structural gaps that were consequences of historical differences, he identified four functional gaps: (1) attribution, i.e. that the sources of TCEs be fully and appropriately acknowledged; (2) control, i.e. concern that TCEs might be employed without consent in ways that would be offensive or hurtful to the peoples and groups who were their custodians; (3) remuneration; and (4) limitations on protection. He then examined if existing regimes, e.g. the Berne Convention, could be modified to meet those aspirations. He concluded that doctrinal gaps lie in some of copyright's most fundamental assumptions, such as authorship and the 'fixity' of a work, and the doctrinal gap between copyright and comprehensive protection for TCEs was wide. On the issue of how gaps might be filled, he questioned whether the potential for partial protection of TCEs under copyright (and related rights) was being fully exploited,

especially for relatively new expressions of old culture were likely to be the most attractive from the standpoint of would-be exploiters. However, this would still leave some gaps unfilled and he concluded with a few lessons, which those contemplating future regimes for TCE protection could learn from the positive values expressed in the existing copyright doctrine.

Roundtable 1 discussed Key Policy Issues on IP and TCEs. Professor Ruth Okediji was the moderator.

Professor Paul Kuruk identified as key characteristics of TCEs the following: they were products of creative intellectual activity; they were handed down from one generation to another, either orally or by imitation; they reflected a community's cultural heritage and social identity and they were constantly evolving, developing and being recreated within the community. He stressed that indigenous and traditional communities had expressed a number of concerns regarding commercial uses of TCEs without their consent, as well as regarding the unauthorized public disclosure and use of secret knowledge, images and other sensitive information pertaining to those communities. Communities had also objected the use of indigenous names in symbols under circumstances perceived to be demeaning. Issues of authenticity and misrepresentation had also been raised. He noted that IP instruments were being used as a policy response to the concerns of indigenous and traditional communities. He also acknowledged the limitations of IP law regarding TCEs, such as ownership, originality and duration. As regards the use of the terms 'protection' or 'safeguarding' in the context of the IGC, he believed that the term 'protection' was more appropriate, since it dealt with subject matter and policy objectives identified as central to the needs of the stakeholders and also because the use of that term was supported by decisions and preferences expressed by the WIPO GA and by the IGC.

Ms. Shuang Hu talked about China's policy to protect TCEs. She explained that provisional regulations on the copyright protection of folk literary and artistic works of China have been drafted to implement Article 6 of the Copyright Law. The objectives of these Draft Provisional regulations were to provide copyright protection for folk literary and artistic works, to guarantee the proper use of these works and to encourage their inheritance and development. A definition and list of types of folk literary and artistic works had been included in the draft provisional regulations. Folk literary and artistic works in the regulations referred to literary and artistic works that were created and transmitted from generation to generation, in a collective context, by unspecified members of a particular nation, ethnic group or community, and embodied the traditional ideas and cultural values of the nation, ethnic group or community. Folk literary and artistic works included folk tales, songs, drama, dances, paintings and sculptures, among others. Ms. Hu clarified that folk literary and artistic works shared some features with works in copyright law, but also had certain particularities. She pointed out that Article 10 of a Draft Amendment of the Copyright Law stated that measures for the copyright protection of works of expressions of folklore should be established separately by the State Council.

Mr. Gihan Indraguptha shared the experiences of Sri Lanka and of the G15 regarding TK and TCEs. He explained that the Sri Lankan IP Law had been adopted in 2003. Before 2013, there had been no basic comprehension of the links between IP, TK and TCEs. An assessment was conducted in 2013 and two options were identified: to wait for an international instrument to be adopted and then ratify it and internalize it, or to do something in the meantime. Sri Lanka had increased its capacity through institutional capacity-building that had included different government agencies. Sri Lanka approached GRs, TK and TCEs separately. He mentioned that a National policy on TK and TCEs was being drafted. Regarding the experience of the G15, which was a group of developing countries from Asia, Africa and Latin America, he explained that, since 2013, it had

decided to focus on four key areas, one of them being IP. Two workshops of the G15 had taken place in the last years on those issues, one in Algeria and another one in Sri Lanka on national policy development.

Ms. Terri Janke presented an example related to a boomerang to illustrate the implications of considering a TCE 'publicly available' or 'generic'. She explained that the styles and shapes of boomerangs differ depending on the clan of origin. She stressed that many boomerangs remained symbols for indigenous peoples. She mentioned a campaign (Fake arts hurt culture) that had been put in place to create awareness regarding fake art and its implications (Artists are cheated/Buyers are cheated/Culture is cheated). These fake items undermined the cultural integrity of indigenous peoples. Ms. Janke also referred to the amendments introduced in 2016 to the Victorian Aboriginal Heritage Act. She showed a number of examples considered by some as inspiration and by others as copies. She explained that indigenous cultural protocols, such as the Australia Council for the Arts Protocols for working with indigenous artists, encouraged consent and communication with indigenous peoples when using their TCEs, and had been widely used in Australia. These protocols have been very strong at encouraging collaboration, such as in the Shell art example. She advocated for a national indigenous cultural authority which would be owned, controlled and managed by indigenous peoples, and could play a key role in the facilitation of TCE rights, while benefitting indigenous peoples, users and consumers.

Mr. Bertrand Moullier explained that the film industry needed legal certainty and predictability, in particular because of the high costs involved when producing a film. He wondered whether the framework provided by copyright was sufficient for IPLCs. He showed concern that new rights to protect TCEs could end up with legal uncertainty and affect creativity, at least for some time. He presented the example of 'Ten Canoes', a film that had been made by Rolf de Heer and the people of Ramingining. He also presented another example to illustrate what could be considered misappropriation, while at the same time showing concern that over regulation may amount to censorship and diminish freedom of expression. Mr. Moullier stressed that he believed in the value of best practices and referred to a filmmaker's guide to working with indigenous people, culture and concepts, prepared by Terri Janke and published by Screen Australia.

Professor Okediji asked the speakers a number of questions and took questions from the audience.

Ms. Janke responded that the national indigenous cultural authority she had referred to could be a global model. WIPO could assist with the governance. The Draft Articles dealing with a competent authority should include functions such as facilitation, capacity-building and awareness-raising. She highlighted that something needed to be done at an international level, because misappropriation mostly happened outside of the borders.

Professor Kuruk clarified that protection and safeguarding could be complementary. He believed that a stronger framework than the one provided by the Draft Articles was needed and wondered, for instance, whether transboundary cooperation was sufficient. He considered that national treatment had limitations and the principle of reciprocity was relevant and should be considered. He also expressed concern regarding the use of qualifiers in the Draft Articles that did not allow for effective protection.

Mr. Indraguptha stressed the need to have the IGC process producing a legally binding instrument.

Mr. Moullier wondered whether formalities were needed or whether best practice approaches were not better solutions.

Ms. Hu stressed the need to strike a balance between rights holders and the public, as well as the need to make common efforts with other countries to find a common solution. She also acknowledged the need to protect ethnic groups where they existed but explained that in China that notion of IPLCs did not exist.

Professor Okediji concluded by noting that nobody in the panel had said that protection of TCEs was unimportant or unnecessary. Nobody had said the outstanding issues were unresolvable. She believed it was possible to find a way to protect TCEs.”

33. Dr. Sumit Seth, First Secretary, Permanent Mission of India to the United Nations, Geneva, Switzerland, reported on Roundtable 2 “Protection of Traditional Cultural Expressions: Practical Experiences, Initiatives and Projects” as below:

“Roundtable 2 was moderated by Mr. Pierre El Khoury.

Mr. Peter Kamau presented three Kenyan practical experiences, initiatives and projects for the protection of TCEs. The first was digitizing traditional culture of the Masaai, where, following a request from a Maasai community, WIPO launched a pilot program with the community and the National Museums of Kenya, which enabled the community to create a piece of its own intellectual property in the form of photographs, sound recordings and community databases. The second practical example was bringing IP and branding to basket weaving in Kenya through a multi-step IP-related branding project focusing on Taita Baskets, with the aim of having a collective mark to protect and promote their baskets. The third was the Protection of Traditional Knowledge and Cultural Expressions Act of Kenya of 2016, which set out a system to ensure that the rights are effectively protected. He summarized the eight sections of the Act, focusing in-depth on the provisions on Section III, entitled ‘Protection of Cultural Expressions’ in the Act.

Ms. Leena Marsio reported on the Wiki-Inventory of Living Heritage in Finland. She demonstrated the Wiki-Inventory as a participatory system of community-based inventoring, which gave a possibility for communities in Finland to make known their heritage. It so far included 120 examples from 150 communities, which had been collected through seminars and other means. There were eight categories in safeguarding and transmitting the living heritage. All content was provided and maintained by various communities, while the Wiki was moderated by the National Board of Antiquities. There was a choice between four different licenses for photos and videos and the content was updated every three years. There was the possibility to apply for the National Inventory and from there to international intangible cultural heritage (“ICH”) lists under UNESCO. There was ongoing work in progress for making the Wiki a tool for the Sami on their craft traditions.

Ms. Cecilia Picache presented the experience of the Philippines with inventory-making of ICH. She referred to the Philippines National Cultural Heritage Act of 2009, which provided for the protection and conservation of the national cultural heritage, strengthening the National Commission for Culture and the Arts and its affiliated cultural agencies. Section 3 of the Act defined that ICH should refer to the practices, representations, expressions, knowledge, skills. Section 19 was entitled National Inventory of ICH and assigned national responsibilities. She specified that the Inventory included tangible and intangible heritage, such as rice terraces and rituals. At present there were 41 entries on oral traditions, 10 performing arts, 246 rituals/social practices, 26 knowledges concerning nature and 39 craftsmanships. Approaches to inventory making included field research and documentation. She concluded with the Summary Inventory Form and with the National Portal Cultural Databank and information sharing practices.

Mr. Ken Van Vey described the work of the Indian Arts and Crafts Board (“IACB”) of the USA, which was created by Congress to promote the economic development of American Indians and Alaska Natives through the expansion of the Indian arts and crafts market. A top priority of the IACB was the implementation and enforcement of the Indian Arts and Crafts Act of 1990, a truth-in-advertising law that provided criminal and civil penalties for marketing products as ‘Indian-made’ when such products were not made by Indians. The Act prohibited the offer or display for sale, or sale of any art or craft product in a manner that falsely suggested it was American Indian or Alaska Native made. Criminal penalties might include individual fines and imprisonment up to 15 years or corporate penalties. Civil penalties included injunctive or other equitable relief, treble damages or punitive damages. Types of art and craft products misrepresented might be both traditional and non-traditional styles of jewelry, beadwork, weavings, clothing, carvings, basketry and fine art. He provided examples of cases relating to TCEs and concluded by referring to possible additional protection through copyright, trademark, State Laws and custom regulations and to a brochure on IP for Native Americans, including copyright and trademark protection.

Dr. Jane Anderson presented ‘Local Contexts’, which was an initiative to support Native, First Nations, Aboriginal, and Indigenous communities in the management of their IP and cultural heritage specifically within the digital environment. It provided legal, extra-legal, and educational strategies for navigating copyright law and the public domain status of this valuable cultural heritage. It developed strategic resources and practical solutions. She summarized the problems that the initiative sought to address, its alternative licensing and labelling approaches, in particular the TK Label. She described the functioning of the TK Labels and work for communities to customize the TK Label themselves. After providing numerous examples of the application of the initiative, she concluded with an outlook on next steps which might include enhancing the Tribal Partner Coalition for TK Label development, building a model for institutional implementation, testing TK labels in other digital context, creating a TK Label citation guide and developing a new TK notice for biodiversity collections.”

34. Ms. Bernadette Butler, Minister-Counsellor, Permanent Mission of the Commonwealth of the Bahamas to the United Nations Office and other international organizations, Geneva, Switzerland, reported on Roundtable 3 “Key Policy Issues on Intellectual Property and Traditional Cultural Expressions: Session Two” as below:

“Roundtable 3 was a continuation of the discussion started during Roundtable 1 on ‘Key Policy Issues on Intellectual Property and Tradition Cultural Expressions’. Ms. Terri Janke, a renowned attorney and advocate for indigenous rights moderated the session, and there were five distinguished speakers.

The first speaker, Ms. Paola Moreno Latorre, Advisor on Intellectual Property, Department of Economic, Social and Environmental Issues, Ministry of Foreign Affairs, Bogota, Colombia, spoke about Colombia’s experiences with regard to the protection of TCEs from an IP perspective. She explained that TCEs could be registered as appellations of origin, and that Andean Community Decision 486/00 recognised them as geographical indications, thereby offering protection to traditional products. She further stated that technical and legal assistance was given to IPLCs that wished to promote and register their handicrafts as appellations of origin. This system, along with awareness-raising had helped to prevent misappropriation of Colombian traditional products. However, challenges remained, which she argued could only be addressed with the establishment of a rights-based international *sui generis* protection system for TCEs, which would further contribute to the empowerment of IPLCs, facilitate the commercial use of TCEs, and support the preservation of ICH.

The second speaker, Mr. Erry Wahyu Prasetyo, Third Secretary, Permanent Mission of the Republic of Indonesia to the United Nations Office and other International Organisations, Geneva, who spoke in his personal capacity, emphasised that protection of TCEs was a vital issue for IPLCs and nations, as TCEs were at the very heart of their cultural identity. He argued that an IP approach to the issue of the protection of TCEs was justified since IP rights protected the investment in creativity and time that were involved in the development of TCEs. Mr. Prasetyo stated that the overarching objective should be to provide the TCE holders with a means to control the use of their TCEs outside of the customary context, and prevent their misappropriation and misuse. He stated further that the beneficiaries should be IPLCs and, wherever circumstances required, nations. Mr. Prasetyo gave the example of Indonesia, where, for historical reasons, the concept of IPLCs was not relevant, rather the concept of nations was relevant. He said that the sort of protection that was sought, which was distinct from preservation, should include moral and economic rights, should apply to the different types of TCEs, should accommodate their evolving character, and should be based on fairness, justice and mutual respect.

The third speaker, Mr. Amadou Tankoano, Professor of Law, Faculty of Law and Political Science, Abdou Moumouni University, Niamey, Niger, made the case in support of an undefined duration of protection for TCEs, in contrast to the limited duration that was granted under copyright, as far as economic rights were concerned. He bolstered his argument with the following points – namely, that TCEs were rooted in the cultural identity of the traditional communities, and were not merely economic assets; that TCEs constituted a heritage whose trans-generational evolution was continuous; and that IP rights of limited duration suited the life-span of individuals, but not communities, who were the custodians of TCEs. However, Professor Tankoano stressed that indefinite protection should not be interpreted as permanent protection.

The fourth speaker, Mr. Preston Hardison, Policy Analyst, representing the Tulalip Tribes, USA, stated that protection of TCEs required a more critical examination of concepts with respect to the multiple relevant legal domains. He said that WIPO Member States were bound by the obligations made in other fora, notably in terms of human rights, and therefore, any WIPO legal instrument should include a non-derogation provision in this regard. He pointed out that 20 Articles of the UNDRIP were relevant in defining the rights of indigenous peoples with regard to their TCEs. Mr. Hardison argued that effective protection should be based on the right of consent and control by the TCE holders over their TCEs, and that protection should not allow unlawful appropriation to take place, where national laws were silent on the protection of TCEs, or in circumstances where there was a ‘failure to take reasonable measures’, on the part of IPLCs. Mr. Hardison stated that the right of consent and control extended beyond the moral rights of the copyright system, and that time frames that would require eligible TCEs to have been practiced in a particular community for a certain period of time would subject new TCEs to a period of non-protection, which would in turn deter communities from evolving. He believed that the tiered approach had merits, but, unless revisited, might derogate from the right of self-determination that indigenous peoples had been granted by international and national law. Mr. Hardison was of the view that a tiered approach might reflect a distorted view of the balance of rights and interests between stakeholders, who did not have equal standing. Mr. Hardison also stated that the rights-based approach and the measures-based approach were not mutually exclusive.

The fifth and final speaker, Ms. Marion Heathcote, Principal, Davies Collison Cave Pty Ltd, Sydney, Australia, gave examples about how increasing awareness among brand owners and consumers, with regard to refraining from the offensive use of TCEs had been increasing over the years. She argued that most instances of offensive use were based on ignorance rather than arrogance; and the examples she provided of offensive use were

discontinued with an apology after public outcry, usually through the influence of the use of social media. She stated that driven by the consumers, brand owners were well aware that a brand had become more than a distinctive trademark: it bore a vision of the world that ought to be accountable in terms of sustainability and solidarity. She further stated that the International Trademark Association (INTA) was keeping a close eye on the IGC proceedings, and was engaged in educating and preparing guidelines for its members to follow on the respectful use of TCEs. She emphasised that 'Brand Owners' were concerned about fairness, transparency and certainty with regard to their businesses. However, she pointed out that in the absence of international legal norms, forward-looking and self-regulated solutions that were based on goodwill and mutual respect should ensure respect for the rights of IPLCs, and respond to the expectations of consumers. She also advised that in 2017, the INTA would be hosting six events with regard to this issue.

A very interactive question and answer period followed the presentations. Some of the issues raised included, among other things, a discussion on:

- The limitation that moral rights would offer in terms of the protection of TCEs, when viewed in light of the diversity of the aspiration of IPLCs, and the need to prevent and redress harm.
- The use of social media as a tool to increase awareness on these issues.
- The use of trademarks, geographical indications and collective marks to protect TCEs, and the attendant costs.
- The requirement for administrative and legal assistance for IPLCs.
- The registration of TCEs as trademarks, and the suitability of this scheme for TCEs, which were dynamic in nature.
- The usefulness of existing protocols and codes of conduct that offered practical means to regulate the use of TCEs by third parties.
- The proposal that all protocols should rely on the principle of free, prior and informed consent ("FPIC") on the part of IPLCs."

35. Ms. Liene Grike, Adviser, Economic and Intellectual Property Affairs, Permanent Mission of the Republic of Latvia to the United Nations Office and other international organizations, Geneva, Switzerland, reported on Roundtable 4 "Past International Developments Related to Intellectual Property: What Lessons for Negotiating an International Instrument on Traditional Cultural Expressions?" and the Closing Address "Reflections on the Way Forward" as below:

"Mr. Pedro Roffe (Senior Fellow, International Centre for Trade and Sustainable Development (ICTSD), Geneva, Switzerland), as the moderator, observed that the world was experiencing technology mutations that were accelerating. Nevertheless, new ideas and designs often built upon previous discoveries TK and TCEs. He was convinced that the recent and past normative developments could be useful and provide guidance to the IGC.

Comparing extracts from both IGC draft texts and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("the Nagoya Protocol"), Mr. Marco D'Alessandro (Policy Advisor, Legal and International Affairs Division, Swiss Federal Institute of Intellectual Property, Bern, Switzerland) highlighted the lessons that the IGC could learn from the Nagoya Protocol. Mr. D'Alessandro proposed that IPLCs be the beneficiaries in the TCEs and TK context, in accordance with the formulation that had been adopted within the framework of the Nagoya Protocol. On the issue of misappropriation, he also proposed that the IGC could consider using a 'positive approach' which put emphasis on the appropriate use of TK and TCEs within the IP system, instead of their misappropriation or misuse. On the issue of existing rights and international



instruments, he proposed that the IGC undertake a 'measure-based approach' that recognized existing rights and highlighted the dynamics experienced in the Nagoya Protocol that led to its adoption. He advised that the IGC should focus on key issues, fact-based discussions including national experiences, work with technical and legal expert groups and aim for instrument(s) that benefited all stakeholders.

Ms. Ruth Okediji (William L. Prosser Professor of Law, University of Minnesota Law School, Minneapolis, Minnesota, United States of America / Member, National Copyright Reform Committee, Nigerian Copyright Commission, Abuja, Nigeria) shared lessons that the IGC could learn from the negotiations of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("the Marrakesh Treaty"). As exemplified by other negotiations of international treaties, she pointed out that the challenges that the IGC faced were not unique and all processes had had difficulties. Road signed to Marrakesh, which could guide the IGC negotiations to possible success, included defining the problem simply and clearly; framing the problem that was clear to all stakeholders; designing the right solution which could navigate international treaties and agreeing upon key principles; ensuring that WIPO was the right institution for the instrument(s); identifying points of convergence; building coalitions and using the art of persuasion. She encouraged participants of the IGC not to bargain over positions but to focus on principles and interests of the beneficiaries.

Mr. Riëks Smeets (Consultant for Intangible Heritage, former secretary of UNESCO's Intangible Heritage Convention, Leiden, The Netherlands) drew lessons from the preparation and adoption of the UNESCO Conventions, focusing on the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, since they were the most relevant to the work of the IGC due to the similarity of subject matter. He laid out the reasons for the quick progress in negotiating and finalizing those conventions, reasons which the IGC could learn from. These included preliminary drafts that had been prepared and definitions and objectives had been agreed upon beforehand; supportive States that paid for the organization of meetings and mobilized support; compromises were found by not defining all notions used and by leaving some problematic issues for treatment in operational directives and, lastly, a secretariat that proactively supported the negotiating sessions.

Ms. Aroha Te Pareake Mead (Member of the Ngati Awa and Ngati Porou Tribes, Wellington, New Zealand) shed an indigenous perspective on the lessons learned from the negotiations for the 1993 Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples and the UNDRIP. She discussed the roadmap that led to the finalization of both declarations and the lessons that the IGC could take from them. These included a strong commitment to successfully complete the negotiations, the essential need for full indigenous participation, good faith, leadership, vision and consensus. She recalled that the adoption of the IGC instrument(s), like the UNDRIP, would just be the beginning of a process: the real work to be done would be to ensure implementation.

Mr. Daniel R. Pinto (Counselor, Head of the Intellectual Property Division, Ministry of Foreign Relations, Brasília, Brazil) presented on the perspective and approach of Brazil to the IGC process. He recalled in broad lines the history of the IGC, highlighted the rationale that justified the urgency of its work. He urged the IGC to look inward to junctures when the process had been close to agreement, and why it had failed. He also called upon the IGC to draw on the body of knowledge and expertise that it had been built up and, more particularly continue supporting exchanges on best practices. For the sake of efficiency, the IGC should be given longer timeframe to conduct and conclude

negotiations and learn from successful negotiations such as the Nagoya Protocol and the Marrakesh Treaty.

Following the presentations, the participants discussed, *inter alia*: the relevance of various treaties as far as the negotiations taking place in the IGC were concerned and their impact in a national and regional context; the need for increased participation of IPLCs and to find other mechanisms, other than monetary, that could be put in place to enable such participation; the need for a gender based approach in the IGC texts given the key role that traditionally women played in the developing and using TK and TCEs.

Ambassador Philip Richard O. Owade, before offering his reflections on the way forward, recalled the different stages that the IGC had reached in the negotiations of an international legal instrument(s) on the protection of GRs, TK and TCEs since their initiation in 2009.

Ambassador Owade had been the Chair of the IGC from its 16th session until its 19th session during its 2010/2011 mandate. He recalled that his tenure as a Chair had seen some progress made, more particularly in the working methodology, with the introduction of facilitators and the organization of inter-sessional working groups, as well as in a better understanding of the relevant issues, like the need to differentiate the kinds of TK and TCEs to consider, and inter-related issues. He commended the progress made on the texts under the highly capable leadership of Ambassador Wayne McCook and Mr. Ian Goss.

The seminars that had been organized in 2015 and 2016 until the present seminar, had positively contributed to enrich the IGC with exchanges of experiences and views. During the present 2016/2017 mandate, Ambassador Owade saw good progress made on the texts on GRs, TK and TCEs respectively, particularly in outlining the different positions, identifying options regarding the beneficiaries and the scope of protection in accordance with the different types of TK and TCEs. Good spirit and efforts to compromise facilitated that result. Nevertheless, despite the progress made, it must be recognized that important gaps and divergent positions remained on key issues. The texts, which were still very detailed, needed to be simplified and avoid duplication. A more high-level approach, that would leave the details to national law, as flagged by Ms. Ruth Okediji in her presentation, was indeed desirable.

The way forward could include: a renewal of the current mandate in similar terms, that would include a program of work on the three texts in parallel; a renewal of the mandate under different terms that would possibly fast-track the text(s) that were more mature; the convening of a diplomatic conference; and the conversion of the IGC into a Standing Committee. Those options were not necessarily exclusive of each other.

Ambassador Owade emphasized that the IGC process was important for the IP system and for WIPO, and needed to be taken seriously. The IGC's mandate asked for a balanced and fair result. Such achievement would reinforce the credibility and integrity of the IP system. Positions were well known. Numerous experiences had been exchanged, and indigenous panels had served to share and reflect indigenous perspectives on the issues. A rich searchable library of information had been produced by the Secretariat.

Time had come to make a step back, clarify the policy objectives of the instruments, regarding particularly the kind of mischiefs that the instrument(s) should address at the international level, and design an efficient process that would achieve those policy objectives. Ambassador Owade made a solemn appeal to Member States to focus on the process. In his own experience of international negotiations on sensitive matters, he had learned that there was always a way through, even upon seemingly intractable problems,

provided that political will was there to move the talks forward. He commended the personal involvement of the WIPO Director General, Mr. Francis Gurry, and the commitment of the Director of the Traditional Knowledge Division, Mr. Wend Wendland, as well as the sacrifices of the present Chair, Mr. Goss, in leading the process. Protection of TK, TCEs and GRs were not only a priority for Africa, but also for the other regions. It was time for Member States to resolve those issues for the sake of humanity, as there was more that united us than divided us. Ambassador Owade stated that success was doable.”

36. The Chair thanked the rapporteurs for their clear, balanced and informative reports. The Chair opened the floor for any questions/comments. There were none.

*Decisions on Agenda Item 5:*

37. *The Committee took note of the oral reports from the rapporteurs: Mr. Ahmed Al-Shehhi, Specialist of Organizations and Cultural Relations, Ministry of Heritage and Culture, Muscat, Oman; Dr. Sumit Seth, First Secretary, Permanent Mission of India to the United Nations, Geneva, Switzerland; Ms. Bernadette Butler, Minister-Counsellor, Permanent Mission of the Commonwealth of the Bahamas to the United Nations Office and other international organizations, Geneva, Switzerland; and Ms. Liene Grike, Adviser, Economic and Intellectual Property Affairs, Permanent Mission of the Republic of Latvia to the United Nations Office and other international organizations, Geneva, Switzerland.*

38. *The Committee also took note of document  
WIPO/GRTKF/IC/34/INF/9.*

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

39. The Chair provided an update on the operation of the Voluntary Fund. At IGC 33, there had been a weakening of representation by indigenous observers, who were critical to the integrity of the IGC. There was a significant increase at IGC 34. The Government of Australia had provided some funding, but the Voluntary Fund still needed to be maintained. He called upon delegates to consult internally and to contribute to the Voluntary Fund. The importance of the Fund to the credibility of the IGC, which had repeatedly committed itself to supporting indigenous participation, could not be overemphasized. He drew attention to document WIPO/GRTKF/IC/34/INF/4, which provided information on the current state of contributions and applications for support, and document WIPO/GRTKF/IC/34/3, concerning the appointment of members of the Advisory Board. The IGC would later be invited to elect members of the Board. The Chair proposed that His Excellency Ambassador Tene, the Vice-Chair serve as Chair of the Advisory Board. The outcomes of the Board’s deliberations would be reported on in document WIPO/GRTKF/IC/INF/6. There was a small amount left, for about

five more participants at IGC 35. He pleaded Member States to consider providing funds to ensure the credibility of the IGC in relation to indigenous representation.

40. The representative of IWA, speaking on behalf of the Indigenous Caucus, indicated the increase in the number of indigenous representatives due in large part to the Government of Australia as well as other governments that had contributed to the Fund in the past. She was pleased to learn that the Voluntary Fund would bring about five indigenous representatives to IGC 35, and hoped that the number could increase in the future, always with a goal of full and effective participation. However, the Fund would be close to depleted after IGC 35, and she called on Member States to contribute, particularly those Member States who had not yet contributed. She highlighted Articles 18 and 19 of the UNDRIP. Article 18 set forth their right to participate in decision-making in matters that affected them. Article 19 complemented that with a State's obligation to consult and cooperate in good faith with indigenous peoples in order to obtain FPIC before adopting and implementing legislative or administrative measures. Article 42 provided that specialized agencies of the UN, such as WIPO, promote respect for and full application of the provisions of the UNDRIP. She thanked the Secretariat, which had supported their participation in the process. A full day of preparation for the session had made a substantive difference in their participation, as did the increase in the number of indigenous representatives. With those increases, they had been better able to prepare for constructive engagement in plenary, informals and contact groups, if any. She hoped that the practice of having a full day for preparation would continue in the future. The work would intensify in the next round of negotiations, and full and effective participation of indigenous peoples would be needed. As beneficiaries of the protection, the need to ensure participation in all aspects of those negotiations became increasingly important. Those could include appointment of indigenous facilitators, increased representation in any working group, participation in an indigenous expert workshop and the possibility of appointing indigenous co-Chairs for working groups. Over the years the numerous ways in which indigenous peoples' increased participation could inform and enrich the process had been demonstrated, and she sincerely hoped to build on that participation in the future.

41. The Chair observed that the indigenous representatives contributed significantly and added value. He asked Member States to carefully consider providing additional funds.

42. [Note from the Secretariat: the following statement was submitted to the Secretariat in writing only]. The Delegation of Colombia, speaking on behalf of GRULAC, thanked the Delegation of Australia for its contribution, which had allowed concretizing the funding of representatives for those sessions, whose contributions were more than welcomed and enriched the debate. It stressed the need to make a collective effort to allow concretizing additional resources to feed the Fund. Finally, it welcomed the appointment of the Advisory Board and wished them success in their work.

43. [Note from the Secretariat]: The Indigenous Panel at IGC 34 addressed the following topic: "Outstanding/Pending Issues in the IGC Draft Articles on the Protection of Traditional Cultural Expressions: Indigenous Peoples' and Local Communities' Perspectives". The keynote speaker was Mr. S. James Anaya, Dean and Thomson Professor of Law, University of Colorado Law School, USA. The two other panelists were: Ms. Aroha Te Pareake Mead, Member, Ngati Awa and Ngati Porou Tribes, New Zealand, and Ms. Jennifer Tauli Corpuz, Member, Kankana-ey Igorot People of Mountain Province, Philippines. The Chair of the Panel was Mr. Antonio Q'apaj Conde Choque, Aymara Centre for Multidisciplinary Studies, Bolivia (Plurinational State of). The presentations were made according to the program (WIPO/GRTKF/IC/34/INF/5) and are available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

“Professor James Anaya’s presentation began by introducing the indigenous peoples’ aspiration to (i) maintain their cultural integrity over their TCEs beyond any economic consideration, and (ii) benefit economically from the use of their TCEs when that benefitting was consistent with their cultural integrity (WIPO/GRTKF/IC/34/INF/8). He highlighted that the IP regime fundamentally promoted economical reward for authors in return to a consumer access to the author’s work. The work of the IGC was crucial to find and expand the IP regime to meet indigenous peoples’ aspirations on the protection of their TCEs. Professor Anaya examined core issues:

- On beneficiaries, he asserted that the term “indigenous peoples” is considerable with the contemporary human rights regime;
- On scope of protection, he pointed out that the differing levels of protection or ‘tiered approach’, which might respond to an IP approach, did not respond to a human rights approach that recognized indigenous peoples’ TCEs as integral parts of their cultures and societies. In this frame, the IP regime should protect TCEs from (i) illegal possession (States should establish civil and criminal procedure to address TCEs which were accessed without indigenous peoples’ authorization); and (ii) false marketing (States should establish legal mechanism to address false marketing of products labeled as indigenous origin);
- Term of protection should be framed based on the right to culture. Consequently TCEs should be protected as long as they were relevant to the indigenous peoples’ cultures;
- Exception or limitation should be defined and concretely formulated in the instruments, and compliance with human rights law;
- The instrument should contain a concept of misappropriation of TCEs.

Finally, he emphasized that issues in front of the IGC were not only technical issues but issues of social justice.

The second speaker was Ms. Aroha Te Pareake Mead. She underlined the important contributions that indigenous peoples had made to the IGC. It was vital therefore for the IGC legitimacy to ensure indigenous peoples’ participation. She presented the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples (1993), which affirmed that indigenous peoples were capable of managing their TK, and they were willing to share as long as they were able to control it as primary beneficiaries were the direct descendant of such knowledge. She also presented the Maori Trademark of quality and authenticity ‘Toi Iho’, which helped Maori artists to protect their TCEs. She highlighted that indigenous peoples suffered from misappropriation and offensive use of their TCEs all over the world. Indigenous peoples had a big expectation in the IGC process to prevent misappropriation, therefore the term misappropriation should be reflected in the instrument(s). She particular referred to misappropriation in the fashion industry.

The third panelist was Ms. Jennifer Tauli Corpus. She briefly introduced the context of indigenous peoples in the Philippines. She addressed that the IP system should adjust to address the indigenous peoples’ aspirations to control their knowledge. She touched on the core issues that the IGC discussed. On beneficiaries, she recalled the indigenous peoples’ position to have in the instrument IPLCs as beneficiaries. She also recognized the role of competent national authorities in the administration of rights. On the scope of protection, she affirmed that tiered approach could bring a balance to some contentious issues. There were some knowledge that indigenous peoples could share freely such as ecological knowledge to mitigate climate change, but indigenous peoples must be the ones who determined how and what indigenous peoples would like to share. She provided different examples of TK and TCEs in the Philippines. She recalled some contribution from the Seminar:

- The safeguarding work was the mandate of UNESCO, and the IGC had a different mandate;
- Indigenous peoples' participation was critical to the IGC process, and the IGC should be able to incorporate any language from the human rights instruments, without any restriction.

Mr. Conde closed the Indigenous Panel by thanking the panelists, the Member States and the WIPO Secretariat.”

44. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on June 14, 2017 to select and nominate a number of participants representing IPLCs to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/34/INF/6 which was issued before the end of the session.

*Decisions on Agenda Item 6:*

45. *The Committee took note of documents WIPO/GRTKF/IC/34/3, WIPO/GRTKF/IC/34/INF/4 and WIPO/GRTKF/IC/34/INF/6.*

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

47. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Hamadi Ag Mohamed Abba, Representative, ADJMOR, Mali; Mr. Abdoul Aziz Dieng, Technical Advisor, Ministry of Culture and Communication, Senegal; Mr. Parviz Emomov, Second Secretary, Permanent Mission of Tajikistan, Geneva; Ms. Aideen Fitzgerald, Policy Officer, International Policy and Cooperation Section, IP Australia, Australia; Ms. June Lorenzo, Representative, Indigenous World Association (IWA), United States of America; Ms. Nusta Maldonado, Third Secretary, Permanent Mission of Ecuador, Geneva; Mr. Kamal Kumar Rai, Representative, Himalayan Folklore and Biodiversity Study Program, IPs Society for Wetland Biodiversity Conservation, Nepal; and Ms. Ofa Veiqaravi Solimailagi, Senior*

*Legal Officer, Office of the Attorney-General, Suva, Fiji.*

*48. The Chair of the Committee nominated Ambassador Robert Matheus Michael Tene, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.*

## **AGENDA ITEM 7: TRADITIONAL CULTURAL EXPRESSIONS**

49. The Chair recalled that he had consulted with Regional Coordinators and interested delegations on the work program and working methodology that had been circulated. Regarding the outcomes of IGC 34, a revised version of document WIPO/GRTKF/IC/34/6 would be produced, using the same methodology as in previous sessions. Rev. 1 would be prepared and presented by Wednesday morning. Time would be given for comments and further suggestions, including textual proposals. Rev. 2 would be prepared and presented by Thursday morning and time would be given for general comments to be included in the report. By the end of Thursday, the plenary would be invited to note Rev. 2 and transmit it as a bundle with the other documents under Agenda Item 8 to the GA. Agenda Item 7 would be closed by the end of Thursday. Agenda Item 8 would be re-opened on Friday morning. In plenary, delegations would be invited to provide comments on the core issues, including the issues identified in the mandate. The Chair intended to introduce the core issues not in a sequential article by article manner, providing commentary to promote discussion. The plenary remained a decision-making body, and its discussions would be reported as usual. He planned on moving to informals quickly, depending on progress. He or a Vice-Chair would chair informals with the active assistance of the facilitators. For those informals, each regional group would be represented by a maximum of six delegates, one of whom should preferably be the Regional Coordinator, noting that the presence of the Regional Coordinator in the informals aided the communication of what occurred to the remainder of the groups. In order to increase transparency, other Member States' representatives would be permitted to sit in on the informals without speaking rights. Indigenous representatives would be invited to nominate two representatives to participate and two additional representatives to observe without speaking rights. The delegates forming the informals might take the floor and make textual proposals. Proposals from indigenous representatives could remain in the text only if supported by a Member State, as confirmed in plenary. There would be no live drafting. Any text proposed by the facilitators would be noted and would only go forward if supported by a Member State. Depending on progress made in the plenary and informals, the Chair might establish one or more small *ad hoc* contact groups, as described in further detail in the methodology paper. Ms. Ema Hao'uli from New Zealand and Ms. Margo Bagley from Mozambique would be the facilitators to assist in informals by following the sessions closely and keeping track of views, decisions, and proposals, including drafting proposals. To enable more focused and incremental consideration of the facilitators' work by delegates as the week progressed, they might introduce and present on the screen progressive work on core issues as "work-in-progress". Anything they presented had no status until it was noted by the plenary. They might take the floor and make proposals, review all materials, undertake drafting and prepare the revisions. The Chair had prepared an Information Note with an annex that placed side-by-side the Draft Articles on TCEs and TK for ease of comparison. He hoped that would be a useful tool to help delegations compare the texts and identify areas where progress made in the TK text might also benefit the TCE text. There were differences, so while there were cross-cutting issues, there were also areas where there might not be a commonality. The Information Note was informal and had no status, and any views were his alone and without prejudice. He wished to focus the discussions first on the following core issues: policy objectives, subject matter, beneficiaries, scope of protection, exceptions and limitations, the

relationship with the public domain, and the definition of “misappropriation”, and then move on to other issues, including administration of rights/interests, term of protection, formalities, sanctions, remedies and exercise of rights, transitional measures, relationship with other international agreements, national treatment, transboundary cooperation, capacity-building and awareness-raising and non-derogation. The Chair opened the floor for comments on “Policy Objectives”.

50. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair for guiding the discussion on outstanding issues, namely policy objectives, subject matter, scope of protection, beneficiaries, use, administration of rights and interests, exceptions and limitations, and relationship with the public domain. It looked forward to fact-based discussions on each of those. Regarding objectives, the IGC had to take into consideration the current IP framework, which should be promoted whenever applicable. It supported awareness-raising activities so as to provide conditions that facilitated access of TCEs to IP rights, such as copyright and related rights, trademarks, and geographical indications. TCEs might also be protected under producer-related rights, as the World Performances and Phonograms Treaty (“WPPT”) and the Beijing Treaty on Audiovisual Performances covered expressions of folklore. Much work had already been undertaken at the international level to safeguard TCEs or expressions of folklore, including Article 15.4 of the Berne Convention and UNESCO instruments.

51. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. However, in acknowledging the nature of TCEs, it was ready to engage constructively to make sure that the policy objectives be focused more on the IP system, safeguarding specific moral and economic rights. It noted the statement by the Delegation of the EU, on behalf of the EU and its Member States, to take note of the applicability of the existing IP system but also noted the limitations of the current IP system in protecting TCEs.

52. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, said that policy objectives should focus on protection, not safeguarding, as safeguarding was not within the IGC’s mandate. The objectives should not facilitate the transfer of TCEs to third parties where they might be subject to distortion, manipulation, hybridization or other abuses. That should only occur with FPIC and in a manner that protected cultural integrity. The mandate called to protect rights, obligations, and aspirations of indigenous peoples in regards to their TCEs, which were crucial to their social, cultural, spiritual and economic relationships. There had to be protection for all TCEs, whether they were secret, sacred, closely held, publicly expressed, or widely available. TCEs were not the servant of the cultural industries. Indigenous peoples created and innovated according to their own motivations. The instrument should not establish objectives that created obligations for indigenous peoples to make their TCEs available to third parties for the good of society as a whole or for the common heritage of humankind. That might occur and indigenous peoples might wish that to occur, but it should not be an objective for it to occur without their consent.

53. The Delegation of Georgia, speaking on behalf of CEBS, looked forward to fact-based discussions on the policy objectives, subject matter, scope of protection, beneficiaries, use, administration of rights, exceptions and limitations, and relationship with the public domain. It was crucial to have a meaningful discussion on the overall objectives of the instrument and to find a common understanding of the predominant objectives and a realistically achievable outcome. While favoring an evidence-based approach, the IGC could draw lessons from the experiences of various Member States’ national legislation in place protecting TCEs and from existing efforts for the safeguarding of TCEs at the international level. Potential consequences should be carefully considered before reaching an agreement on any particular outcome. Other instruments outside and within WIPO addressing the question of the TCEs existed, and the issues discussed in WIPO would be complementary to existing instruments. Therefore, CEBS supported the request to undertake a compilation study of national experiences and domestic



legislation and initiatives in relation to the TCEs put forward by the Delegation of the EU, on behalf of the EU and its Member States at IGC 33 in order to achieve a common understanding on core issues, to assess where TCEs should be positioned within the existing international IP framework, and to focus on recently adopted legislation and initiatives on TCEs among WIPO Member States.

54. The Delegation of Senegal, speaking on behalf of the African Group, believed the objectives should be focused on finding the most appropriate ways to prevent misappropriation and misuse of TCEs with due regard to their specificity. It was important to control the use. It preferred Alt 1, but throughout the week, it would try to shed more light thereon and constructively engage in the discussions to have a positive outcome.

55. The Delegation of Egypt said there were two terms that one should be careful with. The first was “safeguarding”, which was usually used in the UNESCO Conventions and related to the work of archives, but not in WIPO conventions, where “protection” was usually used instead. The second was “interests” which had to be replaced with “rights”.

56. The Delegation of the Islamic Republic of Iran associated itself with the statements delivered by the Delegation of Indonesia, on behalf of the LMCs and the Asia-Pacific Group. It supported Alt 1, which was drafted according to the main objective of the instrument. It was ready to engage constructively in the informals in order to bridge gaps.

57. The Delegation of Ghana said that, with respect to Alt 1, it did not cause much harm to delete two paragraphs 1(d) because they largely expressed definitional issues as to what TCEs would be about. There was no doubt whatsoever they were products of intellectual productive activities, they therefore were creations and innovations, so it did not add much to identify the first paragraph 1(d) as a policy objective and the second paragraph 1(d) to encourage creation and innovation. In Alt 1, paragraph 2, the objective about preventing the grant of erroneous IP rights reminded of provisions discussed in relation to GRs, and that concern was more significant in the context of GRs than TCEs. When it came to misappropriation, there were times where indigenous communities would lose their rights to TCEs when people acquired copyright protection with respect to those types of TCEs, but the objective in paragraph 1(a) regarding the prevention of misappropriation would take care of all that. To make Alt 1 very brief and concise, it proposed to delete paragraphs 1(d) and 2. Alt 2 would run counter to what the IGC was there to do. In Alt 2(a), “unlawful appropriation” was really used in relation to the subject matter, and the definition of “unlawful appropriation” tended to do a very good job of cutting and pasting certain qualifying language from the definitions of “misappropriation”. That ran counter to the objectives of the instrument identified for TCEs. As an example of unlawful appropriation, cases where one purchased TCEs or reverse-engineered TCEs were what indigenous communities wanted to protect. Therefore, it would not be helpful to state an objective that ran counter to that specific objective. For Alt 2(b), it proposed to delete it for the same reasons identified in relation to Alt 1. Alt 2(c) was problematic because, although it seemed to be neutral, it condoned practices that indigenous groups had complained about. In fact, the same was also true for Alt 2(d), on securing the rights gained by third parties. So if somebody illegally acquired TCEs, one should not try to protect those illegally obtained rights. It understood the spirit in which Alt 3 had been proposed, but one could safely omit Alt 3 without doing much harm because the issues tackled in Alt 3 were all captured under Alt 1, which tackled and addressed all of the key elements of concern.

58. The Delegation of Colombia said that Alt 1, which recognized the beneficiaries, enabled to have the means to prevent misappropriation. It also looked at Alt 3 because it had a balanced focus and would be the one that would bring together the diverse views and narrow the gaps.

59. The Chair introduced the issue of subject matter. In the current text, Article 3 provided that “the instrument applies to traditional cultural expressions” or that “the subject matter of the

instrument is traditional cultural expressions”. A definition of that term was also provided in the “Use of Terms” section. The IGC could determine the best place of the definition of the subject matter. Articles 2 and 3 made reference to a criterion that specified which TCEs that fell under the definitions would be protectable. Member States still had divergent views on a number of key elements of the eligibility criteria, and further discussion was needed. There was also the question as to whether criteria for eligibility were necessary at all in Article 3, as in the view of some delegations, in elaborating rights, it could be left to the scope of protection and to the exceptions and limitations to define what was ultimately protected. There were two different approaches to that issue and it would be useful to narrow the gaps in one of those directions. He opened the floor for comments.

60. The Delegation of the Islamic Republic of Iran favored Alt 1 in conjunction with the definition of TCEs proposed by the Delegation of Indonesia, on behalf of the LMCs, at IGC 33, in Article 2. It did not support the inclusion of any criteria for eligibility in that article. It asked to delete the word “safeguarding” from the title. The IGC was not mandated to safeguard TCEs but rather to protect TCEs.

61. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1 in conjunction with the TCE definitions provided by the LMCs at IGC 33, as reflected in Article 2. It supported the subject matter if it mentioned TCEs. Eligibility criteria were not acceptable at that point since the scope of protection had already elaborated the rights and ultimately defined what and which TCEs were to be protected and to what extent. Regarding the title of the article, if it was just “Eligibility Criteria for Protection” without defining the protection, it would not make sense, so it preferred “Subject Matter of the Instrument”. In line with the statement made by the Delegation of the Islamic Republic of Iran, “safeguarding” was not acceptable because that would fall outside the mandates of WIPO and of the IGC to protect TCEs.

62. The Delegation of Ghana proposed retaining “protection” because that was the word that related to the mandate. “Safeguarding” was used in the sense of preserving something for continuity for the benefit of future generations, as UNESCO had been working on. Conversely, the IGC’s mandate was about “protection” in the IP sense, as relating to measures to prevent the unauthorized uses of TCEs, unauthorized commercial exploitation, culturally offensive or derogatory uses, activities of people who acquired IP rights in TCEs, and so on. Historically, the IGC and the GA had always used “protection” in referring to the IGC’s work. Back in 2000, the GA had talked about measures to “protect”. Once the IGC had started text-based negotiation in 2008, it had talked about coming up with specific programs to “protect”. “Safeguarding” had not been used. There were numerous references of consistent reference to protection, never safeguarding. As to eligibility criteria, one of the criteria identified was that TCEs had to be around for at least 50 years before they were deserving of protection. It reflected a very profound misunderstanding of the nature of TCEs and how they were created. When thinking about TCEs, originally there was an individual who had created it, but over time, the group would have taken it over and in true repetition, making constant variations of that subject matter, TCEs changed, were passed from generation to generation, and it would be difficult to place time limits to actually know when a variant of TCE had been created. For IP rights, there was no requirement for an inventor to wait for 40 or 70 years before applying for a patent. The same parties who advocated the acquisition of third-party rights in TCEs of indigenous communities expected that once they made adaptations or came up with derivatives of TCEs, they should be immediately protected, but they failed to understand that by their own logic, if one were to come up with an adaptation of TCEs, he or she would also have to wait for 50 years. For all those reasons, the IGC should delete the references to “safeguarding” and “eligibility criteria” as clearly inconsistent with TCEs.

63. The Chair noted the discussion on “safeguarding” and that the term had been introduced at IGC 33. He asked the Member States who had introduced it to consider their position on that specific term.

64. The Delegation of Senegal, speaking on behalf of the African Group, wished to have Alt 1 alongside the definition in Article 2. The title had to be “Subject Matter of the Instrument”. The text did not have to speak about eligibility criteria because it was in the definition, the scope of protection, the limitations and exceptions and the legal framework for protection. Regarding “safeguarding”, the WIPO Convention did not mention safeguarding.

65. The Delegation of Egypt said that the title should be “Subject Matter of Protection” and asked to delete “safeguarding” and “eligibility criteria”. It supported Alt 1. The aim was to protect TCEs.

66. The representative of Tupaj Amaru supported the statement made by the Delegation of Egypt. He said that Article 2 covered the political and legal content. Since that document had been written up, there had always been a definition of subject matter. A clear and specific definition was essential to move forward. He had proposed several times that TK constituted the product of collective intellectual activity of indigenous peoples, creations of the human mind, evolving with the world and society and was an intrinsic part of ICH of IPLCs. He proposed the following definition: “1. Subject matter protected. The legal protection of traditional knowledge of indigenous peoples and local communities as defined under Article 1, against acts and practices of illicit use or misappropriation would apply to, among others, traditional knowledge that constitutes the collective cultural heritage that is ancestral, spiritual, immaterial or intangible and considered as secret, sacred or collective or community life. 2. Traditional knowledge is intrinsically tied to their use and the management of natural resources and the context duly considered as traditional for the sustainable use and preservation of biodiversity and food safety. Traditional knowledge that maintains a relationship with the land, the territory, flora and fauna, as well as other resources, is the traditional property of indigenous peoples.”

67. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

68. The Delegation of New Zealand had two suggestions to better narrow the differences in the article. First, the issue was to have eligibility with scope as well as with exceptions, so one way to understand would be to take a practical example of a TCE, run a flowchart through all of those different tiers and see what would be left with and the different options, because it might be that one would apply all those tiers and actually what was protected was the same, in which case the IGC was arguing about differences that did not matter; or one could find out that what was actually protected would have differences. Second, the IGC could take a look at existing IP laws, whether at a domestic or international level, and understand the many layers. That might help understand why the proponents of having eligibility, definition, scope of protection and exceptions needed to have all those things.

69. The Delegation of Japan preferred Alt 2. Enhanced clarity was essential, so the IGC should avoid possible disputes on whether protection should be provided to certain TCEs at the international level. The wording “from generation to generation” as stipulated in Alt 2(c) did not add definitive characteristics to the subject matter of TCEs. It recalled the question as to whether the subject matter should extend to any cultural expressions that would arise in the future and meet the criteria of TCEs. The IGC needed to determine under which circumstances contemporary cultural expressions could become TCEs. In that regard, time elements such as “minimum 50 years or five generations” stipulated in Alt 2(d) should be included as an objective criterion.

70. The Delegation of Chile encouraged all delegations to consider its proposal in Alt 3 in order to bridge the gaps between Alt 1 and Alt 2.

71. The Delegation of Uganda supported the statements made by the Delegation of Senegal, on behalf of the African Group, and the Delegation of Indonesia, on behalf of the LMCs, on supporting Alt 1. Regarding Alt 2 and the eligibility criteria, setting time limits within which TCEs should have been known before enjoying protection significantly contradicted the objectives of the envisioned instrument, i.e. to protect creativity and innovation. The IGC could not seek to promote creativity and innovation for those TCEs while at the same time limiting protection to all the works that were five decades old. TCEs were dynamic and constantly evolving due to changing circumstances, for example, climate change and the interests of the beneficiaries. It would expand with practical examples of TCEs that had evolved over time in East Africa during informals.

72. The Delegation of Indonesia recalled that TCEs were evolving and the word “traditional” did not mean that TCEs were old. Making a distinction between traditional and contemporary cultural expressions did not really justify that there should be a timeframe in the eligibility criteria because if something was directly linked to a cultural expression and it was new, it was still a cultural expression. No one could call it a contemporary cultural expression. TCEs were not necessarily old or ancient.

73. The representative of Tupaj Amaru could not accept the article as it stood because it had the effect of making the identity of indigenous peoples more vulnerable to ceding their rights to third parties. Indigenous peoples were then deprived of their spiritual and material rights. Article 3 should revert to its original title, which was “Scope of Protection.” Article 3 had completely modified the text without the participation of indigenous peoples. He proposed deleting Article 3, replacing it with: “For this instrument, the contracting parties would recognize for the rights holders, the beneficiaries of traditional knowledge rights, in compliance with Article 2: (a) the exclusive rights to control, preserve, develop, exploit, and practice their traditional knowledge and traditional cultural expressions; and (b) authorize the utilization, with prior informed consent of the beneficiaries or reject their use and abuse of traditional knowledge.”

74. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

75. The Chair introduced the issue of beneficiaries. He said IGC 33 had made quite a bit of progress on beneficiaries, recognizing the need to narrow the positions in that area, and importantly on the term “nations”. Languages had been formulated to provide some policy space for Member States in that area. “Indigenous peoples” was still bracketed, and he asked Member States whose current position was to have indigenous “people” but not “peoples” to reconsider their views on the inclusion of the term “peoples”. There was also an opportunity to combine those alternatives into a single article. The Chair opened the floor for comments.

76. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 3. There was no dispute that the main beneficiaries of the instrument were ILCs; however, the IGC had to take into account the nature of the TCEs themselves. There might be a situation where TCEs were not confined to specific ILCs, or where TCEs were not specifically attributable to an ILC. The provision should address that concern and should include “other beneficiaries as defined by the national law of each Member State.” There was an opportunity to combine Alt 2 and Alt 3 and it stood ready to engage with the proponents of Alt 2. However, only mentioning situations where there were no indigenous peoples in order to have other beneficiaries would not address the situation where TCEs were not confined to a specific ILC.

77. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 3 for two reasons: (1) the objective of the instrument was to rally the largest number of signatories; and (2) there were cases where it should be left to Member States to freely consider within their national context how the beneficiaries would be identified. It was sometimes difficult to identify beneficiaries and there were cases where beneficiaries were not clearly identified.

78. The Delegation of the Islamic Republic of Iran did not support the inclusion of the word “safeguarding” in all articles. It supported Alt 3, which included the main beneficiaries, namely IPLCs, while preserving space at the national level to determine other beneficiaries under national law. It acknowledged that the main beneficiaries were IPLCs but not exclusively. Therefore, it was essential to recognize the role of each State in identifying the beneficiaries under its jurisdiction. It concurred with the Chair concerning Alt 2 and Alt 3. There were not so many substantial differences and it was in favor of merging those into one in the informals.

79. The Delegation of China stated that the article had to recognize the different composition of beneficiaries in different countries. In some countries, there was no such notion of “indigenous peoples”. That fact had to be taken into account. It supported the combination of Alt 2 and Alt 3.

80. The representative of Tupaj Amaru was against Alt 3 because without indigenous people there would be no TK or customs. The beneficiaries were those who benefited from collective rights to TK, in other words, IPLCs and their descendants. Those communities would continue to exist. It did not matter what they were called. They could be traditional communities, not necessarily indigenous peoples. The name was not so important, but indigenous peoples were threatened with vanishing together with their secrets and traditions. The discussion was about people who together collected, preserved, and transmitted that cultural heritage from generation to generation. Those rights holders or property owners had the right to a fair and equitable share of the benefits that flew from the use of their TK, their innovation, and their various traditional practices of preserving biological diversity and of the sustainable use of the various components thereof.

81. The Delegation of Ghana supported the statements made by the Delegation of Senegal, on behalf of the African Group, and the Delegation of Indonesia, on behalf of the LMCs regarding Alt 3. Alt 1 and Alt 2 contained restrictions that were not found in Alt 3. Alt 3 was broad, comprehensive, and could be applied flexibly by any member of the IGC that wished to adopt it. The best way to facilitate consensus was to have a holistic, broad definition that could be flexibly applied by all Member States. It asked what issue Alt 1 was designed to address. The concern there was about indigenous peoples. It said that the concern in Alt 2 was to make sure to recognize other beneficiaries, only when indigenous peoples were not found. The broad provision in Alt 3 could cover cases where there were no indigenous peoples within a territory. It wondered why some Member States would introduce restrictions in Alt 1 and Alt 2. They served no genuine purpose other than to delay the process. Alt 1 and Alt 2 should be deleted without causing much harm.

82. The Delegation of Georgia, speaking on behalf of CEBS, preferred Alt 1, because some countries had prohibitions and restrictions in recognizing the rights of some people.

83. The Chair wondered if the Delegation of Georgia, on behalf of CEBS, wanted to bracket the whole word “peoples” instead of “s”.

84. The Delegation of Georgia, speaking on behalf of CEBS, said that in Alt 1 the word “peoples” was bracketed.

85. The Delegation of Australia said that the definition of beneficiaries should not be left so wide as to encompass all possible beneficiaries. Alt 2 and Alt 3 could possibly be better formulated to ensure that when reading with Articles 3 and 5, only other beneficiaries that were entrusted with the responsibility to protect and transmit TCEs in a traditional context might be recognized as beneficiaries. It was necessary to carve out unintended beneficiaries to ensure greater certainty in the text and to close some of the gaps. Looking at some of the wording in Alt 1 and how it could be worked with the other alternatives could provide that kind of certainty.

86. The Delegation of Egypt supported Alt 3 because it was balanced and was likely to ensure an appropriate application, as the text did not exclude any beneficiaries. Moreover, it could help solve all practical problems that might crop up.

87. The Delegation of Indonesia referred to the title of the draft instrument and said that there was an agreement that the subject matter of protection was TCEs, even though the IGC was still debating whether they should meet eligibility criteria or not. While the main beneficiaries of protection were ILCs, no one could ignore that there were TCEs that were not owned by ILCs. If some delegations could not give room to protect those kinds of TCEs, it would be against the policy objectives, the title of the draft instrument, and the article on the subject matter of protection. The Delegation wanted to make sure that there was a way to protect the TCEs that were not confined to one particular ILC within one national territory. It thanked the Delegation of Australia and looked forward to discussing further to make sure that languages in Alt 2 and Alt 3 could actually carve out some other beneficiaries that were not acting for the protection of TCEs.

88. The representative of INBRAPI said that the IGC had been discussing the issue of beneficiaries for seven years. She asked the Member States who defended Alt 1, for the sake of legal certainty, who were the peoples referred to, if those were the peoples or the nations themselves. She asked if the IGC was creating an instrument that would protect everyone with no distinction. She asked what the word “protected” meant at the end of Alt 1. In Alt 2, other problems arose. IPLCs were there because their rights were not being recognized. If there was no concept of indigenous peoples, there might be a local community identified, as mentioned by the Delegation of Brazil, or groups that were not indigenous but local communities and they had specific rights that could be protected under national law. She did not understand that there was no distinction between indigenous peoples and other beneficiaries. Several Member States had mentioned that Alt 3 was a possible solution because it included IPLCs and other beneficiaries “as may be determined under national law.” She wondered what would happen if national law changed, did not recognize the rights, was not adopted, or was not good legislation. IPLCs included different segments and groups, and those peoples were the beneficiaries. If those groups were not identified, the State had its own role in identifying the rights. The IGC was specifically trying to protect the rights of TCEs created by IPLCs. She asked for examples of other TCEs that did not come from IPLCs so as to clarify many of the questions raised.

89. The Delegation of Nigeria supported Alt 3 for the reasons presented by the Delegation of Senegal, on behalf of the African Group, the Delegation of Ghana, the Delegation of Egypt and the Delegation of Indonesia, on behalf of the LMCs. When looking at Alt 3, there were three categories clearly covered, indigenous peoples, local communities, and the open category of other beneficiaries. The practicality of that was really important because when looking at other regimes, like the Nagoya Protocol, there had been so many instances where it was not able to identify with any certain beneficiaries and there was sometimes a transboundary connection between ILCs. It could retain Alt 3 without any of the sentiments being conversed in Alt 1 and Alt 2.

90. The representative of the Tulalip Tribes preferred Alt 1. The issue of “develop” was open depending on the discussions on beneficiaries. He shared the concerns of the Delegation of Australia of having an open-ended, ill-defined group of beneficiaries. There were arguments on both ends: it could be beneficial in some cases and in others it could be threatening. One threat was the volume of TCEs at stake. He asked what volume would occupy the TCEs of just IPLCs in the IP system. It would probably not be all that great. But once it would be up to the State to define beneficiaries, that volume could become very large and could create some very big problems for the IP system. He was concerned that, if there were others that were potential “beneficiaries” but who could not really be associated with a TCE but were claiming the TCE that was held by indigenous peoples (and that had happened because of the historical movement of TCEs), that could set up a conflict between the different claimants. He had

outstanding concerns over those countries that did have IPLCs who were holders of TCEs that were not being recognized. He was happy to discuss that. He did recognize the problem that having an open-ended category was trying to solve, but he hoped that those words might help others understand his concerns.

91. The Delegation of Mexico supported Alt 3, which had merit given that not only did it recognize indigenous peoples as the main beneficiaries, it also opened space to include local communities and even other beneficiaries that might come under national legislation. It appealed to delegations who had other types of beneficiaries to consider the flexibility that the option would provide in implementing an instrument trying to bring together different systems and different opinions. Alt 3 was inclusive and provided the necessary space and flexibility that most delegations needed.

92. The representative of Tupaj Amaru said that Article 5 was not an article, rather a declaration or a statement. It had no content. It did not even mention indigenous peoples in the article. Member States should specify what they were trying to protect and how far they were willing to go in that protection.

93. The representative of CEM-Aymara echoed the statements made by the representatives of INBRAPI and the Tulalip Tribes on the issue of beneficiaries. He preferred Alt 1. He saw the logic in the IP system trying to protect creators in the case of copyright or inventors in the case of patent law. Under that instrument, it was the indigenous peoples who needed protection. He understood the concerns around some TCEs that were difficult to associate with some peoples. There were various types of indigenous peoples who might have TCEs, and there were boundaries between them, but the rights that could be identified in those TCEs could be discussed under Article 6 when looking at the administration of rights. That might be where the space existed to look at the role of Member States to ensure that those rights were exercised and protected, once IPLCs were identified as the beneficiaries. He had concerns with regard to having “peoples” in brackets in Alt 1. The term “indigenous peoples” was already recognized under international human right law. The term “peoples” showed the nature and the quality of which they were a part. Indigenous peoples had their territory and their own laws. All of that covered their right to self-determination, and it certainly did fit better with the term “peoples”.

94. The Delegation of Colombia supported Alt 3, which broadly included IPLCs directly and also added the opportunity for all Member States to include other beneficiaries under their national legislation.

95. The Chair introduced the issue of scope of protection. There were quite a number of alternatives within that article. The aim was to try and create clarity within the different positions and approaches. There was the tiered approach, which proposed differentiated protection. That suggested that economic rights could be appropriate for some sort of TCEs whereas moral rights-based models could, for example, be appropriate for TCEs that were publicly available and widely known but still attributed specifically to IPLCs. TCEs were tiered according to their quality, level of control, and the degree of diffusion of the TCEs. The IGC should carefully consider what criteria were appropriate and should be used in order to determine the tiers. In doing so, consideration should be given to the practicality and legal implication of the proposed tiers. The criteria that might be relevant in the TK context might not necessarily apply in the TCE context. Another approach gave States maximum flexibility to determine the scope of protection. Alt 4, Option 2, paragraph 3, effectively constituted an exception, and he invited proponents to move it to Article 7. He opened the floor for comments.

96. The representative of Tupaj Amaru could not accept Article 5 because it was not a provision. He wondered how the judges could understand what it was referring to. He had a proposal to submit: “For this instrument, contracting parties would recognize the exclusive rights of beneficiaries and rights holders of TK in conformity with Article 3: (a) to control,

preserve, develop, exploit and exercise their TK and their TCEs; (b) to authorize the utilization with prior informed consent of the beneficiaries, or deny access, use and abuse of their TK; (c) to fair and equitable share the benefits derived from the use of that TK, as laid out in mutually agreed terms; (d) to prohibit misappropriation and misuse of all types of fraudulent appropriation or misappropriation, exploitation or misuse of their TK without their prior informed consent and in violation of their customary laws.”

97. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

98. The representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, said that he remained open to the tiered approach, but modifications were necessary to ensure that it would not diminish the rights associated with widespread TCEs. It would have to take account of the spiritual nature of those expressions, cultural laws, human rights, other rights, and the intentions and aspirations of indigenous peoples who were the owners of such expressions. The fact that a TCE was widespread did not diminish those characteristics. All the provisions of the instrument had to be subject to the principle of non-derogation. States should accept the moral interests and rights and human rights and obligations of indigenous peoples. Those were expressed in Articles 3, 11, 13, 20, 25, 28, 31 and 45 of UNDRIP, as well as other international standards. States must protect the rights of indigenous peoples to define their TCEs and the forms of protections that applied. He was open to discussing the tiered approach, but it could only go forward if protections of indigenous peoples’ rights were ensured in such an approach.

99. The Delegation of Indonesia, speaking on behalf of the LMCs, agreed with the Chair’s remarks regarding the tiered approach and the different nature of TK and TCEs. It had invited the IGC to take a practical view of the rights as expressed by the character of the TCE in question and the character of their use, where different kinds or levels of rights or measures would be available to right holders depending on the nature and characteristic of the TCEs. As to the level of rights by the character of the TCE, core elements would be provided, namely the subject matter of protection, beneficiaries, scope of protection, and exceptions and limitations. Taking into account the different nature of TK and TCEs, at IGC 33 it had proposed language that was reflected in Articles 2 and 5, and it had supported Alt 2 while also considering the language in Alt 3. It wanted to be more constructive and to have a more practical tiered approach. It could support Alt 3.

100. The Delegation of Senegal, speaking on behalf of the African Group, said that at IGC 33 it had expressed a preference for Alt 2. At the same time, it had indicated that Alt 3 deserved deeper consideration and had some interest. It changed its preference to Alt 3. It requested to go over the different alternatives to see which ones were no longer supported by States in order to eliminate some of them to simplify the text.

101. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. It preferred Alt 3, which addressed the economic and moral rights of beneficiaries and also could be considered as a middle way and landing zone which captured the concerns of Member States. Under Alt 3, policy space had been given to Member States. Alt 3 was the most efficient way forward to bridge the gaps between Member States.

102. The Delegation of the EU, speaking on behalf of the EU and its Member States, recalled that the public domain should be safeguarded and that the promotion of innovation and creativity remained its essential priorities, as it fitted the prerogatives of WIPO.

103. The Chair opened the discussion on exceptions and limitations. The article contained three alternatives. Alt 1 and Alt 2 did not refer to the duality of general exceptions and specific



exceptions. Alt 3 was divided into general and specific exceptions. He opened the floor for comments.

104. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, said that it was of fundamental importance to ensure that the provision be considered in a balanced way depending on the specific situations of each Member State and the substantive interest of the rights holders. There should be flexibility for Member States to decide on appropriate limitations and exceptions.

105. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 1, which provided three essential conditions to limit the breadth of exceptions and limitations, which still had to be the exception.

106. The Delegation of Indonesia, speaking on behalf of the LMCs, said that it had introduced Alt 1 at IGC 33. Therefore, exceptions and limitations should not be too extensive so as not to compromise the scope of protection, which in turn compromised the draft instrument.

107. The Delegation of Egypt was in favor of Alt 1 because the text was quite traditional and provided for a three-step text, which was a well-known approach in most IP conventions as well as in WTO agreements. That particular system would take into consideration the interests of one and all.

108. The representative of the Tulalip Tribes said that he could work with Alt 1, with some text and brackets to be removed and a few small other changes. On Alt 3, for those members that claimed that they were not really supportive of *sui generis* regimes, there were actually quite a large *sui generis* regimes that were being proposed. What was stipulated in international law were those wide, broad exceptions and limitations without constraint, and they were essentially creating a designation of certain actions that would allow access to TCEs without acknowledgment and without benefit-sharing. Essentially, if those exceptions were adopted, it would put wide amounts of TCEs into the public domain, and for that reason, he rejected Alt 3 completely.

109. The Delegation of the Islamic Republic of Iran supported Alt 1, which had been drafted according to agreed international language, as illustrated in other instruments and drafted by the LMCs.

110. The Chair opened the discussion on the relationship with the public domain. A definition of the term “public domain” had been introduced in the TCE text at IGC 27. That concept linked to the understanding of the related concept of “publicly available”, referred to in Article 5. Defining the public domain was a challenging exercise with significant and wide-reaching public policy ramifications going beyond the scope of the IGC. The IGC could reflect upon whether the definition of “publicly available” was relevant in the TCE context.

111. The Delegation of Senegal, speaking on behalf of the African Group, said that the IGC should not try to define “public domain” for two reasons: (1) it was a challenge that would have consequences going beyond the IGC framework; and (2) there was no IP instrument in present nomenclature where “public domain” was defined.

112. The Delegation of Indonesia, speaking on behalf of the LMCs, said that while the concept of “public domain” was relevant to understanding the interface between IP and TCEs and designing a balanced and effective IP-like system for the protection of TCEs, the merits of developing and including a specific definition of “public domain” within the instrument were unclear. There was a need to safeguard the public domain, but there was no reason or need to define “public domain” for the reasons laid out by the Delegation of Senegal, on behalf of the African Group.

113. The representative of INBRAPI said that one of the reasons why there was misuse, misappropriation, exploitation or illicit exploitation of TCEs was that the concept of “public domain” had been wrongly applied to TCEs. In the public domain, no right holder was identifiable, so when the concept of “public domain” applied to TCEs, it was denying the rights of those who had created them. Dealing with the public domain had to be done with many reservations. The protection of TCEs could not be considered isolated from established rights and principles, such as FPIC and fair and equitable sharing of the benefits. When applying the tiered approach, it had to be asked whether the TCEs were publicly available, whether there was no right holder, or whether indigenous peoples had no control over them. The IGC could not focus on the public domain, but focus on the problems that the public domain had created for TCEs.

114. The Delegation of Ecuador said that, alongside the statement made by the Delegation of Indonesia, on behalf of the LMCs, the public domain was incompatible with TCEs. Unlike the scientific domain, TCEs had a link to peoples with an identity. The identities of all those different groups had to be differentiated, and that was why TCEs were broadly dispersed throughout cultures. It did not mean that they should be part of the public domain. They had to be managed. In the IP framework, something entered the public domain once the period of protection had lapsed. TCEs, the collective nature of their creation and their link to the culture went beyond a time period. It could not be linked to the public domain. When looking at the tiered approach, the IGC had to look at the rights of the peoples, and their knowledge. The IGC had to be very careful with the public domain.

115. The Delegation of Brazil associated itself with the statement of the Delegation of Indonesia, on behalf of the LMCs, and with the concerns raised by the representative of INBRAPI. The common definition of “public domain” was not in the mandate of the IGC and would not in any way contribute to making progress in the discussion on TCEs.

116. The Chair introduced the issue on the definition of “misappropriation”. He suggested avoiding a definition, but he took onboard the comments made by Professor James Anaya during the Indigenous Panel, who had put forward a very succinct definition: “access without consent”, which could be turned into “access and use without consent”. That was probably worth discussing in the informals. He said that the IGC had completed the substantive core issues in plenary.

117. [Note from the Secretariat: The following took place on the next day, June 13, 2017.] The Chair said that it was important to start to narrow positions rather than just state positions in relation to preferences. He noted that the facilitators had reflected on the discussion that had taken place the day before and would present some initial proposals and thoughts based on those discussions. He emphasized that the material presented was simply work-in-progress, and it had no status and was not a revision. The Chair invited the facilitators to present their work.

118. Ms. Bagley, speaking on behalf of the facilitators, said they had made progress on the drafts and had captured Member States’ positions to simplify and move forward on the text. There were only two suggested changes. The first related to Article 4 on beneficiaries. The Delegation of Australia had suggested modifying Alt 3 with language from Alt 1 to better address concerns of over-breadth in the phrase “beneficiaries”, so new Alt 4 reflected the facilitators’ attempt to capture that suggestion. It read: “The beneficiaries of this instrument are indigenous peoples, local communities, and other beneficiaries, who hold, express, create, maintain, use, and develop traditional cultural expressions, as may be determined under national law.” That captured elements of Alt 1 and inserted them into Alt 3 to hopefully carve in the concept of other beneficiaries more closely. Regarding Article 5, she said that the Delegation of Indonesia, on behalf of the LMCs, had changed their support from Alt 2 to Alt 3, which was originally a

facilitators' formulation, so the facilitators suggested deleting the original Alt 2 and making the prior Alt 3 new Alt 2, which meant that there were three alternatives in Article 5. The Delegations of Egypt and Ghana had suggested textual adjustments to alternatives in Articles 1 and 3. However, they were not requesting that those changes be made at that time. That would be different from the African Group's positions. The facilitators noted that the discussions might be more fruitful if Member States considered reviewing the articles holistically, considering how they interacted with each other, which might lead to the conclusion that some terms or wording that might appear critical were actually addressed in other provisions of the articles. For future meetings, the use of explanatory notes to accompany the different provisions would be a useful tool.

119. Ms. Hao'uli, speaking on behalf of the facilitators, said that a useful exercise could be for relevant Member States to go through the alternatives that they supported for each article with examples of actual TCEs in order to get a better understanding of what Member States considered should be protected and what should not, and the rationale for those perspectives, as a basis for discussion towards narrowing gaps.

120. The Chair opened the floor for initial feedback.

121. [Note from the Secretariat: all speakers thanked the facilitators for their work.] The Delegation of Indonesia, speaking on behalf of the LMCs, recalled the Delegation of Australia's suggestion in Alt 4. It could be flexible thinking about that, because the reason why it wanted to see other beneficiaries in Article 4 was not because there was no recognition of IPLCs, but because there were situations where the TCEs could not be attributed to IPLCs or the TCEs were not confined to IPLCs. The Delegation of Australia had also stated that it was worth exploring a balance between allowing some beneficiaries and carving out others. It was not an unlimited kind of "other beneficiaries". It had to be qualified to make sure that beneficiaries as defined under national law were actually beneficiaries who maintained, used and held TCEs. Regarding Article 5, it thanked the facilitators for reflecting its positions, and supported Alt 2.

122. The Delegation of Thailand thanked the Delegation of Australia for proposing Alt 4, and thanked the facilitators for the new language in Alt 4, which it supported. Considering that it had supported Alt 3 at IGC 33 and expressed interest in Alt 2, the new Alt 4 was more specific.

123. The Delegation of Brazil associated itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. It thanked the Delegation of Australia for the constructive work. Alt 4 of Article 4 was worth considering.

124. The Delegation of Senegal, speaking on behalf of the African Group, said that the proposal needed more consideration, and it wished to go through the proposals in more detail to evaluate them.

125. The Delegation of the Islamic Republic of Iran associated itself with the position of the Delegation of Indonesia, on behalf of the LMCs. The new proposal endeavored to capture the concerns of all Member States as stated in plenary. It supported the deletion of Alt 2.

126. The Delegation of Colombia supported the proposal made by the Delegation of Australia. Alt 4 included not only IPLCs but also other beneficiaries, and, therefore, it made it possible to adjust to the legislation of various countries.

127. The representative of INBRAPI was delighted to see that phrase "indigenous peoples" appeared in Alt 4 as proposed by the Delegation of Australia. The IGC was trying to establish who created TCEs and who should be protected. She was concerned that the possibility was available for national legislation to add other beneficiaries. Therefore, a deeper discussion was needed in consultation with IPLCs.

128. The representative of Tupaj Amaru said that there was no significant change in the article regarding beneficiaries, as the other beneficiaries were still included. He wondered how judges would interpret that text, which was open to a number of interpretations and could create artificial, virtual beneficiaries. He rejected the inclusion of other beneficiaries. He wondered whether other international instruments had been looked at. The IGC was debating and drafting the text without consulting the existing instruments. He urged participants to understand what they were doing, while they were gambling the future of IPLCs.

129. The Delegation of China thanked the Delegation of Australia for proposing Alt 4, which was a new advance of the text. Alt 2, Alt 3 and Alt 4 were all worth considering. At the same time, one should consider the two different situations where there was a notion of “indigenous people” and where there was no such notion, so it suggested adding, after the word “other beneficiaries”, “such as nations”.

130. The Chair said there had been a long debate in that area at many sessions, and the IGC had moved past the use of the term “nations” and the other alternative options were directed at that. He asked the Delegation of China to reconsider its intervention for reintroducing that language. The alternative provided policy space to address that particular concern.

131. [Note from the Secretariat: This part of the session took place after the informals and the distribution of Rev. 1 dated June 14, 2017 prepared by the facilitators.] The Chair explained that he would invite the facilitators to introduce Rev. 1. His guidance to the facilitators had been the same as in previous meetings: (1) to provide clarity in the text in relation to Member States’ positions as reflected in the alternatives in some articles; and (2) to attempt to narrow gaps with the need to maintain the integrity of Member States’ positions. He had given the facilitators some license to develop their own text if it could assist in narrowing gaps. Whenever the facilitators had developed their text, it was in italics and would require members’ support to go forward. As per the rules of procedure, every Member State had the right to have its views reflected, and the facilitators had attempted to achieve that. Any omissions or errors were inadvertent. Once the facilitators had completed the introduction, he would provide time to review the document and consult. Member States could come forward to speak directly to the facilitators to clarify issues, ask questions, or indicate errors or omissions. The Chair thanked the facilitators for their efforts. They were there to assist in moving the process forward and balance the interests of all Member States. If the IGC was to deliver an outcome, it had to balance all Member States’ interests, and those of other key stakeholders, such as indigenous peoples.

132. Ms. Hao’uli, speaking on behalf of the facilitators, said that the facilitators had tried to capture in Rev. 1 Member States’ positions on the issues discussed thus far. That had incorporated Member States’ useful feedback on their work-in-progress presented the day before, and in some areas they had made their own changes with the intention of simplifying the text. They were grateful for Member States’ willingness to engage with the facilitators informally to ensure that as far as possible they were accurately capturing the various positions expressed. That helped their drafting process considerably, and they would continue to come to delegations for clarification and with suggested modifications as they tried to move the text forward. On Article 1, Alt 1 contained two changes. The introduction of the term “unauthorized use” in Article 1.1(a) came from a Member State’s proposal in informals and was intended to help situate the policy objectives more clearly within the IP context. Article 1.2 of Alt 1, which previously referred only to the erroneous grant of IP rights, currently read: “Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.” Alt 1 read: “This instrument should aim to: 1.1 Provide beneficiaries with the means to: (a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions; (b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary; (c) promote the equitable

compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and (d) encourage and protect tradition-based creation and innovation. Option (d) encourage and protect creation and innovation. 1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.” Alt 2 of Article 1 had one change as suggested by a Member State in informals, which was to bring the new Article 1.2 of Alt 1 into Alt 2 as Paragraph (e). Alt 2 of Article 1 stated: “This instrument should aim to: (a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions]; (b) encourage creation and innovation; (c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange; and (d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain. (e) aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.” In Alt 3, there was one change requested by a Member State in informals. It stated: “The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, and to recognize the rights of [beneficiaries] [indigenous peoples and local communities].” Alt 4 was a new alternative provided by a Member State in informals and was based on the language of Alt 3. It stated: “The objective of this instrument is to prevent misappropriation, misuse, or offensive use, and to promote the protection, of traditional cultural expressions within the intellectual property system, and to recognize the rights of [beneficiaries] [indigenous peoples and local communities].” In Article 4, they had not made any changes to Alt 1, Alt 2 or Alt 3, and Alt 4 was a new alternative, based on the facilitators’ work and progress, to reflect an intervention made by the Delegation of Australia. They had amended that original Alt 4 to reflect a proposal made by a Member State in informals. It stated: “The beneficiaries of this instrument are indigenous peoples, as well as local communities and other beneficiaries, as may be determined by national law, who hold, express, create, maintain, use, and develop protected traditional cultural expressions.” In Article 5, they had intended to remove the original Alt 2 as its proponents had removed their support for it, so there were three alternatives, but they were otherwise unchanged.

133. Ms. Bagley, speaking on behalf of the facilitators, said that Article 6 had been modified by Member State during informals to have a single provision as opposed to two alternatives. Member States who supported prior Alt 1 had agreed to delete it and accepted prior Alt 2 with the following modification: the insertion of “in consultation with” as an alternative to “with the explicit consent of”. It read in full: “6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in consultation with the beneficiaries, to administer the rights/interests provided for by this [instrument]. 6.2 [The identity of any authority established under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]” They had also deleted the brackets surrounding “identity”, as they were unclear regarding their origin. If a Member State had a basis for requesting those to be remained, it should mention it. Regarding Article 7, Alt 1, which was a modified form of the three-step test, was unchanged. Alt 2, which imposed certain explicit constraints on exceptions and limitations, had been modified by a Member State to insert within paragraph 2, “may” as an alternative to “shall” and “should” and to make the list of exceptions non-exhaustive by adding “such as” before paragraph 4. There was an error in the text, as it accidentally deleted the word “for”. Alt 2 read: “In complying with this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law. 1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs. 2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should/may] have exceptions, such as: (a) learning teaching and research; (b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions; (c) the creation of literary, artistic, or creative works inspired by, based on,

or borrowed from traditional cultural expressions.” Alt 3 was a new provision proposed by a Member State during informals, which presented a more traditional three-step test for exceptions and limitations. It read: “In complying with the obligations set forth in this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.” As requested by the Chair, the facilitators had revisited prior Alt 3, which was new Alt 4, and revised it with a view to closing gaps, streamlining the text, and providing a middle-ground approach. It combined a traditional three-step test from Alt 3 with explicit protections for beneficiaries that had been in prior Alt 3. It read: “In complying with the obligations set forth in this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties, provided that the use of traditional cultural expressions: (a) acknowledges the beneficiaries, where possible; (b) is not offensive or derogatory to the beneficiaries; (c) is compatible with fair use/dealing/practice; and (d) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries.]” No changes had been made to Articles 8 or 9. The only option in Article 10 for which a Member State had indicated support was prior Option 1, which was then Article 10.1, but it had been modified with language from the TK text proposed by a Member State during informals. Another Member State had requested the insertion of the language presented as Article 10.2, also taken from the TK text. They read: “[10.1 Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument. 10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions may include restorative justice measures, according to the nature and effect of the infringement.]” The facilitators had deleted the remaining paragraphs of Article 10 as no Member State had indicated support for them; however, they could be added back if that was an error. Finally, a Member State wanted language inserted in each of Articles 8, 9, 10, 11 and 13 that “no such provisions” should be included in the text, as they prejudged the outcome of the negotiations. Consistent with the approach taken in the GRs text, that language “No such provisions” had been included as an alternative to Articles 8, 9, 10, 11 and 13, in an effort to ensure that the Member State’s position was reflected, while seeking to narrow gaps and streamline and un-clutter the text.

134. The Chair said Member States surely appreciated the facilitators’ efforts. Member States that had questions, sought clarifications or wanted to signal an error or omission could speak directly to the facilitators to maintain the efficiency. The Chair said that Rev. 1 had no status and it was just work in progress. He would open the floor for comments on the elements revised by the facilitators based on the discussions in plenary and informals. The facilitators’ proposals were in italics and needed to be approved by one or more Member States. Any interventions by observers also had to be supported by one or more Member States.

135. Ms. Bagley, speaking on behalf of the facilitators, said that they had spoken with a number of delegations about errors or omissions in Rev. 1 that would be corrected in Rev. 2. In Article 1, in Alt 2, paragraph (c), they had deleted the word “and” at the end of that clause and inserted at the end of paragraph (d). In Article 4, they had deleted “protected” before TCEs. In Article 6.1, they had inserted “where applicable” after “beneficiaries”. In Article 7, in Alt 2, paragraph 2, they had reinserted “for” after “such as”. In Article 10.1, they had replaced “shall” with “should/shall”. A Member State had requested in plenary for the global bracketing of the word “peoples” throughout the document, consistent with the TK text.

136. The Chair said that the bracketing of “peoples” was a very sensitive political issue for indigenous peoples. The issue went well outside of WIPO and the IGC. Ultimately, as a norm it would be resolved at a political level. He opened the floor for interventions, article by article.

137. Ms. Hao’uli, speaking on behalf of the facilitators, asked for comments on Article 1.

138. [Note from the Secretariat: all speakers thanked the facilitators for their work.] The Delegation of the Philippines recalled that at IGC 33 it had made an intervention about the use of the word “free” to describe prior informed consent (“PIC”). While it was happy to see that it was the case under Article 1, particularly Article 1(c), the term PIC appeared in the rest of the text without the word “free”. The term was not reflected consistently throughout the text and should be in the next revision.

139. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, was happy to see that all positions delivered by Member States during both plenary and informals were reflected in Rev. 1. It would be delighted to see Rev. 2 and would be happy to transmit it to the GA.

140. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. It welcomed the addition of Articles 1.1(a) and 1.2, which provided more clarity. The principles in original Article 1.1(d) and its option were already well reflected in an explicit way in the Preamble so they should be taken out of Alt 1.

141. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that “unauthorized” and “assertion” should be in brackets, as it could not have such a broad rights-based approach. It had doubts about the new numbering of Article 1. It asked to bracket paragraph (e) of Alt 2, given the important and problematic changes that addition bore. It preferred the previous version of Alt 3.

142. The Delegation of Senegal, speaking on behalf of the African Group, stated that Rev. 1 reflected the views expressed. It preferred Alt 1. As underlined by the Delegation of Indonesia, on behalf of the LMCs, Option (d) of Alt 1 would be better placed in the Preamble.

143. The Delegation of Uganda stated that the word “protect” in Article 1(d) in Alt 1 and Article 1(a) in Alt 2 should be removed for consistency with the whole document because the overall objective was the protection of TCEs.

144. The Delegation of the Islamic Republic of Iran aligned itself with the position of the Delegation of Indonesia, on behalf the LMCs, with regard to Alt 1. The content of paragraph (d) was already addressed adequately in the Preamble and should be deleted from Alt 1.

145. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, was happy to work on the basis of Alt 4 because it was streamlined, balanced and reflected the desire of indigenous peoples to prevent the misappropriation of TCEs. Yet there seemed to be some inconsistency in the formulation. It was better to say “protect” rather than “promote the protection” since it was more consistent with the first part, which said “prevent”. She wondered whether it was necessary to have “within the IP system” because anything developed by WIPO would necessarily be within the IP system. She preferred IPLCs rather than “beneficiaries” towards the end of the alternative.

146. The Delegation of Colombia supported the proposal.

147. The representative of Tupaj Amaru said Article 1 did not state whether it was about TK or TCEs. Each of the documents should lay out clearly what it was about. For years he had been opposed to the utilization of terms such as “policy objectives”. Alt 1 should state “shall” in each of its sentences. The objective was the protection of TCEs. He proposed the following: “shall protect TCEs, including all the forms of expression maintained and transmitted from generation to generation.”

148. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

149. The Delegation of Egypt supported Alt 1 and proposed that subparagraph (d) be included in the Preamble. The term “encourage” did not reflect a legal provision and it was a principle.

150. The Delegation of Switzerland noted a minor change in Alt 3. It was still analyzing whether there would actually be a difference by bringing in that change. It preferred maintaining the original language along, as stated by the Delegation of the EU, on behalf of the EU and its Member States.

151. The Delegation of Japan preferred Alt 2. It also supported paragraph (e) in Alt 2 because preventing the grant or assertion of IP right was essential.

152. The Delegation of the USA supported the qualifying word “protected” before TCEs in Alt 2, paragraph (a).

153. Ms. Hao’uli, speaking on behalf of the facilitators, invited comments on Article 4.

154. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 3, as there was a need for flexibilities on beneficiaries.

155. The Delegation of the USA supported the use of the word “protected” in brackets before TCEs in Alt 4.

156. The Delegation of Colombia, speaking on behalf of GRULAC, welcomed Alt 4, though some Member States in the Group had some questions with regard to the content.

157. The Delegation of Senegal, speaking on behalf of the African Group, preferred Alt 3, which provided most flexibility for States.

158. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the interpretation of “and” was not clear. It wished to understand if “and” meant for a cumulative or alternative definition. The definition of other beneficiaries was not clearly defined and would be problematic if nations or States were to be understood by that. It welcomed clarification on the exact meaning.

159. The Delegation of Egypt preferred Alt 3, which was a balanced and flexible alternative, guaranteeing easy implementation by Member States. It was not excluding any beneficiaries and took into account all possible practical circumstances.

160. The Delegation of Argentina preferred Alt 3, but it welcomed the wording used in Alt 4, which distinguished clearly between indigenous peoples on the one hand and local communities and beneficiaries on the other. The concept of indigenous peoples enabled to identify specifically who the beneficiaries were. Although it understood the need to maintain a reference to local communities and other beneficiaries, the term was not defined and would have to be established under national legislation. The wording in Alt 4 was clearer than in Alt 3. It asked to use similar wording for Alt 3.

161. The Delegation of the Islamic Republic of Iran reiterated its concern regarding the title of the article. It was not in favor of including the word “safeguarding” in the title. Along with the Delegation of Indonesia, speaking on behalf of the LMCs, it favored Alt 3, which carried enough policy room for all Member States. At the same time, it saw merit in Alt 4, which, with some tweaks in the language, could provide a landing zone.



162. The Delegation of Uganda supported the statement made by the Delegation of Senegal, on behalf of the African Group, and it favored Alt 3. It sought clarification on the reference to “other beneficiaries as may be designated under national law”. That was intended to provide flexibilities and policy space for some countries that might have within their borders peoples who did not belong to ILCs but who practiced their own TCEs, whether inside the borders of a country or having created hybrid expressions of their cultures through interruption and assimilation. A key example of such other beneficiaries was refugees. Uganda was host to approximately a million refugees from its neighboring countries. They produced their own TCEs and countries should have some flexibility to extend some rights to them.

163. The representative of Tupaj Amaru said that the article did not mention the transmission from one generation to the next. He insisted to maintain that principle. He did not believe that other societies or business people could be beneficiaries. IPLCs were the main beneficiaries.

164. The Delegation of Colombia asked that the word “protected” be in brackets, as that might limit the TCEs. There was controversy over what was protected or not.

165. The Delegation of Bolivia (Plurinational State of) preferred Alt 1 with the deletion or bracketing of the term “protected” as stated by the Delegation of Colombia, because there would be sensitivities for determining what TCEs were protected or not. That was directly correlated to what had been stated at IGC 32 on TK. It did not know if it was possible to have criteria with regard to Article 3.

166. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, thanked the proponent of Alt 4 and the other delegations that worked on that language in the informals. She could work on the basis of that alternative, which recognized quite clearly indigenous peoples as the beneficiaries and, in certain countries that did not recognize indigenous peoples and might call them “local communities” or other beneficiaries, there was the possibility for them to enjoy the status of beneficiaries. The qualification that those were beneficiaries who held, expressed, maintained, used and developed the TCEs was very useful because it provided clear criteria. She was not sure that the word “protected” was necessary or if it added anything.

167. The Delegation of Georgia, speaking on behalf of CEBS, preferred Alt 1.

168. The Delegation of Morocco associated itself with the statement made by the Delegation of Senegal, on behalf of the African Group. It supported Alt 3, which was encompassing all and in line with enabling flexibility to States.

169. The Delegation of the USA, with respect to Alt 1, supported the word “protected” before TCEs. Out of the vast universe of potentially protectable TCEs, ultimately a subset of those would be protected. That was an important matter for further discussion.

170. The Delegation of Brazil supported Alt 3. It agreed with the Delegation of Colombia that the word “protected” was redundant in Alt 1 and Alt 4, and should be in brackets.

171. The Delegation of Ghana expressed its support for deleting the reference to “safeguarding” and to retain “protection”. Regarding Article 4, there had been no mention about safeguarding. Parties who had originally expressed an interest in safeguarding emphasized the retention of “protected” in Alt 4. That underscored the relevance of the term “protection”. However, the word “protected” could be safely deleted from Alt 4 to the extent that the scope of the instrument was based on protecting whatever qualified as TCEs and it did not add anything to include “protected”.

172. The Chair opened the floor for comments on Article 6.

173. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, agreed with the deletion of Alt 1. In Alt 2, she appreciated that in the establishment or designation of a competent authority the consent of indigenous peoples was required. She had proposed the alternative text “in conjunction with” in the informals and thought it would be reflected because it seemed to enjoy support. She wondered if there was a typographical error because the text was “in consultation with”.

174. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tebtebba Foundation.

175. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to better understand the exact meaning of the insertion of “in consultation with” as opposed to “with the explicit consent or in conjunction with”. On Article 5, the closing square bracket at the end of Article 5.2 under Alt 1 should be deleted.

176. The Delegation of Indonesia, speaking on behalf of the LMCs, said that the insertion of “in consultation with” had been proposed by the Group, as the proponent of previous Alt 1. It might consider Alt 2 to reflect the options of “explicit consent” and “in consultation with”. It was open to further discussion. Actually, the facilitators had made it clear that its input would be “in consultation with the beneficiaries if possible”, which was consistent with its position on beneficiaries. It sought clarification from the facilitators if that was not the case. Article 6.2, to be consistent with the language in Article 6.1, should read: “The identity of any authority established or designated under paragraph 1 [...]” with the addition of the words “or designated”.

177. The representative of Tupaj Amaru asked the Chair why the IGC had not discussed the most important article, Article 5. The representative of Tupaj Amaru said that “administration” was not an appropriate word. One administered a business, not an international binding instrument. He proposed “exercise of collective rights” and would delete the rest. He proposed: “The contracting parties of the present instrument shall establish in consultation with the owners and holders of traditional cultural expressions with their free prior informed consent national and regional competent authorities with the following mandate [...]”.

178. The Chair said that observers’ intervention had to be supported by a Member State, as per the rules of procedure. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

179. The Delegation of the Islamic Republic of Iran favored the title “Administration of Rights”, which was the most legally acceptable term. In paragraph 6.1, its original preference was Alt 1, which was not in the text anymore. It was not in a position to support the inclusion of the phrases “with the explicit consent of” or “in conjunction with”. It had shown flexibility along with the other members of the LMCs to bridge the gaps. If those expressions remained in the text, it would ask to retain Alt 1.

180. The Delegation of Senegal, speaking on behalf of the African Group, shared the concerns raised by the Delegation of the Islamic Republic of Iran and expressed its preference for Alt 1 as it appeared in the text before.

181. The Delegation of Brazil proposed alternative language for Alt 1: “Member States/Contracting Parties may establish or designate a competent authority in accordance with national law, to administer, in consultation with the beneficiaries, the rights/interests provided for by this instrument.” It agreed with the suggestion of the Delegation of Indonesia, on behalf of the LMCs, to put in original paragraph 2 “the identity of any authority established or designated” under paragraph 1.

182. The Delegation of Indonesia, speaking on behalf of the LMCs, said that in light of the development of the discussion on administration of rights, it left it to the discretion of the Chair and the facilitators to make sure that all decisions stated within the plenary would be reflected. Based on its original intervention and those by the Delegations of the Islamic Republic of Iran, Senegal, on behalf of the African Group, and Brazil, it could support the proposed language by the Delegation of Brazil “where applicable, in close consultation with the beneficiaries,” while retaining Alt 1.

183. Ms. Bagley, speaking on behalf of the facilitators, said that in Article 5, a change had been introduced in the facilitators’ work-in-progress based on the transfer of support by the Delegation of Indonesia, on behalf of the LMCs, from original Alt 2 to original Alt 3. Original Alt 2 had been deleted and new Alt 2 was prior Alt 3.

184. The Chair opened the floor for comments on Article 7.

185. The Delegation of the EU, speaking on behalf of the EU and its Member States, found merit in keeping aspects of previous Alt 3 and asked that to be reinserted into the text. Other Member States had suggested working on the language of that alternative to narrow the gaps. It looked forward to further discussion around Article 7 and would further analyze it with its Member States.

186. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked the Delegation of the EU, on behalf of the EU and its Member States, for disclosing its position on Article 7 and looked forward to narrowing gaps on previous Alt 3 in future sessions. It wondered what the Delegation of the EU, on behalf of the EU and its Member States, thought about new Alt 3 and Alt 4, whether they were sufficiently reflecting all the elements of prior Alt 3. That had actually been a discussion with the Delegation of the EU at IGC 33. It preferred Alt 1, as it was language it had proposed based on international language. It took note of new Alt 3 and Alt 4. It saw merit in the discussion and would try to merge some elements in those three alternatives to come to a middle ground in future sessions.

187. The Delegation of Senegal, speaking on behalf of the African Group, continued to support Alt 1, which remained unchanged.

188. The Delegation of the USA, with respect to Alt 2, said that the exceptions and limitations set forth in paragraph 2(a) through 2(c) were ones of special importance. It had never intended it to be a closed list. It took note of the addition of “may” and “such as” but was not in a position to support them because they turned the list into a mere list of examples. Nonetheless, it was sensitive to the concern that the delegations that had proposed those were trying to address, i.e. the notion that it might be interpreted as a closed list. To resolve that issue in a slightly different way, it recommended a new paragraph 3: “A Member State may provide for exceptions and limitations other than those permitted under paragraph 2.” In Alt 3, the word “complying” was used only to refer to legally binding obligations. The word “obligations” existed in Alt 3 as well as in Alt 4. To address that issue it proposed placing in brackets the phrase “in complying with the obligations set forth in” and introducing another bracketed alternative formulation that would read “implementing this instrument” both in Alt 3 and Alt 4. The incidental use exception, as formulated under Article 10, had been deleted. It should be moved into Article 7, numbered as a new Alt 5 or any other numbering the facilitators might find optimal. It would read as follows: “A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.” The wording was almost identical to Article 10.5, only slightly changed to fit Article 7.

189. The Delegation of Egypt said it had supported Alt 1 before it had been amended by the text in brackets, because the wording, used in most conventions, was very easy to understand. But it could only accept Alt 3 taking out the parts in Alt 1.

190. The Delegation of Ghana said that the first part of Alt 3 took into account the interests of third parties. It raised a definitional issue and was ambiguous and redundant. There had been discussions about the legitimate interests of beneficiaries, which were defined under the scope of protection in Article 5. But the term “third parties” had not been defined and what their interests were had not been addressed. It was not possible to understand what type of legitimate interests would justify an exception or limitation. The new proposal of paragraph 3 in Alt 2 was interesting. If Alt 2 specified three exceptions and Alt 3 stated that a member could include other exceptions not identified in Alt 2, it meant that Member States could introduce exceptions and limitations for whatever reason they chose to. It was another way of saying there was no need for an exceptions and limitations clause because the whole objective of an exceptions and limitations clause was to allow reasonable deviation from the scope of the instrument. But if one could, for any reason, carve out exceptions, it diminished the effect of Article 7. It proposed bracketing that new proposal. In Alt 3, the very last paragraph should be bracketed because once could talk about limited interests of beneficiaries, not knowing who the beneficiaries were and what their interests were. But those third parties were unknown.

191. The representative of Tupaj Amaru agreed to delete third parties from Article 7. The following would be more appropriate and shorter: “The state parties with the arrangement of their national legislation shall establish limitations and exceptions to authorize the use of protected traditional cultural expressions wherever and whenever they are as a public use or scientific use in conformity with use in the traditional context and with the prior consent of the owners or holders of traditional cultural expressions in accordance with their customary practices. By their intrinsic nature, sacred, spiritual and secret knowledge would not be subject to any type of exception or limitation.”

192. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

193. The Delegation of Brazil supported Alt 1, which was a very elegant solution that provided the necessary flexibility for Member States, considering the variety of national situations. It took note of the suggestion of the Delegation of the USA to Alt 1. Alt 1 separated those who wanted an international treaty, which was the case of the Delegation of Brazil, with those who did not, which appeared to be the case of the Delegation of the USA in Alt 2. Alt 1 should remain as it was.

194. The Delegation of Indonesia, speaking on behalf of the LMCs, preferred Alt 1. It saw merit in Alt 2, Alt 3 and Alt 4. It had not seen any support for Alt 4, but had seen requests for prior Alt 3 to be put back. It welcomed that. It was very happy to see that the Delegation of the EU, on behalf of the EU and its Member States, saw merit in one of the alternatives on exceptions and limitations. It took note of the input delivered by the Delegation of the USA and asked whether the objective of introducing paragraph 3 in Alt 2 was to have an unlimited possible deviation from the objective of the instrument, because that wording just meant that everybody could use exceptions and limitations without any kind of limitation itself. It also asked if the incidental use exception in Alt 5 could be made a stand-alone alternative, perhaps as a new paragraph under Alt 2.

195. The Delegation of Canada, without prejudice, said that the whole discussion on exceptions and limitations would need to be linked to any outcome on the scope of protection. It was interested in preserving various options for consideration. It asked the Delegation of the USA whether it objected to keeping the options of “may” and “such as” in that text in brackets. It sought clarification to find out what was the status of those two phrases.

196. The Delegation of Tunisia supported the proposal made by the Delegation of Senegal, on behalf of the African Group, and supported Alt 1. Alt 3 and Alt 4 comprised expressions that were outside of the parameters of exceptions and limitations. The protection proposed in Alt 3 was less than the protection sought for TCEs, such as provided by UNESCO. The Tunis Model Law on Copyright for Developing Countries included a number of principles among which the condition for authorizing derivative works from TCEs. It preferred Alt 1 to avoid the legal loopholes present in Alt 3 and Alt 4. It did not accept the notion of third parties without a clarification of who those third parties were and what the legal effect would be. Alt 1 was the alternative with the least legal loopholes.

197. The Delegation of Georgia, speaking on behalf of CEBS, associated itself with the intervention made by the Delegation of the EU, on behalf of the EU and its Member States, in respect of Alt 3.

198. The Chair opened the floor for comments on Article 10. He said that the Delegation of the USA had put forward a clear alternative on the table, which was “Article 8, 9, 10, 11 and 13. No Such Provisions” and he assumed that it had no intent of putting any further proposals into Article 10. The integrity of the text was important.

199. The Delegation of the USA said it would be happy to answer the questions regarding the previous article bilaterally. It intended, without prejudice to its prior position, to make comments on Article 10, which was its prerogative as a Member State. The language of Article 10.1 confirmed the concerns expressed previously. It proposed the following textual amendment: “Member States shall undertake to adopt appropriate, effective, and proportionate legal//and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.”

200. The Delegation of New Zealand said it was so pleasing to see so much text taken out of the article at no loss. The text contemplated the remedy of that being a violation of the right. In “Scope of Protection”, it was contemplating both rights-based and measures-based approaches. For example, a State might have a prohibition against offensive use but one might not provide it in a rights context. It suggested that the facilitators think about broadening out the scope just a tad. It wondered if that might have been part of the issue that the Delegation of the USA was pointing to.

201. The Delegation of Indonesia, speaking on behalf of the LMCs, welcomed the new formulation of Article 10. It respected the position of the Delegation of the USA that there should be no such provisions as Articles 8, 9, 10, 11 and 13. However, there was agreement in the IGC that discussions were not prejudging the outcome, which was why all the articles were in brackets and they were not in agreement. But making a position that there should be no such provisions actually did prejudge the outcome of the discussion, which would be that there would be no Articles 8, 9, 10, 11 and 13. That was in conflict with what the Delegation of the USA had been saying. On Article 10, it sought clarification from the Delegation of the USA whether the new alternative was in line with the position of having no provision.

202. The Delegation of the EU, speaking on behalf of the EU and its Member States, suggested considering the following alternative: “Member States/Contracting Parties should/shall provide in accordance with the national law the necessary legal, policy or administrative measures to prevent willful or neglectful harm to the interests of the beneficiaries.” It wished to learn more about the meaning of “restorative justice”, an interesting concept that required further assessment. It supported the insertion of “Alternatives to Articles 8, 9, 10, 11, and 13. No Such Provisions”.

203. The Delegation of Ghana echoed the sentiments expressed by the Chair concerning multiple proposals, which tended to contradict earlier proposals made by the same delegations. He recalled an important principle in international law "*pacta sunt servanda*," i.e. "agreements are made to be complied with". Underlying that was the principle that parties should act in good faith. When undertaking to abide by the terms of an agreement, parties agreed to be bound by it. The same principle applied when negotiating. Parties who were negotiating should be able to rely on the fact that their partners negotiated in good faith and took consistent positions. That was what created credibility. Where it was possible to state contrasting positions, it made it difficult to know where a party actually stood. A delegation had stated that Article 10 was not necessary, but actually necessary. Delegations could not shift stance and change positions when suitable because it was not possible to articulate a precise and consistent national policy. It implored all delegations to adhere to that important principle of public international law.

204. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, said, similar to Article 6 on administration of rights, Article 19 of UNDRIP also applied to any measures that a State put up that would potentially affect indigenous peoples. In particular, UNDRIP required FPIC before adopting and implementing legislative or administrative measures that might affect indigenous peoples. She had a similar proposal that read: "10.1 Member states shall, in conjunction with indigenous peoples, put in place accessible, appropriate, effective, dissuasive and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument. Indigenous peoples shall have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm." In many instances, in many countries, the State was slow to or did not act on violations of indigenous peoples' rights and indigenous peoples had mechanisms that would address the harms. Those had been read in the informals and were being presenting to the plenary for consideration. In paragraph 10.2, restorative justice measures had been included. It was very interesting; however, restorative justice was not really a sanction, rather, it was a remedy. In order to reflect that the article contained both sanctions and remedies, as stated in the title, it proposed breaking up paragraph 10.2 into two separate sentences. The first would deal with sanctions, the second with remedies. It would be changed as follows: "10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures, as appropriate. Remedies may include restorative justice measures, such as repatriation, according to the nature and effect of the infringement." She hoped that the Member States could reflect on that text in the informals.

205. The Delegation of Bolivia (Plurinational State of) supported the textual proposals.

206. The representative of Tupaj Amaru said that States that did not want to have sanctions or wanted to have an instrument without coercive measures for its application, were simply saying that it would be a mere declaration, not a binding instrument. Therefore, he proposed the following: "The contracting parties to this international instrument commit to adopt in accordance with their respective domestic legal systems and in accordance with the international legislation, enforce the effective appropriate measures to guarantee the protection of TK and TCEs against any misappropriation, including premeditated harm or deliberate harm or violation, either by negligence or omission. In cases of misappropriation of TK, which would run the risk of facing extinction and in accordance with the aforementioned article, the States would establish mechanisms for the application of this article, including a mechanism for arbitration and mediation to ensure effective compliance. Dispute settlements among the beneficiaries and users of TK without prejudice to that provided in other international instruments. Sanctions and administrative remedies in both criminal and civil courts would be applied. In accordance with Article 4, competent groups would be established on the free prior informed consent of beneficiaries to provide advice and assistance to the beneficiaries mentioned in Article 2 in order to guarantee compliance and respect for their rights and the application of sanctions stipulated herein. The contracting parties would provide cooperation,

and assistance to the beneficiaries in order to facilitate the application of the mechanisms and measures within the national territory and within the boundaries of neighboring countries contemplated in this instrument.”

207. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

208. The representative of INBRAPI said that other delegations had already questioned the word “interests” because the mandate was to protect rights and not interests. Therefore, legally it would be clearer to use the word “rights” instead. She completely supported the position of the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus. She thanked the Delegation of Bolivia (Plurinational State of) for supporting the textual proposal with regard to the fact that sanctions, remedies and the exercise of rights needed to be done in conjunction with IPLCs who created the TCEs. Those measures needed to be accessible, because often they were not. Concerning the burden of proof, often there was no shown economic harm. Some TCEs were not being traded, but their misuse did cause harm, not necessarily economic harm. She asked States for their continued support for the text to continue to reflect the interests of all parties, particularly the creators of TCEs, IPLCs.

209. The Delegation of Brazil asked for clarification from the Delegation of the USA whether it was withdrawing its proposal to restrict the proposals considering the new article.

210. The Delegation of the USA said its position was entirely consistent. It had expressed concern and made an intervention early on and suggested looking at those negotiations in a sense of a window where each of the delegations could look to the positions of other delegations, including textual suggestions. Some delegations had looked at those negotiations more as a mirror where only their reflection counted. It took exception to that and would continue to make principled textual and policy interventions.

211. The Delegation of Uganda suggested adding in Article 10.2, in the second line, “as may be determined by national law according to the nature and effect of the infringement” to try to bridge the gap. In most cases, countries would implement the instrument and at the national level there were usually sanctions to handle issues arising from such implementation.

212. The Delegation of El Salvador thanked the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus for the amendment. It supported the review in Article 10.1 with regard to the fact that the demonstration of economic harm should not be needed. Regarding Article 10.2, it supported further specification that sanctions could be either civil or criminal. It wished to merge Articles 12 and 16, taking Article 12.1 followed by the current paragraph of Article 16 as Article 12.2 and adding the following text: “in accordance with how it harms or causes prejudice to the rights of the indigenous peoples enshrined in UNDRIP” and adding Article 12.3 “in the case of legal conflict, the rights of indigenous peoples enshrined in the aforementioned declaration would prevail and every interpretation would be guided by the declaration.”

213. The Delegation of Ecuador thanked the Delegation of El Salvador for the text put forward. It recognized the contribution made by the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus in Article 10 because it covered the fundamental issue of the participation of indigenous peoples within decisions that affected their rights. It supported it, as it went along with the existing international instruments and with its national legislation.

214. The Delegation of Bolivia (Plurinational State of) said it was important to have clarity with regard to the title of Article 3 and asked the facilitators to consider its views.

215. [Note from the Secretariat: this part of the session took place after the distribution of Rev.2 on June 15, 2017.] The Chair invited the facilitators to introduce Rev. 2 and explain the content and rationale underlining the changes made.

216. Ms. Hao'uli, speaking on behalf of the facilitators, said they had taken the interventions made in plenary to develop Rev. 2. They had tried to represent Member States' positions and she thanked Member States for consulting informally and clarifying proposals. In some cases, Member States might have altered or withdrawn certain proposals, and she hoped to have come up with a more streamlined and concise text. The Delegation of the Philippines had asked to insert the word "free" before "prior informed consent". A Member State had asked for the global bracketing of the term "peoples". The facilitators had made both changes throughout the text. In Article 1, Alt 1 had not been changed from Rev. 1. In Alt 2, they had amended the error pointed out in plenary, i.e. moving "and" from the end of paragraph (c) to paragraph (d). They had also bracketed new paragraph (e), inserted in Rev. 1, as well as the words "or assertion" as requested by the Delegation of the EU, on behalf of the EU and its Member States. In Alt 3, they had reinserted the word "recognizing" as suggested by the Delegation of the EU, on behalf of the EU and its Member States, and the Delegation of Switzerland. Alt 4 had been amended following a proposal by the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus, supported by the Delegation of Colombia, who was the proponent for Alt 4. Alt 4 read: "The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous [peoples] and local communities." There were no changes to Article 2. In Article 3, there was one change suggested by the Delegation of Bolivia (Plurinational State of) in the title, i.e. to bracket the words "eligibility criteria for protection/safeguarding". They had added the word "protection" at the end of the title, which read: "[Eligibility Criteria for [Protection]/[Safeguarding]/[Subject Matter of [the Instrument]/[Protection]]". In Article 4, they had inserted brackets around "protected" where it preceded "TCEs" in Alt 1 and Alt 4, and in Alt 4 around the words "who hold, express, use or maintain traditional cultural expressions" based on the proposal made by the Delegation of Argentina. In Article 5, they had deleted the bracket at the end of Alt 1 as requested by the Delegation of the EU, on behalf of the EU and its Member States. Alt 2 had not changed and Alt 3 had only changed with those global changes mentioned earlier.

217. Ms. Bagley, speaking on behalf of the facilitators, said that in Article 6, Alt 1 was a new provision presented by the Delegation of Brazil, which involved "close consultation with beneficiaries where applicable" and was supported by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Senegal, on behalf of the African Group. It read: "6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument. 6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]" Alt 2 was old Alt 2, which was the sole provision in Rev. 1. Paragraph 6.1 of Alt 2 had been modified by the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus, with the support of the Delegation of Bolivia (Plurinational State of) to replace "in consultation" with "in conjunction" as an alternative to "with the explicit consent of". In paragraph 6.2, "or designated" had been inserted after "established". Alt 2 read: "6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument]." Paragraph 6.2 was the same as in Alt 1. In Article 7, Alt 1 was unchanged. In the chapeau of Alt 2, "complying with" had been replaced by "implementing" and in paragraph 2, brackets had been added around "may" and "such as" as requested by the Delegation of the USA. In addition, two new paragraphs had been inserted in Alt 2. Paragraph 3 introduced by the Delegation of the USA made clear that Member States were not limited to only the exceptions listed in paragraph 2. Paragraph 4 provided for exceptions and limitations for incidental uses of TCEs. It previously



appeared in Article 10, as 10.5, before Rev. 1. The Delegation of the USA had suggested moving it to Article 7. The facilitators considered Alt 2 as the most logical location for the provision; however, it had not been subject to discussion and so it was not owned by any particular Member State. Paragraphs 3 and 4 read as follows: “3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2). 4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.” In Alt 3, brackets had been placed around “complying with” and “implementing” as requested by the Delegation of the USA. Alt 4 from Rev. 1, which was a facilitators’ provision, based on prior Alt 3, had been deleted and replaced with prior Alt 3 as requested by the Delegation of the EU, on behalf of the EU and its Member States. There were no changes in Articles 8 and 9. Article 10 contained four alternatives. Alt 1 was former paragraph 10.1 from Rev. 1 and was unchanged. Prior paragraph 10.2 had been moved to Alt 2, which was a provision proposed by the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus, supported by the Delegation of Bolivia (Plurinational State of). The facilitators had combined that provision with an intervention made by the Delegation of El Salvador, so there were brackets around certain phrases. Alt 2 read: “10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm. 10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.” Alt 3 was a new provision introduced by the Delegation of the USA. It read: “Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.” Alt 4 was a new provision introduced by the Delegation of the EU, on behalf of the EU and its Member States. It read: “Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.” There were no changes to Article 11. Article 12 had been modified as requested by the Delegation of El Salvador to include three new paragraphs. Paragraph 12.2 contained the language from Article 16 on non-derogation. Article 12 read: “12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.] [12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. 12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]”

218. The Chair recalled that, as per the agreed methodology and work program, the plenary would be invited to identify obvious errors or omissions in Rev. 2 for correction by the facilitators. Any other comments on Rev. 2, such as new proposals, drafting improvements, and other substantive comments would be recorded in the full report of the session. At the end of the discussion, the text, as corrected, if necessary, for obvious errors and omissions, would be noted and considered under Agenda Item 8, as document WIPO/GRTKF/IC/34/8. The text would also be transmitted to the GA as part of the IGC’s factual report to the GA, together with the GR and TK texts. The text was not adopted at that stage but simply noted and transmitted. He opened the floor for comments on Rev. 2.

219. [Note from the Secretariat: all speakers thanked the facilitators for their work.] The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, thanked all Member States for their valuable contribution. It respected every Member State's position. Rev. 2 really reflected all the different positions of Member States that had been put forward in plenary and informals. Rev. 2 was a good basis for further discussion, and the IGC should transmit it along with the other documents on GRs and TK to the GA.

220. The Delegation of El Salvador wished to correct the text proposal in Article 12. What had been proposed to add only two paragraphs to Article 12, so it wished to have paragraph 12.1 continue as it was, and in paragraph 12.2, it wanted to take Article 16, add a comma and add "such as the rights of indigenous peoples enshrined in the Declaration on the Rights of Indigenous Peoples". That would avoid repeating the two paragraphs. The only difference in the two paragraphs was that paragraph 12.2 stated that "nothing in this instrument may" and the other paragraph stated "nothing in this instrument would/shall". So to simplify the text on Article 12, "may/shall" could be included. Paragraph 12.2 should read: "12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples." It was simply combining paragraphs 12.2 and 12.3, and maintaining paragraph 12.4 as 12.3.

221. The Delegation of Colombia, speaking on behalf of GRULAC, said that, given the clarifications by the Delegation of El Salvador and without any prejudice to any member of the Group that would like to make statements, Rev. 2 reflected the discussions and was a very good basis for continuing the work. The IGC would take note of and transmit it for the continuation of work on that topic together with the other revised documents in the other thematic areas within the IGC.

222. The Delegation of Senegal, speaking on behalf of the African Group, said that Rev. 2 reflected all the points of view expressed during the discussions. It should be transmitted to the GA with the other documents on GRs and TK for further discussions in other meetings, including the GA.

223. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the insertion of "unauthorized use" in Article 1.1(a) of Alt 1 and the insertion of "or assertion" in Article 1.2 of Alt 1 should be put into brackets as it could not agree to that broadened rights-based approach. It had asked for that modification in Rev. 1. On Article 3, it asked to introduce "/safeguarding" at the end of the title. Throughout the document, the alternatives "protection/safeguarding" should be both kept together in the text, given the lack of agreement on the substantial issue of rights-based or measures-based approach. On Article 7, it thanked the facilitators for introducing Alt 4, former Alt 3, at its own request. It found merit in further discussing that alternative. Different Member States had introduced parts of that alternative, some of which were not agreeable. Among its Member States, it would further analyze its view on exceptions and limitations, and in particular on specific parts of Alt 4. On Article 10, it thanked the facilitators for the insertion of Alt 4 and looked forward to discussing that proposal. It found new Articles 12.2 to 12.4 unacceptable on legal grounds and considered it premature to discuss that article, given the lack of agreement on the form of the instrument. It supported the text "Alternatives to Article 8, 9, 10, 11, and 13. No such Provisions."

224. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked Member States for their valuable contributions to a clearer text that could be used as a basis for further discussion regarding the protection of TCEs. In Rev. 2, on Article 1, it preferred Alt 1 and approved the addition that made Alt 1 clearer. On Article 3, it preferred Alt 1 in conjunction with the definition of TCEs as the alternative text in Article 2. On Article 4, it preferred Alt 3. On Article 5, it preferred Alt 2. In Article 6, it was happy with the inclusion of the language proposed by the Delegation of Brazil, supported by the Delegation of Senegal, on behalf of the African Group,

which was Alt 1. On Article 7, it preferred Alt 1, as it was the language proposed by the Delegation, on behalf of the LMCs. On Article 10, it preferred Alt 1. On Article 12, it would need to consider the addition of paragraphs 12.2 to 12.4, but it agreed with paragraph 12.1. On the alternatives to Articles 8, 9, 10, 11 and 13, it respected each and every Member State's position, but it reminded every member of the IGC that the discussions were without prejudging the outcome of the instrument. The fact that all provisions within the text were in brackets was already a message that it was not agreed yet, but by having positions of "no such provisions" on particular articles was actually prejudging the outcome of the discussion, and that was not a good spirit to have in mind. It asked the indulgence of Member States to narrow existing gaps. There was still no agreement on the measures-based or rights-based approach, there was still no agreement on the outcomes of the document, but one should not prejudge the outcome of the document by having positions that prejudged the outcome of the document. Rev. 2 was a good basis for further discussion on the protection of TCEs.

225. The Delegation of the Islamic Republic of Iran aligned itself with the interventions made by the Delegation of Indonesia, on behalf of Asia-Pacific Group and on behalf of the LMCs. It thanked all Member States for their inputs. It was deeply concerned regarding the position of some Member States contradicting the IGC's mandate and the primary principles of international negotiations. It expected to see a more constructive approach from those Member States in future. With regard to Article 1, it supported Alt 1. On Article 3, it preferred Alt 1 in conjunction with the definition proposed by the Delegation of Indonesia, on behalf of the LMCs, and it was not in favor of the inclusion of any criteria for eligibility. For Article 4, it favored Alt 3, which could answer the main concern of Member States. For Article 5, it supported Alt 2. For Article 6, it preferred Alt 1. It supported Alt 1 of Article 7, as drafted by the Delegation of Indonesia, on behalf of the LMCs. It favored Alt 1 of Article 10.

226. The Delegation of Colombia requested to modify Alt 4 of Article 1 as follows: "The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous peoples and local communities."

227. The representative of Tebtebba Foundation, speaking on behalf of the Indigenous Caucus, supported the intervention of the Delegation of Colombia. She thanked the Member States for their openness and for taking the proposals of the Indigenous Caucus into consideration. She was pleased to note that her textual proposals, which were supported by Member States, had been included in the text. She invited further reflection on those proposals, including on the concept of "repatriation" reflected in the second sentence of Article 10.2, which she hoped could be un-bracketed at the next meeting. She agreed with the inclusion of the text on non-derogation in Article 12 and noted that the elaborated text provided the appropriate level of legal certainty on the relationship of the instrument with other international agreements. She commented on the brackets around the word "peoples". Earlier that week, the Indigenous Caucus had held a side-event to celebrate the 10th anniversary of the adoption of UNDRIP. In the ten years since then, there had been wide acceptance of the use of "indigenous peoples" in various international treaties and documents, including within the UN system. She did not understand why "peoples" remained within brackets, in light of the acknowledgment by the IGC that the international instruments developed by WIPO had to be in harmony and should not run counter to other existing international agreements. That being said, the text was clear, balanced and had benefited from the hard work of the IGC. She wanted it forwarded to the GA for consideration.

228. The representative of INBRAPI supported the positions of the representative of Tebtebba Foundation, on behalf of the Indigenous Caucus. She thanked the Delegations of Colombia and El Salvador for their support. She also highlighted the importance of removing the brackets around "indigenous peoples". In various articles the expression "protected" should be removed for clarity. In Article 10, she was very pleased that Alt 2, as supported by the Delegations of

Bolivia (Plurinational State of), Ecuador, and El Salvador, was reflected in the text because it showed their key interests and the importance for their peoples. In Article 12, she agreed with the reference to UNDRIP, which was in all three texts within the IGC. She thanked the States for having taken that into account, and hoped to be able to progress. She was flexible and hoped her opinion would continue to be taken into account in the discussions.

229. The Delegation of Georgia, speaking on behalf of CEBS, saw improvement in the text of Rev. 2. It associated itself with the intervention made by the Delegation of the EU, on behalf of the EU and its Member States, on Article 3, in introducing the word “safeguarding”. Under Article 10, it thanked the facilitators for introducing Alt 4, and on Article 12, it shared the position of the Delegation of the EU, on behalf of the EU and its Member States, on the relationship with other international instruments in relation to paragraph 12.4.

230. The Delegation of Bolivia (Plurinational State of) said that Rev. 2 reflected its interests. On Article 3, it was happy to see the title “Subject Matter of the Instrument/Protection”. The IGC needed to focus on setting standards. It requested bracketing “eligibility criteria”, as mentioned by the Delegation of the Islamic Republic of Iran. In Article 4, it wished to delete “protected” before TCEs, as that would give an improper view for the authorities. It could create a lot of problems. It asked to remove the brackets around the term “peoples”, in keeping with the CBD, which referred to IPLCs and which should be taken into account when negotiating the text.

231. The Delegation of the USA said that the best way to make progress on the IGC’s work was to have a text that reflected the full range of views and positions of all delegations. It had intervened along the way to bring about the accomplishment of that goal. It welcomed Rev. 2 as a text that might be likened to a garden where the positions of many delegations, as diverse as they were, were beginning to come into bloom. With respect to Article 4, Alt 4, its intervention of inserting the words “as well as” between the opening part of that alternative (which focused on instruments for indigenous peoples) and the remaining part of that section might have introduced some confusion. Its goal in requesting the insertion of “as well as” was to make a distinction between instruments that embodied the concept of indigenous peoples that were well-established and well-known, and local communities and other beneficiaries, which might be defined in national law and that were considered less well-known. It was a very narrow intervention and in no way was it reflecting its position with respect to any element of Alt 4. It reserved its position to further clarify issues related to local communities and other beneficiaries.

232. The Delegation of Egypt said that Rev. 2 could be added to the unified instrument on the three subjects and could be the subject of a diplomatic conference in the near future. In its form, it was much better than some of the effective conventions, such as the Marrakech Treaty. However, it did not know what it would be reaching, but it was basing itself on the current text. The expression “safeguarding” was not contentious in itself from a legal point of view, but it was being used in an erroneous position. It reiterated that international instruments protected rights and not interests. It supported Alt 1 of Article 1, Alt 1 of Article 3, Alt 1 of Article 4, Alt 2 of Article 5, Alt 1 of Article 6 and Alt 1 of Article 7. Article 10 could have been simplified into a consensus article by using the TRIPS language on the enforcement of rights. Those changes were still possible.

233. The Delegation of Brazil aligned itself with the statements made by the Delegation of Colombia, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. On Article 1, it preferred Alt 1. On Article 3, its position about the importance of having “protection” in the title was well known, and it supported Alt 1. The definition of TCEs would have been dealt with in Article 2. In Article 4, it preferred “Beneficiaries of Protection” and liked Alt 3, but was ready to engage in further discussions on Alt 4 as well, even though it was still not perfect. On Article 5, it supported Alt 2. On Article 6, it supported Alt 1, as it was language it had contributed to. On Article 7, it supported Alt 1. On Article 10, it supported Alt 1, which was

comprehensive. In Article 12, it was satisfied with the language in paragraphs 12.2, 12.3 and 12.4. It was very appropriate and did not create new burdens on members, which were already committed to the fulfillment of UNDRIP and other instruments. Removing Articles 8, 9, 10, 11, and 13 at that point, even suggesting their removal, would go against the spirit of the IGC's work in good faith and without prejudging outcomes. It did not support that.

234. [Note from the Secretariat: the following statement was submitted to the Secretariat in writing only.] The Delegation of the Russian Federation favored Alt 2 in Article 1, as it contained a clearer wording. Regarding Article 3, it was in favor of Alt 3. Furthermore, should it be possible to move the definition of TCEs contained in that alternative to Article 2, it would also be ready to consider Alt 1. Regarding Article 5, it could support Alt 3. Alt 3 divided TCEs into "secret", "closely held", and "widely known" knowledge. However, provisions concerning "secret" knowledge needed to be clarified. It wondered what kind of access and which users were possible in the case of secret TCEs, except for their owners. It was more reasonable to single out secret TCEs in a separate subparagraph. Regarding Article 6, it favored Alt 1. In Article 7 all alternatives required further discussion. In the current version it favored Alt 1 and Alt 4. Regarding Article 10, it was in favor of Alt 4. Article 12 required further discussion.

235. The Chair closed Agenda Item 7.

*Decisions on Agenda Item 7:*

236. *The Committee developed, on the basis of document WIPO/GRTKF/IC/34/6, a further text, "The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2". The Committee decided that this text, as at the close of this agenda item on June 15, 2017, be considered by the Committee under Agenda Item 8 (Taking Stock of Progress and Making a Recommendation to the General Assembly), in accordance with the Committee's mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19.*

237. *The Committee also took note of documents WIPO/GRTKF/IC/34/7, WIPO/GRTKF/IC/34/12, WIPO/GRTKF/IC/34/INF/7 and WIPO/GRTKF/IC/34/INF/8.*

**AGENDA ITEM 8: TAKING STOCK OF PROGRESS AND MAKING A RECOMMENDATION TO THE GENERAL ASSEMBLY**

238. The Chair said that, in accordance with the mandate, IGC 34 would address TCEs and take stock of progress made by the IGC and make a recommendation to the 2017 GA. In achieving the objectives under Agenda Item 8, he intended to balance appropriate flexibility with an adequate focus, while trying to maintain transparency within the process. Pursuant to the work program, delegations would be invited to express their views on the state of the respective texts with an emphasis on the progress they considered to have been made. Then, based on the expressed views, the session could agree on a recommendation to the GA, which would be

called upon, according to the mandate, to take stock of progress and decide on whether to convene a diplomatic conference or continue negotiations. It would also consider the need for additional meetings, taking account of the budgetary process. The IGC might also consider the conversion of the IGC into a Standing Committee, and if so agreed, make a recommendation to the 2017 GA. He had consulted with Regional Coordinators and interested delegations on the methodology and work program for the session, especially for Agenda Item 8. He had circulated the agreed methodology and program and all delegations had seen them. Firstly, regional groups, the Delegation of the EU, the Delegation of Indonesia, on behalf of the LMCs, and the representative of the Indigenous Caucus would be invited to provide initial comments of up to three minutes on the stocktaking exercise and their views on a recommendation to the GA, noting that some of the opening statements had also covered that item. Any other statements should be handed to the Secretariat in writing to be included in the report. After those initial comments, he would suspend Agenda Item 8 and, throughout the week, would convene informal consultations coordinated by one or both Vice-Chairs. The informal consultations would attempt to develop a draft recommendation to be presented in plenary for consideration. Ms. Marcela Paiva from Chile would help capture work in progress, which would be made available from time to time in hard copy in English. When work resumed on Agenda Item 8, the Vice-Chairs would brief the plenary on the outcome of the informal consultations. It had been agreed that each regional group would be represented by a maximum of six delegates, one of who should be the regional coordinator, or a regional group could decide to nominate a lesser number of delegates, as that would be welcome to keep the informals as small as possible. Regional groups could change the composition of their teams as they deemed fit, depending on the issues being discussed; however, groups would be limited to six delegates. Observers would not be permitted to sit in, and there would be no live audio feed of discussions. It was very important that observers had an opportunity to engage directly with the Member States involved in those informals. The Chair asked observers and Member States to engage with each other. A framework of time slots had been set up for the consultations, noting that by their very nature, informal consultations would have a degree of flexibility. That was a guide and it could change as the week progressed. It might also be used for bilateral activities, depending on progress. Agenda Item 8 would resume in plenary on Friday, with Agenda Item 7 having been closed on Thursday. He asked participants to be efficient and to not repeat or support interventions. The fact that one Member State had provided an intervention was sufficient for it to be on the record and for it to be considered. Delegations would be invited to take note of and discuss the progress made, considering documents WIPO/GRTKF/IC/34/4, WIPO/GRTKF/IC/34/5, and WIPO/GRTKF/IC/34/8. The contents of those documents would not be reopened, but would serve as a basis for the stocktaking exercise, and would be transmitted "as is" to the 2017 GA. Delegations would also be invited to present the outcome, if any, of informal consultations on a recommendation to the GA. The plenary remained a decision-making body, and its discussions would be reported on as usual. The aim of the work under Agenda Item 8 would be to take stock of progress made and to reach agreement on a recommendation by the IGC to transmit to the GA. In any event, the IGC would transmit the three texts to the GA accompanied by a factual report on the work of the IGC in 2017. The Chair had prepared an Information Note on Agenda Item 8, as an attempt to frame the discussions on future work and the IGC's recommendation to the GA. It was produced without prejudice to any Member State position and provided context and a framework for those critical discussions. He had attempted to be factual, to present all Member States' positions in a balanced way and to frame the key questions and possible options on future work and recommendations to the GA, without prejudicing any decisions in that area. In considering those options, he had reviewed the status of the negotiations, including lessons from the current mandate. Those views were his alone, noting all participants had different perspectives on the negotiations, reflecting individual Member States' perspective, policy interests, domestic environments, including legislative environments under which the different subject matter operated, and individual expectations. He did not intend to discuss that note in detail and it was provided to assist in the preparations. He opened the floor for statements on the stocktaking exercise and recommendation to the GA.

239. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, said that, in accordance with the mandate, the IGC would need to submit to the 2017 GA the results of its work on an international legal instrument(s) relating to IP, which would ensure the balance and effective protection of GRs, TK and TCEs. It supported the methodology and program on Agenda Item 8. Progress had been made within the IGC with various degrees of success. It had seen a shift towards more IP-focused objectives in the three subject matters. The framework documents had a set of standards or mechanisms that provided flexibility for implementation at the domestic level. It hoped that IGC 34 would be able to come up with recommendations to the GA to guide the future work based on the progress made under the current mandate. Some members had different position; however, most of the members of the Group reiterated the need for a legally binding instrument(s) providing effective protection of GRs, TK and TCEs. No Member State could ignore the progress made. It confirmed its full support and cooperation in the discussions under Agenda Item 8. It was committed to engaging constructively in negotiating a mutually acceptable outcome.

240. The Delegation of Georgia, speaking on behalf of CEBS, said the Information Note provided a clear picture on the developments within the IGC and it supported the methodology. It acknowledged the IGC's mandate, which stated that IGC 34 was to be "taking stock of progress and making a recommendation to the General Assembly". Hence, it reemphasized the importance of GRs, TK and TCEs and believed it was crucial to have a meaningful discussion on the overall objectives of the instruments. In the framework of WIPO, Member States had to find a common understanding of the main objectives and of what was realistically achievable. A number of sessions had been dedicated to discussions on GRs, TK and TCEs and taking into consideration the divergence of views, the work required further advancement. The IGC should recommend a reasonable and feasible work program to the GA. Finally, it reaffirmed its commitment to being actively engaged in discussions to be carried out in a pragmatic and efficient manner, thus ensuring the successful accomplishment of a mutually acceptable outcome.

241. The Delegation of Colombia, speaking on behalf of GRULAC, acknowledged the Chair's efforts to make the sessions as productive as possible, which included an evaluation of the progress made during the past two years. It agreed on the need to start the process of informal consultations to allow reaching an agreement on a recommendation by the end of the week. The process should be open and inclusive. It recalled the current mandate. It was of utmost importance that the text-based negotiations have continuity under a renewed mandate. That renewal had to include an action and work plan with indicative dates and detailed activities that would allow streamlining and focusing the work of the current negotiations and that would indicate that the GA would consider the text(s) to be presented with the aim of deciding whether or not to convene a diplomatic conference. It reiterated its interest in participating in a proactive way in the process of consultations.

242. The Delegation of Senegal, speaking on behalf of the African Group, said that the main thesis of its statement could be found in its opening statement. The IGC had achieved a great deal thanks to the combined effort of the Secretariat, the Bureau, Member States and experts from various fields. Over time and through the use of very wise mechanisms, with imagination and innovation, the IGC had narrowed gaps. In general, there two approaches: rights-based and measures-based approaches. Those approaches were not mutually exclusive and could be subject to negotiation for mutually advantageous results. The three draft instruments had been improved and consolidated with clear options that reflected the various positions. To that day, the technical work had been done in great detail, but the IGC needed to complete that process through strong political will. A diplomatic conference was highly pertinent to meet the challenges for negotiation and to resolve the pending technical issues. It called for it to be convened as soon as possible. It also recommended that the IGC be turned into a Standing Committee, and it promised to work constructively to ensure positive outcomes.

243. The Delegation of China recalled its opening statement and said that Agenda Item 8 was important. It would actively take part in the discussions and would make the necessary efforts to achieve a feasible work program, taking into consideration all parties' interests and concerns and based on the current work to promote the protection of GRs, TK and TCEs in a concrete and practical manner.

244. The Delegation of Japan, speaking on behalf of Group B, said that the IGC should focus its effort on reaching a common view on the substance. It recognized that some progress had been made in the last 18 months, but the text required more work. It was hopeful that Member States would develop a common understanding on core issues using an evidence-based approach so that meaningful advancement could be achieved. That included studies and examples of national experiences, domestic legislation and examples of subject matter and subject matter not intended to be protected. The IGC should focus its effort on recommending a reasonable way forward to the GA, taking account of the budgetary process. It was ready to engage in informal consultations. It remained committed to contributing constructively in order to achieve a mutually acceptable result.

245. The Delegation of the EU, speaking on behalf of the EU and its Member States, said that the topics of GRs, TK and TCEs had been discussed for many years and a substantial number of sessions had been dedicated to those discussions. Discussions during the mandate had shown how difficult it remained to find common grounds on many of those topics. The lengthy discussions and small return on investment in time and resources needed to be taken into account when considering the future of the IGC. While all three topics required equal attention and needed to be treated in an equal manner, it recalled its constructive proposal that addressed satisfactorily the question of the discussion of GRs. Any future discussions should focus on what was achievable rather than reproduce the discussions of the past.

246. The Delegation of Indonesia, speaking on behalf of the LMCs, said the IGC would have completed its work program under the current mandate. It supported the methodology and program on Agenda Item 8. It hoped that the session would be able to come up with a recommendation to the GA that would guide the future work of the IGC based on the progress made under the current mandate. It took note of the progress made during the current mandate, as reflected in the three working documents, which reflected a focus on the IP system, flexibilities, constructive spirit and practicability, as had also been shown by the LMCs. It reemphasized the urge and need to prevent the misappropriation of GRs and TK associated with GRs. It could prevent and take all the transnational problems through a full compliance mechanism. Taking note of the progress made at IGCs 29 and 30 on the protection of GRs, it provided clear options for Member States to consider. The text on GRs included a mandatory disclosure requirement clause that could be brought forward for a positive decision. It was high time for all stakeholders to finalize the consolidated text of GRs. Most of the technical work was done. Member States needed to show political will to go forward. It drew attention to the progress made regarding TK and TCEs at IGCs 31, 32 and 33, and hopefully IGC 34. In relation to the scope of protection relating to TK and TCEs, gaps had been narrowed, aided by the introduction of a more practical tiered approach. There had been a shift toward framework documents, which acted as a set of standards or mechanisms that provided flexibility for implementation at the domestic level. It hoped that the IGC would also be able to define a clear timeline for key decisions to ensure that the negotiations on TK and TCEs would bring about outcomes. Based on all the progress made in the current mandate, the IGC should be able to deliver a recommendation to the GA that outlined key deliverables and/or outcomes for future work. Taking into account the different nature of the three equally important subject matters, as well as the different perspectives on the level of maturity in the three working documents, discussions on future work should consider the question between parallel and incremental approaches while also safeguarding the work on all three subject matters. The normative level of the instruments could not be stalled without plausible and strong reasons. The progress



made could not be ignored, and the process started in 2000 and the progress made through the negotiations could not be undone. Noting the importance of the implementation for all, the IGC should move forward together, taking the next step with a view to adopting a legally binding instrument(s) providing protection of GRs, TK and TCEs and perhaps convening a diplomatic conference.

247. The representative of INBRAPI, speaking on behalf of the Indigenous Caucus, reiterated her commitment to the work of the IGC. Indigenous peoples had been flexible, and the IGC had discussed different themes for seven years. The mandate required having concrete results as well as a detailed workplan to finish the work ahead with legally binding instrument(s) providing balanced and effective protection for GRs, TK and TCEs. She supported presenting to the GA a specific agenda with dates set out for the IGC's work and specifically for the convening of a diplomatic conference in 2018/2019 biennium. She had concrete proposals in order to increase the participation of indigenous peoples in the future. She recommended the participation of indigenous peoples in the informal consultations. She appealed to Member States to include representatives from IPLCs in their delegations and to work in good faith in a spirit of trying to move forward and find consensus as well as to find solutions to those issues and problems where solutions had to be found for each community for their own TCEs, TK and GRs that they had created and improved upon. There were vital questions under negotiation and that should be reflected in the future work in all of the texts in a coherent and harmonious way.

248. [Note from the Secretariat: the following statements were submitted to the Secretariat in writing only.] The Delegation of Japan said that sixteen years had passed since the IGC had started its discussions, and it had been actively and constructively engaged in the discussions. It appreciated the significant developments that the IGC had achieved thus far. But, at the same time, one had to recognize the complexity and difficulties with the issues being discussed. Some Member States believed that the current texts were detailed enough to hold a diplomatic conference. However, the depth of understanding among Member States on the fundamental issues was still insufficient for any kind of agreement to be reached at the international level. That was an objective observation of the situation and one should not underestimate the difficulty of the discussion. A pragmatic and cautious approach was essential in order to reach a common goal. The IGC should not set artificial and procedural targets, such as setting the date for a diplomatic conference, before it achieved common objectives that all Member States could share. In addition, all of the three issues, namely, GRs, TK and TCEs, should proceed on equal footing and at equal speed. The IGC needed to take into account their equal importance and their interconnectedness. It stressed the importance of taking the evidence-based approach, which included each Member State sharing its national experiences and domestic legislation in order to overcome divergent views and help the discussions move forward toward a satisfactory conclusion for all. Its goal was to ensure the effective protection of GRs, TK and TCEs. With that in mind, it should find a step-by-step solution based on advancing in a constructive and mutually satisfactory manner, instead of just rushing to reach a goal. Its commitment to the discussions in a faithful and constructive manner would enable reaching tangible and meaningful outcomes that all Member States could be satisfied with.

249. The Delegation of Brazil associated itself with the statements made by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Colombia, on behalf of GRULAC. Its position was unequivocal: it could not conceive of WIPO without the IGC. For the quality, quantity and importance of the work achieved so far, and also for involving groups that had been until recently largely alienated from IP discussions, the IGC had a strategic role for WIPO. It congratulated the Secretariat, as well as those who had contributed to those achievements. On the importance of the issues under the responsibility of the IGC, Director General, Mr. Francis Gurry, had said in his acceptance speech, back in 2008: "...The same phenomena of a globalizing economy and the advances in communication technologies have exposed special vulnerabilities of indigenous peoples and traditional communities to the unfair loss and appropriation of the products of their traditional knowledge systems. In the course of

addressing those vulnerabilities, it has become apparent that there is a need to recognize explicitly the contribution to human society of collectively generated and maintained innovation and creativity and to protect the artifacts of that innovation and creativity. The Organization has undertaken a long process of discussion and negotiation on the means of meeting this need. I believe that it is time to move this process to concrete outcomes that would see WIPO embrace a broader base of constituents and a more universal mission.” ([http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_gurry\\_acceptance\\_speech\\_2008.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_gurry_acceptance_speech_2008.html)). Indeed, it sounded even more valid now than nine years ago. The IGC should be granted an adequate timeframe to pursue negotiations in a realistic and serene way on the three legally binding instruments in the mandate. In particular, it reiterated the statement made by the Delegation of Colombia, on behalf of GRULAC, about the importance of a detailed workplan. It was convinced that reaching an agreement on one or more of the three subject matters in the mandate would be the appropriate opportunity to turn the IGC into a Standing Committee, a goal it fully supported. A delegate had said: “Much of the substantive work being done at WIPO right now is taking place at the IGC.” It agreed and suspected many others did as well.

250. The representative of OAPI welcomed the collaboration and successful partnership with WIPO, concerning both the issues on the agenda of the IGC and various IP matters. Since 2007, OAPI, in collaboration with its sister organization, ARIPO, had prepared draft legal instruments on the protection of GRs, TK and TCEs. At that time, the drafts already reflected the position of the OAPI’s Member States. Since then, OAPI had followed the work of the IGC with interest and in accordance with its statute, and had monitored its development. Ten years later, in view of developments in the work of the IGC, the drafts were still consistent with the aspirations of the Member States of OAPI. Their input in different regional forums led OAPI to fulfill its standard obligations for the protection of GRs, TK and TCEs. Thus, after a thorough reading of the drafts, she said they had decided to refer them to a committee of experts for their adoption by a diplomatic conference. However, the IGC should continue its work, which OAPI would follow with interest, and she was delighted to see that that view was shared and accepted by the participants in the IGC session.

251. The Delegation of Australia welcomed the opportunity to take stock of the progress made throughout the biennium and to make a recommendation to the 2017 GA on the mandate and future work of the IGC. GRs, TK and TCEs were of central importance to indigenous peoples, including Australia’s Aboriginal and Torres Strait Islanders, therefore the important work of the IGC should continue. It supported continued discussions on all three subjects, bearing in mind the progress made on the GRs text throughout the biennium, and the commonalities between TK and TCEs. The future work program would benefit from an intensified focus on resolving outstanding issues on an internationally consistent disclosure regime on GRs and TK associated with GRs, and flexibility to allow for an advanced decision on whether to convene a diplomatic conference or to continue negotiations on that issue. It would contribute constructively at the meeting and called on all delegations to continue to work together throughout the discussion. It acknowledged indigenous peoples as the traditional owners and custodians of their resources, knowledge and expressions. It had recently renewed its funding to the WIPO Voluntary Fund to ensure the integral perspectives of indigenous peoples would continue to be included in the future discussions in the IGC. It also urged other Member States to contribute to the Fund.

252. The Chair noted the plea for Member States to consider the greater involvement of indigenous people, an issue partly at the domestic level, and he encouraged them to do so. There appeared to be consensus that the work of the IGC should continue in whatever form. The informals were about trying to get into the detail of what that looked like, reflecting that different expectations had been flagged.

253. [Note from the Secretariat: this part of the session took place after informals.] The Chair said that agreement had been reached in the informals on a recommendation to the GA, which

focused on the key agreement among the IGC that it had made progress, reaffirmed the importance of the work, and recommended to the GA to continue the work in the new biennium. He invited the Vice-Chair, Mr. Jukka Liedes, who had chaired the informals, to give a more detailed briefing.

254. Mr. Liedes said that, on the basis of the discussions and helpful proposals from the Delegation of El Salvador and the Delegation of Senegal, on behalf of the African Group, they had been able in the informals to arrive at a decision on a recommendation to the GA. In so far as the details of a new mandate were concerned, the matter was left to the GA. In any case, delegations would not go empty-handed as far as the mandate was concerned. Many negotiation points, if not all, had been well identified and there were some consensus points on the most important things, for example on the suggested number of sessions for the IGC to continue its work: six sessions in two years. All the issues identified could be solved in good faith negotiations at the GA. He thanked all participants for their willingness to participate, engagement, wisdom and contributions to the informal consultations. The Secretariat had acted in a very professional way, assisting in all the steps of the consultations. He paid special tribute to Ms. Paiva as the facilitator.

255. The Chair recognized the significant efforts of Mr. Liedes, and Ms. Paiva in fulfilling a demanding task. The outcome demonstrated a strong commitment from the IGC to continue its work. The Chair closed Agenda Item 8.

*Decisions on Agenda Item 8:*

*256. The Committee noted that throughout the 2016-2017 biennium, a draft text was prepared on each subject matter, narrowing the gaps on core issues. Noting the progress made, the Committee considered that more work needs to be done.*

*257. Bearing in mind the Development Agenda recommendations and affirming the importance of the Committee, the Committee recommended that the WIPO General Assembly decide that the Committee should continue its work during the 2018-2019 biennium and that the Assembly decide on a mandate and a work program.*

*258. The Committee submitted herewith to the WIPO General Assembly the results of its work on genetic resources, traditional knowledge and traditional cultural expressions:*

- Consolidated Document  
Relating to Intellectual Property  
and Genetic Resources  
(document  
WIPO/GRTKF/IC/34/4);*

- *The Protection of Traditional Knowledge: Draft Articles* (document WIPO/GRTKF/IC/34/5);
- *The Protection of Traditional Cultural Expressions: Draft Articles* (document WIPO/GRTKF/IC/34/8).

259. *The Committee decided that this decision is without prejudice to the elements of the mandate to be approved by the General Assembly.*

### **AGENDA ITEM 9: CONTRIBUTION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS**

260. Further to the 2010 WIPO GA decision “to instruct the relevant WIPO Bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations”, the Chair invited delegations and observers to discuss the contribution of the IGC to the implementation of the Development Agenda (DA) Recommendations.

261. The Delegation of Senegal, speaking on behalf of the African Group, reiterated the importance of the implementation of the DA recommendations. The IGC had an extremely important role to play, specifically with regard to Cluster A on capacity building and technical assistance. Recommendation 18 urged the IGC to accelerate the process on the protection of GRs, TK and TCEs, without prejudice to any outcome, including the possible development of an international instrument or instruments. The IGC should intensify its efforts in order to fulfill that task. The three texts should be accelerated in order to have better readability of the contribution of the IGC to the implementation of the DA.

262. The Delegation of Indonesia, speaking on behalf of the LMCs, acknowledged the various activities undertaken by the Traditional Knowledge Division and WIPO in general to provide regulatory advice and other development-oriented assistance to developing and least developed countries. It urged WIPO to continue to contribute in that area. Recommendation 18, adopted in 2007, urged the IGC to accelerate the process on the protection of GRs, TK and TCEs, without prejudice to the outcome, including the possible development of an international instrument or instruments. One of the most important contributions of the IGC was the implementation of the DA recommendation for the conclusion of the three subjects under the negotiations with an outcome of an international legally binding instrument(s) that would enhance the transparency and the efficacy and would protect tradition-based knowledge in the modern IP framework.

263. The Delegation of the Islamic Republic of Iran recalled the importance of an efficient and practical coordination mechanism to realize the contribution of all WIPO Committees towards the full and effective implementation of the DA recommendations. Regrettably, despite the decision of the 2010 WIPO GA, the proper functioning of the system had turned out to be a challenge in the implementation of the DA recommendations, which should be addressed by Member States at the GA and the Committee on Development and Intellectual Property. The

fact that Recommendation 18 specifically referred to the IGC and called for the acceleration of its process was a clear demonstration of the importance of the IGC's negotiations and its outcomes for development objectives. The IGC process was an obvious example of development-oriented IP norm-setting in WIPO. Success would send a message to developing countries that WIPO was a UN specialized agency promoting IP rights, taking into account development concerns. By contrast, the failure of the process would not only undermine all ongoing norm-setting in the IP system, but also send a wrong message that WIPO Member States were not determined to address the IP system in its entirety so as to enable developing countries to enjoy the necessary protection. It was a long pending aspiration of the right holders and beneficiaries in many countries to see that their TK, TCEs and GRs be protected against misappropriation and misuse. Doing so would move the IP system in a more balanced direction, i.e. increasing the interest of developing countries in the IP system, empowering an enabling environment for development and enhancing the contribution of developing countries to global knowledge and global cultural partnerships. To realize all of those objectives, the establishment of international legally binding instruments to protect TK, TCEs and GRs was essential. The IGC should devise a mechanism which would ultimately bring comfort to TK, TCEs and GRs to promote creativity and innovation. Acknowledging the progress undertaken in the IGC, the IGC could not continue open-ended negotiations. Accordingly, at the end of the current mandate, it was time for the IGC to make a final decision and complete the work that had been ongoing for 16 years. The Delegation highlighted the importance of the Secretariat's technical assistance to countries in order to enable them to formulate national protection systems for TK, TCEs and GRs, as well as to explore methods for the commercialization of these subject matters for the benefit of their owners.

264. The Delegation of Japan did not mean to debate, but it understood that the debate on the coordination mechanisms had been concluded.

265. The Delegation of Nigeria supported the statements made by the Delegation of the Islamic Republic of Iran, the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Senegal, on behalf of the African Group. It joined all the delegations that had requested the IGC to accelerate its work towards adopting functional minimum standard instruments that would ensure the effective protection of GRs, TK and TCEs. That would be a bona fide way for the IGC and for Member States, especially developing countries, to feel ownership of the IGC's significant steps to protect all forms of knowledge and to equate them with the value, relevance and integrity that they should enjoy.

266. The Delegation of Brazil associated itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. The DA was a major landmark in the history of WIPO. It had been adopted after three years of intense negotiations that aimed at putting broader societal interests at the core of WIPO's activities. That was a matter of legitimacy and the IGC had a major role in ensuring that important mission would be achieved. Recommendation 18 stated that Member States should accelerate the process on the protection of GRs, TK and TCEs. In spite of the clear command given by the GA, it was a sign of magnitude of the task that after 10 years, the IGC was still a long way from agreeing on binding instruments on GRs, TK and TCEs. The Delegation urged all delegations to show constructive spirit and positively contribute to the discussions by presenting proposals consistent with the goal of narrowing existing gaps as the mandate stated. It pledged to show that same constructive spirit and listen in good faith to everyone's views to reach a mutually agreed and satisfactory solution.

267. The Delegation of Uganda joined the comments made by the Delegation of Senegal, on behalf of the African Group, the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of Nigeria, on supporting the need to set up a legally conducive environment for the protection of GRs, TCEs and TK. It appreciated the work of the African Bureau of WIPO in supporting the capacity-building initiatives in setting IP instruments in Africa. Many African countries were challenged in that area, and most of the GRs, TCEs and TK were

misappropriated because of a lack of an acceptable international agreement. It asked that the IGC accelerate its work for an instrument(s) and that the African Bureau of WIPO continue to support awareness-raising and capacity-building initiatives so that African countries could be able to set up their own instruments to operationalize international IP instruments. Uganda was already working towards developing a legal framework to address the issue of IP in the country, and it was committed to ensuring that the issues of indigenous peoples were taken into consideration in the areas of GRs, TK and TCEs.

268. The Delegation of Indonesia appreciated the contributions of the IGC and the Traditional Knowledge Division in the implementation of the DA, and aligned itself with its comments made on behalf of the LMCs and the comments made by the Delegation of Senegal, on behalf of the African Group, and the Delegations of Brazil, the Islamic Republic of Iran, Uganda and Nigeria. TK and TCEs reflected the diversified aspirations of all Member States, particularly developing and least developed countries. The IGC should be able to continue its work to realize those aspirations. It recalled DA Recommendation 18. The discussion on the coordination mechanism was concluded but the IGC had at least one, if not more, DA recommendations that were very relevant. The IGC should be able to contribute to the DA recommendations in the three subject matters under negotiation.

269. The Representative of Tupaj Amaru said that, since the establishment of the IGC in 2000, there was a lack of the political will of Member States. Over the course of time, indigenous peoples had not been recognized as peoples, as subjects under international law. He recalled the IGC's mandate. After all those years of debate, the IGC should revise and change its working methodology and procedures. The GA had invited the IGC to examine its procedures, its rules, in order to strengthen and acknowledge the substantive contributions of indigenous peoples to the negotiation process, in order to agree on a binding international instrument(s). And yet, the IGC had not strengthened the rules and procedures for the participation of indigenous peoples in the negotiation process.

270. The Representative of ADJMOR, speaking on behalf of the Indigenous Caucus, was aware of the problems and urged all parties to show flexibility during the negotiations in order to move forward toward a just and equitable international instrument(s). He hoped that WIPO would consider the issues with regard to GRs, TK and TCEs, and would make that issue a cross-cutting issue. GRs, TK and TCEs were important issues for indigenous peoples and should be considered within the context of local development. It was also part of the SDGs. He hoped that indigenous peoples would be able to continue to participate fully in the process.

*Decision on Agenda Item 9:*

*271. The Committee held a discussion on this item. The Committee decided that all statements made on this item would be recorded in the report of the Committee and that they would also be transmitted to the WIPO General Assembly taking place from October 2 to 11, 2017, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

**AGENDA ITEM 10: ANY OTHER BUSINESS**

272. The Delegation of Namibia drew attention to the decision taken at the Conference of the Parties of the CBD, serving as the meeting of the parties of the Nagoya Protocol, in December 2016 to take under consideration the issue of “Digital Sequence Information on Genetic Resources”. There was a call from the CBD for submission of views by parties and other stakeholders that would close in September 2017. Some IGC members might have views on how the work of the IGC, especially as it related to GRs, related to the issue of digital sequence of genetic information or a discussion about terminology. In the continuation of the work of the IGC, that issue would take on increasing importance. There had been a similar decision at the FAO Commission on Genetic Resources for Food and Agriculture. There was information gathering going on. Member States could submit any views on the IP implications of digital sequence information on GRs to the CBD Secretariat.

*Decision on Agenda Item 10:*

*273. There was one statement under this item, which was noted.*

#### **AGENDA ITEM 11: CLOSING OF THE SESSION**

274. The Delegation of Senegal, speaking on behalf of the African Group, thanked the Chair, the Secretariat as well as the Vice-Chairs and the facilitators for all of the untiring work carried out in order to assist in coming to those results. The IGC had made real progress and it was proud of it. It appreciated the flexibility of delegations during the session as well as the fruitful bilateral meetings. It noted the results of IGC 34, the Roundtable and the Seminar, which had richly contributed to the discussion. It was specifically grateful for the spirit of cooperation and the constructive spirit in the regional groups in order to assist in coming to mutually acceptable results on TK, GRs and TCEs. In the new global economy, the experience of IPLCs was of growing importance. It had to be ensured that there was no negative impact on the management of their rights over GRs, TK and TCEs. Wishing to move forward toward a diplomatic conference, it reiterated its commitment to continuing to work with the Chair and contributing in a spirit of cooperation.

275. The Delegation of Colombia, speaking on behalf of GRULAC, expressed its sincere thanks to the Chair, the Vice-Chairs and the facilitators for all of the work carried out. The contributions, as well as the work carried out collectively in the regional groups, had enabled moving those results forward to the GA. It was important to be able to send a political message on the renewal of the mandate, and it was very satisfied with the results, although there was a great deal of work still to be done at the GA. During the session the main goals had been accomplished thanks to the flexibility on the part of all groups. It hoped to continue working in that same spirit of cooperation. It thanked the Secretariat and all of those people helping out in the room, and the interpreters, and looked forward to the GA to continue the informal consultations and discussions on the renewal of the mandate with its different components.

276. The Delegation of Indonesia, speaking on behalf of the Asia-Pacific Group, thanked the Chair, the Vice-Chairs and the facilitators for all their hard work in guiding the IGC in the course of the week. It thanked all Regional Coordinators and all Member States for their flexibility and constructive spirit. It thanked the Secretariat and the Conference and Interpretation Services because without them the meeting would not have been as smooth. It was delighted to see that the IGC was able to come up with the recommendations to the GA and to agree to close Agenda Item 7 with the TCE Draft Articles. More work would be done in the GA. It would cooperate and would engage constructively for a mutual outcome. In its national capacity, it thanked all members of the Asia-Pacific Group for delivering constructive inputs and decisions during the session.

277. The Delegation of Georgia, speaking on behalf of CEBS, thanked the Chair, the Vice-Chairs, the Secretariat and the facilitators for their invested efforts in the work of the week and all Member States for their constructive deliberations and hard work to advance in the challenging exercise. It thanked the Secretariat for its valuable contribution in organizing the Seminar, which had provided an active exchange of views during the roundtables, thereby fueling evidence-based discussions. It thanked all delegations for their constructive deliberations during the negotiation of the TCE text and the facilitators for capturing the positions of all Member States in both revisions. However, it was crucial to have a meaningful discussion on the overall objectives of the instrument and to reach a common understanding on the core issues and a realistically achievable outcome. It recognized the constructive and flexible approach while negotiating Agenda Item 8. It agreed that some progress had been achieved and taking into consideration the divergence of views it had witnessed that work required further advancement. It assured of its further constructive engagement on the elements of the IGC mandate during the coming GA.

278. The Delegation of Japan, speaking on behalf of Group B, extended its appreciation to the Chair and the Vice-Chairs for their dedicated guidance and to the facilitators for their essential efforts. It also extended appreciation to the Secretariat for its contributions and to the interpreters for always being there throughout the week. It thanked all Regional Coordinators and Member States for their tireless efforts, especially during the informal consultations, which had been able to reach consensus on the draft decision under Agenda Item 8. It took note of the recommendation to the GA. It would continue to support an evidence-based approach and to consider a broad range of outcomes. It remained committed to contributing actively in order to achieve mutually acceptable results on the mandate and the work program at the GA.

279. The Delegation of China said that under the Chair's leadership the meeting had successfully concluded all items. It thanked the Chair for his efforts during the biennium. It thanked the Vice-Chairs, the Secretariat and the facilitators for their efforts. It was very pleased to see that a decision had been reached under Agenda Item 8, which recognized the progress made during the mandate, reaffirmed the importance of the IGC and submitted a recommendation to the GA to continue the IGC's work during the next biennium. It would continue to cooperate and discuss with all Member States in a flexible and constructive manner in order to advance the work.

280. The Delegation of the EU, speaking on behalf of the EU and its Member States, thanked the Chair, the Vice-Chairs and the facilitators for their contribution to the work, in particular on Agenda Items 7 and 8. The text-based work on Agenda Item 7 showed the difficulties involved in attempting to make progress without a clear understanding on fundamental principles. The methodology used to work on the text required clarification. On a number of occasions, its comments had not been taken up in the revised draft on the basis that it did not support the language. On other occasions, its suggestions had been taken onboard. The IGC methodology should be applied consistently throughout the text. As regards Agenda Item 8, it supported the decision on the recommendation to the GA in order to allow the stocktaking exercise to reflect the overall positive outcome of the current mandate. It saluted the valuable contribution of the Vice-Chair, Mr. Lieder, who had helped foster the agreement. It noted, however, that the decision made no clear reference to the studies and other work streams during the biennium. It looked forward to studies being given the place they deserved in any new IGC's mandate. Progress could only be achieved through an evidence-based approach. It wished to avoid parallel processes in the future, as those did not necessarily contribute to an optimal use of time during the week. It thanked the interpreters and meeting room technicians, without whom the meeting would not proceed as smoothly as it had. It was grateful to the Chair for his commitment to the process.

281. The Delegation of Indonesia, speaking on behalf of the LMCs, thanked all Member States for their constructive spirit. It appreciated the active participation of the representatives of ILCs



within the IGC. It thanked all Regional Coordinators, the Chair, the Vice-Chairs, the facilitators, the Secretariat, the TK Division, the conference services and the interpreters, without whom the meeting would not have run so smoothly. The IGC was able to come up with recommendations on Agenda Item 8. It confirmed its full support and cooperation on further work to be done during the GA. It hoped to keep the warm, friendly and respectful atmosphere in the GA when discussing the work program and mandate. It was delighted and took note that the IGC had been able to discuss further the TCE Draft Articles, and was happy to see that it would also be continued in future work of the IGC. Noting the importance of effective protection of GRs, TK and TCEs for all, it urged and asked the indulgence of all Member States to move forward and take the next step with a view to adopting legally binding instrument(s). It congratulated the Secretariat and extended its appreciation for the two new WIPO publications, which would also inform the negotiations, just as studies might do.

282. The representative of CEM-Aymara expressed his gratitude to the Chair for his leadership and to the Secretariat. He thanked the Vice-Chair, Mr. Lienes and Ms. Paiva for having led the work in the informals on Agenda Item 8. He thanked the Delegation of Senegal, on behalf of the African Group, and the Delegation of El Salvador for their proposals and the States that had supported the participation of indigenous peoples in the process. He recognized the importance of coming to an agreement on one or various legal instruments, which could ensure the effective protection of GRs, TK and TCEs. That was not only crucial for the creativity and innovation of indigenous peoples but also represented their identity and heritage, which were sacred to indigenous peoples. He recognized the progress made in the IGC on the various texts and said that consensus should be reached for the adoption of those texts at a diplomatic conference. He urged Member States to have flexible positions in order to come to an agreement to ensure that indigenous peoples could maintain, control and continue to develop their TCEs, TK and GRs. It was crucial to include indigenous peoples in the IGC as the conclusion of the process was nearing. The full participation of indigenous peoples in the process ensured the contribution of those who would be the beneficiaries of the instruments. The UN had recognized seven cultural regions when the Human Rights Council renewed the mechanism for participation of indigenous peoples, and it continued to expand. When establishing intersessional working groups, new working models should ensure representation of indigenous peoples from every region.

283. The representative of INBRAPI expressed her gratitude to the Chair, the Vice-Chairs, the Secretariat, the tireless facilitators and the interpreters for their work. She thanked the Delegation of Senegal, on behalf of the African Group, and the Delegation of Indonesia, on behalf of the LMCs, for their support to her proposals. It was very important to implement the participation of indigenous peoples and increase it in the work of the IGC because one or various binding international instruments granting effective protection to TCEs, GRs and TK were urgently needed. There was a reference to UNDRIP in the three operative texts. She was pleased to see that many parties from many countries continued to work with a view to the future to ensure that a diplomatic conference could overcome any gaps identified in plenary and informals. She hoped to return home under the blessings of the creator to achieve their aim.

284. The Delegation of Brazil aligned itself with the statements of the Delegation of Colombia, on behalf of GRULAC, and the Delegation of Indonesia, on behalf of the LMCs. It thanked the Chair, the Vice-Chairs, the Secretariat and the facilitators for their efforts during the intense week and for its preparation, which had certainly been no less intense. It expressed its appreciation for the Chair's personal commitment and important role in moving the process forward. It also thanked the Vice-Chair, Mr. Lienes, and the facilitator, Ms. Paiva who deserved high praise for helping to reach consensus among very different viewpoints. It was hopeful that the recommendation to the GA would result in a strong mandate that would allow Member States to build common ground with a view to reaching agreement on an international legal instrument(s). That should continue to be done in consultation with indigenous groups. It could not conceive of WIPO without the IGC. The Chair and all Member States could count on the

Delegation to work in a committed, loyal and constructive manner towards a mutually satisfactory outcome.

285. The Delegation of the USA thanked the Chair, the Vice-Chairs, the facilitators and the Secretariat for their efforts to bring the session as well as the biennium to a satisfactory conclusion. It recognized the diligent efforts of the Vice-Chair, Mr. Liedes, and the facilitator, Ms. Paiva, in finalizing a decision for the GA. It looked forward to working with other WIPO Member States at the GA to reach an agreement on a new mandate and a work program. Under that new mandate, it envisioned a process that was inclusive of a full range of observers with input from all interested stakeholders. Work under the new mandate should fully consider text-based proposals of all Member States. In addition, the process would benefit from additional information about the implementation of national disclosure requirements. The IGC would also benefit from a deeper examination of how existing provisions to protect TK and TCEs worked in practice. As such, studies and other evidence of national experience would be extremely valuable. It looked forward to reading WIPO's new publication about disclosure requirements. It looked forward to working constructively with others during the GA to find a mutually acceptable path forward on those important topics.

286. The representative of Tupaj Amaru said that the IGC had not answered, after so many years of debates, the substantive question as to why there was a need for a binding international instrument. He felt more than ever the absence of an international legal framework that guaranteed the protection of TK, TCEs and GRs. Those were a source of well-being, not only for indigenous peoples, but for all of humanity and, in particular, for the balance of humanity with nature, which was vital to sustain all life on the earth, because GRs and TK associated with them covered infinite living organisms and other forms of life which were constantly transforming over time. Nowadays, more than ever, they were threatened with extinction through bioprospection, since biodiversity was not a process of GRs of those peoples who possessed, maintained, held, developed and created those resources covered by the IP regime. He thanked the interpreters for conveying his ideas to the meeting, and thanked the Chair and the Vice-Chairs for having allowed him to intervene on various occasions.

287. The representative of OAPI thanked WIPO for having enabled her to participate in the session. She thanked the Secretariat for having ensured that the work had taken place correctly and well. She took note of the progress made and noted that the participants had agreed on how to proceed with the work of the IGC, given the importance of the question at hand. The compromise that had prevailed should continue during the next mandate in order to come up with more concrete results, particularly a diplomatic conference.

288. The Delegation of Nigeria aligned itself with the statement made by the Delegation of Senegal, on behalf of the African Group. It was thankful to the Secretariat who had assisted in the session. It was delighted to note the progress made and, in particular, the decision that Member States had arrived at. It thanked the Chair for the constructive and encouraging approach. Continued and ongoing interaction and engagement, both formally and informally, was critical to the conclusion of the work that the IGC had been tasked with and to which it had been dedicated for quite a number of years. Despite the progress made, a number of Member States recognized that much work was needed, particularly on the TCE text. It looked forward to sharing experiences and to the study of existing case studies that WIPO had produced over the years that could help bridge the gaps and foster mutual understanding. It looked forward to the GA and to the opportunity to craft a mandate that was meaningful, advanced progress, and brought to a conclusion on one or more of those proposed instruments.

289. The representative of ADJMOR, speaking on behalf of the Indigenous Caucus, thanked the Chair, the Vice-Chairs, the facilitators, the Member States and the Secretariat for their support of the participation of IPLCs. The negotiations must result in international instruments that adequately protect IPLCs' collective rights, TK, cultural heritage and TCEs. The legitimacy

of the process itself depended on the full and effective participation of indigenous peoples. The Indigenous Caucus had several suggestions for improving the participation of IPLCs, as outlined in the statement under Agenda Item 6. He would particularly like to draw attention to the need for funding to ensure the continued participation of IPLCs. Indigenous peoples strongly urged Member States to implement national policies that protected the rights of indigenous peoples, their TK, cultural heritage and TCEs; to include indigenous representatives in their delegations to the IGC; and to expressly guarantee the participation of indigenous peoples in the IGC. The international instruments developed by the IGC could not treat their TCEs in a way that was based solely on individual rights because IPLCs viewed them as falling under a collective right. The approach should ensure mutual strengthening of rights and measures to address the identified gaps in the protection of TK, cultural heritage and TCEs. Those rights could be derived from UNDRIP and other relevant instruments. That should be reflected in the mandate of the IGC. Indigenous peoples collectively maintained a spiritual, religious, social, cultural and economic link with their TK, cultural heritage and TCEs. The draft texts must recognize this link and provide better means of maintaining and protecting that relationship. As the IGC moved towards the end of the current IGC mandate, indigenous representatives remained confident that IPLCs could contribute constructively and effectively to all the future work of the IGC.

290. The Chair said that, in relation to the further negotiation of the mandate, he, the Vice-Chairs and the facilitators remained available to support the ongoing discussions until the GA. It was the first time that an agreement to a high-level recommendation by the IGC had been forwarded to the GA. It demonstrated a strong commitment to the ongoing work of the IGC. He appreciated Member States' efforts and the efforts of Mr. Liedes and Ms. Paiva in helping to come to a conclusion. He thanked the Vice-Chairs and the lead facilitator and the Friend of the Chair, Ms. Bagley who had contributed significantly to the outcomes over the two years and had been invaluable in ensuring the smooth conduct of meetings over the biennium. They always operated as a team in a professional manner, and made a significant contribution to the IGC, and he hoped that they would continue to be actively involved in the future. He thanked the other facilitators who had supported the process, including Ms. Hao'uli and Ms. Paiva, among others. They performed a demanding and difficult task to put forward working documents that took account of the interests of all Member States. The IGC could always continue to improve its process and particularly its methodology, and he took those comments onboard. They had fulfilled their mandates in a fair and balanced way, and it was at times a thankless task, and he very much appreciated their commitment to that work, often into the late hours. He thanked the Secretariat and the interpreters who worked tirelessly in the background to meet the needs of Member States and to ensure that the procedural and administrative arrangements were in place throughout the meetings and between meetings. He noted the significant contribution of the Seminars throughout the biennium, planned and implemented by the Secretariat, and the significant amount of material prepared to support members in their deliberations, such as the online information portal that included a wealth of material on the subject matter, including domestic and regional legislation and tools such as a guide for IPLCs. He noted the new publication on patent disclosure requirements. He thanked the members and the Regional Coordinators for their commitment to the process and for always acting in a respectful and friendly manner. Lastly, he thanked the observers, particularly the indigenous observers who were the beneficiaries of the IGC's work. He asked Member States to carefully consider positions on those key issues over the next months to reach consensus relatively quickly at the GA. He, the Vice-Chairs and the facilitators were available to move that process on from then through the GA. IGC 34 was the last session of the biennium. He thanked the participants for the trust given to him as the Chair, and hoped to have honored that trust. The Chair closed the session.

*Decision on Agenda Item 11:*

291. *The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6,*

*7, 8 9 and 10 on June 16, 2017. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by August 31, 2017. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.*

[Annex follows]

**LISTE DES PARTICIPANTS/  
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Vice-présidents/Vice-Chairs: Jukka LIEDES (M./Mr.) (Finlande/Finland)

Robert Matheus Michael TENE (M./Mr.)  
(Indonésie/Indonesia)

Secrétaire/Secretary: Wend WENDLAND (M./Mr.) (OMPI/WIPO)

VIII. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE  
DE LA PROPRIÉTÉ INTELLECTUELLE (OMPI)/  
INTERNATIONAL BUREAU OF THE  
WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

Francis GURRY (M./Mr.), directeur général/Director General

Minelik Alemu GETAHUN (M./Mr.), sous-directeur général/Assistant Director General, Global Issues Sector

Edward KWAKWA (M./Mr.), directeur principal, Département des savoirs traditionnels et des défis mondiaux/Senior Director, Department for Traditional Knowledge and Global Challenges

Wend WENDLAND (M./Mr.), directeur, Division des savoirs traditionnels/Director, Traditional Knowledge Division

Begoña VENERO AGUIRRE (Mme/Ms.), conseillère principale, Division des savoirs traditionnels/Senior Counsellor, Traditional Knowledge Division

Shakeel BHATTI (M./Mr.), conseiller, Division des savoirs traditionnels/Counsellor, Traditional Knowledge Division

Simon LEGRAND (M./Mr.), conseiller, Division des savoirs traditionnels/Counsellor, Traditional Knowledge Division

Daphne ZOGRAFOS JOHNSON (Mme/Ms.), juriste, Division des savoirs traditionnels/Legal Officer, Traditional Knowledge Division

Kiri TOKI (Mlle/Ms.), boursier à l'intention des peuples autochtones, Division des savoirs traditionnels/WIPO Indigenous Fellow, Traditional Knowledge Division

Alice MANERO (Mlle/Ms.), consultante, Division des savoirs traditionnels/Consultant, Traditional Knowledge Division

Rhona RWANGYEZI (Mlle/Ms.), stagiaire, Division des savoirs traditionnels/Intern, Traditional Knowledge Division

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