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

Fourth Session
Geneva, December 9 to 17, 2002

REPORT

adopted by the Committee

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INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly (see document WO/GA/26/10, paragraph 71), and of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) at its third session (see document WIPO/GRTKF/IC/2/17, paragraph 311), the Committee held its fourth session in Geneva, from December 9 to 17, 2002.

2. The following Member States were represented: Algeria, Argentina, Australia, Austria, Barbados, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Cameroon, Canada, China, Colombia, Comoros, Congo, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, El Salvador, Eritrea, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Japan, Kenya, Latvia, Lesotho, Lithuania, Madagascar, Mali, Malta, Mexico, Morocco, Namibia, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, United Kingdom, United States of America, Uruguay, Venezuela, Zambia and Zimbabwe (94). The European Commission was also represented as a member of the Committee.

3. The following intergovernmental organizations ('IGOs') took part as observers: African Intellectual Property Organization (OAPI), African Regional Industrial Property Organization (ARIPO), African Union (AU), Arab League Educational Cultural and Scientific Organization (ALECSO), European Patent Office (EPO), Food and Agriculture Organization of the United Nations (FAO), General Secretariat of Andean Community, International Center for Sustainable Development, International Labour Organization (ILO), International Union for the Protection of New Varieties of Plants (UPOV), League of Arab States (LAS), Secretariat of the Convention on Biological Diversity (SCBD), Secretariat of the Pacific Community, South Centre, United Nations University, The World Bank, United Nations Conference on Trade and Development (UNCTAD), United Nations Permanent Forum on Indigenous Issues (UNPF), and the World Trade Organization (WTO) (19).

Representatives of the following non-governmental organizations ('NGOs') took part as ad hoc observers: Aboriginal and Torres Strait Islander Commission (ATSIC), Action Aid, Ainu Association of Sapporo, American Association for the Advancement of Science (AAAS), American Folklife Center, American Folklore Society, Arctic Athabaskan Council (AAC), Assembly of First Nations, Benelux Association of Trademark and Design Agents (BMM), *Association Bouregreg*, *Association pour l'épanouissement des femmes nomades TINHINAN*, Association TAMAYNUT, Berne Declaration, Brazilian Association of Intellectual Property (ABPI), Center for International Environmental Law (CIEL), *Centre de documentation, de recherche et d'information des peuples autochtones (DoCIP)*, *Comisión jurídica para el autodesarrollo de los Pueblos Originarios Andinos (CAPAJ)*, Copyright Research and Information Center (CRIC), CropLife International, *Droit et Démocratie*, FARMAPU - Inter and CECOTRAP - RCOGL, First Peoples Worldwide, Foundation for Aboriginal and Islander Research Action (FAIRA), *Fundación Nuestro Ambiente* (FUNA), Genetic Resources Action International (GRAIN), Health and Environment Program, Indian Confederation of Indigenous and Tribal Peoples (ICITP - NEZ), Indian Movement *Tupaj Amaru* Bolivia and Peru, Institute for African Development (INADEV), International Bar Association (IBA), International Chamber of Commerce (ICC), International Confederation of Music Publishers (ICMP), International Environment Law Research Centre (IELRC), International Federation of Industrial Property Attorneys (FICPI), International Federation of Musicians (FIM), International Federation of Pharmaceutical Manufacturers Associations (IFPMA), International Literary and Artistic Association (ALAI), International People Biodiversity Network (IPBN), International Publishers Association (IPA), International Seed Federation (FIS), Inuit Circumpolar Conference (ICC), Max Planck - Institute for Intellectual Property, Competition and Tax Law, *Mejli* of the Crimean Tatar People, Native American Rights Fund, *Organisation des volontaires acteurs de développement et Action - plus* (OVAD-AP), Patent Documentation Group, Russian Association of Indigenous Peoples of the North (RAIPON), SAAMIC Council, *Société Internationale de l'Éthnologie et de Folklore* (SIEF), The *Métis* National Council, The World Trade Institute of the University of Berne, Tsentsak Survival Foundation, Working Group of Indigenous Minorities in Southern Africa (WIMSA), World Conservation Union (IUCN), and the World Self Medication Industry (WSMI) (55).

4. A list of participants is annexed to this document.

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

- "Draft Agenda" (document WIPO/GRTKF/IC/4/1 Prov.1),
- "Accreditation of Certain Non-Governmental Organizations" (WIPO/GRTKF/IC/4/2),

- “Addendum to Accreditation of Certain Non -Governmental Organizations” (WIPO/GRTKF/IC/4/2Add),
- “Further Addendum to Accreditation of Certain Non -Governmental Organizations” (WIPO/GRTKF/IC/4/2Add2),
- “Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/4/3),
- “Brief Report on Legal -Technical Assistance for the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/4/4),
- “Initial Checklist of Legal and Practical Issues for an Intellectual Property Toolkit” (WIPO/GRTKF/IC/4/5),
- “Update on Work Concerning Traditional Knowledge Databases” (WIPO/GRTKF/IC/4/6),
- “Review of Existing Intellectual Property Protection of Traditional Knowledge” (WIPO/GRTKF/IC/4/7),
- “Elements of a *suigeneris* System for the Protection of Traditional Knowledge” (WIPO/GRTKF/IC/4/8),
- “Traditional Knowledge –Operational Terms and Definitions” (WIPO/GRTKF/IC/4/9),
- “Report on Electronic Database of Contractual Practices and Clauses relating to Intellectual Property, Access to Genetic Resources and Benefit -Sharing” (WIPO/GRTKF/IC/4/10),
- “Initial Report on Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge” (WIPO/GRTKF/IC/4/11),
- “Participation of Local and Indigenous Communities in the Work of the Committee” (WIPO/GRTKF/IC/4/12),
- “Access to Genetic Resources Regime of the United States National Parks” (WIPO/GRTKF/IC/4/13),
- “Technical Proposal on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources” (WIPO/GRTKF/IC/4/14), and
- “Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore)” (WIPO/GRTKF/IC/4/INF/2; WIPO/GRTKF/IC/4/INF/3; WIPO/GRTKF/IC/4/INF/4; WIPO/GRTKF/IC/4/INF/5; and WIPO/GRTKF/IC/4/INF/5Add).

6. The following questionnaires were circulated between the Committee’s third and fourth sessions to facilitate its work:

- “Revised Questionnaire for the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge” (WIPO/GRTKF/IC/Q.1),
- “Questionnaire of Contractual Practices and Clauses relating to Intellectual Property, Access to Genetic Resources and Benefit -Sharing” (WIPO/GRTKF/IC/Q.2), and
- “Questionnaire on Various Requirements for Disclosure Relating to Genetic Resources and Traditional Knowledge in Patent Applications” (WIPO/GRTKF/IC/Q.3)

7. A summary of the Committee’s current working documents and a selection of other relevant documents was provided in document WIPO/GRTKF/IC/4/INF/6.

8. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made in detail nor necessarily following the chronological order of interventions.

AGENDA ITEM 1: OPENING OF THE SESSION

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

Election of the officers

10. Upon the nomination of the Delegation of Portugal, the Committee re-elected Mr. Henry Olsson (Sweden) as chair for one further year, and Mr. Qiao Dexi (China) and Mr. Ahmed Aly Morsi (Egypt) as its Vice-Chairs for one year. Mr. Antony Taubman (WIPO) acted as Secretary to the fourth session of the Committee.

AGENDA ITEM 2: ADOPTION OF THE AGENDA

11. Before submitting the Draft Agenda for approval, the Chair proposed that WIPO/GRTKF/IC/4/12 ("Participation of Local and Indigenous Communities in the Work of the Committee") be discussed under Agenda Item 3 (Accreditation of Certain Non-governmental Organizations). The Agenda was adopted on this understanding.

General Statements

12. The Delegation of Algeria, on behalf of the African Group, reaffirmed certain principles that were emphasized by the African Group in previous sessions of the Committee. The African Group was convinced of the need for an agreed approach to genetic resources, traditional knowledge (TK) and folklore based on principles of justice and equity, which would promote increased cooperation between rightsholders and rights users on the basis of clearly established rules that ensure equitable benefit-sharing. The Delegation welcomed the work already accomplished by the Committee and approved of the continuation of work already decided upon in previous meetings. The African Group believed that the mandate of the Committee should cover the preparation of the implementation of protection policies and protection systems. It reiterated a proposal that the next session of the Committee should consider an updated situation report that would enhance and highlight the progress made on the protection of genetic resources, TK and folklore, and make it possible for Member States to evaluate the work thus far accomplished by the Committee.

13. The Delegation of Barbados, on behalf of the Group of Latin American and Caribbean Countries (GRULAC), recalled the prominent role played by the GRULAC in the establishment of the Committee reflecting the importance of countries in the region attached to the issues under consideration. The Delegation stated that the work conducted within the Committee had a significant contribution to the make, in terms of enabling use of genetic resources, TK and folklore as well as fostering the development of Member States. Although there had been progress in the Committee's work, important issues were outstanding, and it was important to assess whether the original objectives set during the establishment of the Committee had been achieved and attained. GRULAC was interested in moving away from studies and evaluation towards a more concrete stage which involved recommendations and the like, emanating from the Committee to be incorporated into WIPO's work agenda mainly in the areas of industrial property and copyright. The Delegation stressed the importance of closer coordination and cooperation between WIPO and other international organizations in dealing with issues under consideration by the Committee. The work of the Committee should be conducted in a coherent and sustainable manner that reflects and responds to

Member States development needs and concerns. The Delegation hoped that the Committee would be able to contribute to the work of other forums, such as the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, and referred to Article 29 of the Draft Declaration. The Delegation expressed strong interest in the issue of funding of indigenous peoples and local communities to meetings of the Committee and hoped for positive results being achieved, especially the funding of indigenous peoples and local communities apart from their inclusion in national delegations. It requested increased technical cooperation for the region, particularly in the area of TK, as there was a richness and diversity of experiences within the region, from which individual GRULAC members as well as other Member States could benefit. The Delegation stated that it wished to have more information on *suigeneris* systems, particularly the range thereof, and noted that no one option or modality should be stressed more than another since it is important that the issue be addressed in a balanced and objective manner.

14. The Delegation of India, on behalf of the Asian Group, acknowledged the progress achieved, during the session of the Committee, in identifying issues relating to TK, genetic resources and folklore. It believed that the Committee was the correct forum for developing consensus on these issues, which were of interest to all countries. Numerous countries of the Asian Group were currently undertaking initiatives to improve the interfaces between existing intellectual property (IP) systems and genetic resources, TK and folklore. Initiatives had also been undertaken by several countries at the national level to develop new national IP mechanism, including *suigeneris* mechanisms for the protection of genetic resources, TK and folklore. It referred to a position paper submitted during the second session (WIPO/GRTKF/IC/2/10) which concerned compiling databases of TK already in the public domain and making them available to patent granting authorities for the purpose of prior art searches in order to prevent grant of any IP right over such public domain knowledge. The Delegation added that the establishment of registries of TK elements which were not in the public domain had also been recommended to keep contents undisclosed, pending possible establishment of new protection standards for TK elements. It stated that the Asian Group had since developed a regional consensus on certain technical aspects of databases and registries for genetic resources and TK. The Delegation stated that a formal proposal had been submitted on behalf of the Asian Group as a document WIPO/GRTKF/IC/4/14 (“Technical Proposal on Databases and Registries of Traditional Knowledge and Biological Genetic Resources”). These proposals reflected the views of the countries of the region as a starting point for further work on the interface between IP, and TK and genetic resources. The technical proposal included a suggestion for further work focused on, but not limited to, protecting genetic resources and TK from piracy through the patents system, by making available such public domain material available to patent examiners as searchable prior art. It stated that it also included technical suggestions and proposals on improving the use of existing and new IP mechanisms at the national level for positive protection of genetic resources and TK not in the public domain.

15. The Delegation of China stated that the efforts made by WIPO on the IP protection of genetic resources, TK and folklore were of great practical and historical importance. These efforts, in its view, had laid down a solid foundation for the development not only of the IP systems of developing countries, but eventually also of the international IP system as a whole. The Delegation noted that since the establishment of the Committee, WIPO had set out the objectives for this work, and had guided Member States in seeking feasible approaches and solutions to the problems. The Delegation was gratified to see that with the efforts of all the previous Committee sessions, preliminary achievements had been made and the objectives had been clarified. The Delegation recalled that China had always firmly supported WIPO's

efforts, and was ready to make its own contribution as much as possible. It noted that China had made useful experiments with, and gained preliminary experiences in, using the existing IP system and other legal systems for the protection of TK. Such useful experiences included the patent protection of traditional Chinese medicines, the establishment of a database of patent documentation on traditional Chinese medicines, and the protection of traditional arts and crafts. The Delegation assured the Committee that China's efforts in the protection of TK would be continued by further improving legislative and other measures. In the meantime, the Delegation affirmed that China was ready to undertake extensive cooperation and exchange programs with other countries by sharing and drawing on each other's experiences and practices, so as to achieve even greater progress in the protection of TK. The Delegation expressed its conviction that with the common endeavor of all Member States and under the leadership of WIPO, reasonable solutions, which were acceptable to all parties, could be found for the IP protection of genetic resources, TK and folklore, thus addressing the concerns and needs of all countries, especially developing countries.

16. The Delegation of Nepal, speaking on behalf of the South Asian Association for Regional Cooperation (SAARC), associated itself with the statement delivered by the Delegation of India on behalf of the Asian Group. The Delegation stated that TK play an important role in areas such as food security, development of agriculture and medicine and noted the role of the Committee in developing internationally acceptable and equitable solutions in this area. The SAARC countries welcomed the statement of the Asia-Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in which they had actively participated, and looked forward to implementing the agreed conclusions. The Delegation further informed that the Subregional Forum for Intellectual Property Cooperation among Member States of SAARC had devoted significant attention to genetic resources, TK and folklore and had agreed to:

(i) develop appropriate proposals for model legislation, mechanisms, contractual terms and practices for regulating access to and benefit-sharing in genetic resources and for the protection and conservation of TK and folklore, which could contribute to the development of internationally acceptable standards;

(ii) identify, catalogue, record and document genetic resources and TK, including expressions of folklore, using information technology and IP tools, wherever possible;

(iii) prepare an inventory of TK, particularly relating to non-medicinal plants and knowledge associated with those plants. A meeting of experts from SAARC Member States and representatives of WIPO should be arranged to discuss the matter further with a view to preparing a blueprint of how this task could be meaningfully performed; and

(iv) deposit new micro-biological strains in recognized depositories for establishing their geographical origin. In order to economize, it would be desirable to have depositories in the region accessible to all members. WIPO might assist in setting up such depositories recognized under the Budapest Treaty.

The Delegation closed by stating that the protection of genetic resources, TK and folklore should be viewed within the context of larger socio-economic and cultural development and by identifying a need to develop appropriate legal and policy mechanisms for the protection, conservation, promotion and use of TK at international and regional levels.

17. The Delegation of Egypt associated itself with the statement of the African Group and expressed its belief that the provision of documents in Arabic was of paramount importance to facilitate the work of the Committee. It reported that, at the Secretariat's advice during the third session of the Committee, it had put a request to the Program and Budget Committee of WIPO in September 2002, so that this issue would be discussed by that Committee. The Secretariat confirmed that the issue would be considered by the Program and Budget Committee at its meeting in April 2003 when it would consider the draft Program and Budget for the 2004 -2005 biennium.

18. The representative of Indigenous Peoples' Biodiversity Network (IPBN) offered some general observations on the state of play of international policy discussion on IP policy and the role of indigenous peoples there in. In setting out general background developments, the representative explained that changing economic and political forces as well as new technologies had given rise to a global marketplace, an interest in researching the TK of indigenous peoples, and a revolutioning global IP systems, which was affecting every country. The representative noted that cultural knowledge was not so much valued for its intrinsic worth, but for its instrumental value, i.e., the commercial gain that may arise from its use, which had led to a "goldrush" mentality *inter alia* in claiming IP right over TK. The representative maintained that IP policies and practices had profound implications for indigenous and traditional communities, as exemplified by instances where the IP system had sanctioned IP claims over materials associated with indigenous knowledge and innovation systems. The representative pointed out that therefore most indigenous peoples considered the IP system to be highly predatory and to exacerbate the trend of exploitation, poverty and cultural erosion with which indigenous peoples lived. The representative explained that indigenous peoples saw IP claims as technically, spiritually and morally wrong, based on three views, among others. First, the nature of the Western IP system was inadequate to protect their innovations because indigenous peoples had a different world view from the dominant Western culture with its primary emphasis on individualism and materialism. Second, indigenous knowledge and innovation should be managed by indigenous concepts of authorship and of IP, which can be found in local customary laws. Third, it was an ethical principle of their system that anyone wanting to make use of indigenous peoples' innovations or to reproduce their creations must fully respect their cultural or spiritual context. However, the representative qualified that indigenous peoples were not necessarily advocating the complete removal of the IP system, but were asking to be left to decide for themselves what characteristics of the IP system can best be used to assist them in protecting and sustaining their values, cultures and livelihoods. Regarding the state of play in international IP policy debates, the representative pointed out that appropriate laws and policies on this topic could only be developed if the holders of TK were at the center of the process of defining the meaning and purpose of protection and the appropriate mechanisms for this. The representative indicated that there were many policy initiatives which had taken place, but unfortunately the voice of indigenous peoples had remained largely invisible. The representative indicated that the minimal participation of indigenous peoples illustrated the limits of the participatory mechanisms in place and that the "multi-stakeholder" approach had greatly limited the scope of discussions and the role of indigenous peoples. The representative expressed concern that there was minimal systematic participation of indigenous peoples in relevant WIPO meetings, and little, if any, monitoring, analysis or critique of papers, reports and recommendations being produced. The representative indicated that the second component of his statement concerned the announcement of a new, independent, indigenous peoples' initiative on IP policy, entitled "Call of the Earth Circle: Ancient Wisdom for Sustaining Cultures, Livelihoods and Environments," which brought together leading indigenous experts in culture and IP from around the world, to:

- (i) provide indigenous peoples an ongoing space for dialogue on IP policy;
- (ii) enable indigenous people to participate more substantively and meaningfully in the international policy arena; and,
- (iii) support indigenous peoples' efforts to reconceptualize the policy discussion on IP and indigenous knowledge to focus on the rights of indigenous peoples, the collective and spiritual dimensions of indigenous knowledge, and existing customary law approaches for its protection.

In closing, the representative recommended that indigenous peoples be better assisted by WIPO to participate in the Committee process, and in particular that WIPO and its Member States follow the example of sister UN agencies to consider the establishment of a Fund to support the systematic and effective participation of indigenous peoples.

AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS

Accreditation of certain non-governmental organizations

19. At the invitation of the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/4/2, WIPO/GRTKF/IC/4/2 Add. and WIPO/GRTKF/IC/4/2 Add.2, which gave details of seventeen organizations that had requested ad hoc observer status for the sessions of the Committee. The Committee unanimously approved accreditation of all the following organizations as ad hoc observers: American Indian Law Alliance (AILA), Arctic Athabaskan Council (AAC), Assembly of First Nations, *Asociación Tamaynut* (Amazigh People), Centre for Youth Research, *Centre Togolais d'Assistance Juridique pour le Développement* (CETAJUD), *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos* (CAPAJ), *Fundación Nuestro Ambiente*, Global Education and Environment Development Foundation (GEED - Foundation), *Institut Borjade Bioética*, *Instituto Indígena Brasileño de la Propiedad Intelectual* (InBraPi), Métis National Council (MNC), National Aboriginal Health Organization (NAHO), Native American Rights Fund (NARF), The Rockefeller Foundation, *Société Internationale d'Éthnologie et de Folklore* (SIEF), and Tsentsak Survival Foundation (*Cultura Shuar del Ecuador*).

Participation of Local and Indigenous Communities

20. Upon introduction by the Secretariat of document WIPO/GRTKF/IC/4/12 ("Participation of Local and Indigenous Communities in the Work of the Committee"), the Chair identified two issues of principle contained in this document: namely, whether the Committee was prepared to accept, as a matter of principle, the financing of non-governmental organizations by WIPO for participation in the Committee; and what should be the criteria for selecting the funded organizations.

21. The Delegation of Portugal, on behalf of Group B, declared that it was important that the Committee should continue its work to facilitate the involvement of indigenous and local communities in its activities. It was these communities that were directly affected by the work of the Committee, and as such their participation was imperative to the successful fulfillment of the Committee's mandate. The Delegation stated that the Committee had recommended, at its third session, that the Program and Budget Committee consider the

possible financing by WIPO of the participation of indigenous and local communities. In response to this recommendation, the General Assembly took the decision that the Committee should consider suitable further mechanisms, as appropriate, for facilitating the involvement of the representatives of indigenous and local communities, in its work for the 2003 meetings and to be reflected to the General Assembly in 2003. The Delegation recalled that document WIPO/GRTKF/IC/4/12 reported on this decision which proposed various possible mechanisms to achieve greater participation, and invited Members of the Committee to consider these proposals, among others. The Delegation stated that many Group B members were already implementing most of the mechanisms proposed in document WIPO/GRTKF/IC/4/12. They included: including, and in some cases funding, representatives of indigenous and local communities on national delegations; holding specific briefings and consultations with indigenous and local communities; consulting on draft documents being prepared for the Committee, and involving indigenous and local communities in regional and national workshops. Some also provided direct funding for the independent participation of indigenous and local communities as accredited ad hoc observers. The Delegation affirmed that Group B encouraged all members of the Committee to continue to pursue these and other valuable practices on an annual basis, and also agreed that the Committee should consider having WIPO take a more extensive role in facilitating participation of local and indigenous communities, including the possibility of some form of appropriate funding from various sources to enhance participation. However, the Delegation cautioned that before supporting such a decision, it was important for the Committee to have more detailed information on the modalities of various possible mechanisms in order to ensure that the Committee made the most informed choices to achieve effective results. Hence, Group B members proposed that the Secretariat prepare, for the Committee's fifth session, a report outlining a broad range of options for facilitating more formalized participation of indigenous and local communities, and that this report propose specific modalities on how these various options could be implemented by the Committee. As part of this report, the Delegation proposed that the Secretariat's report should include a number of issues of interest to the Members of Group B including, among other items:

(i) a review of the practice of other UN and relevant intergovernmental organizations in facilitating the participation of non-governmental organizations, including the modalities of selection, accreditation, allocation of funding, if applicable; and

(ii) a review of the range of possible options available to the Committee for formalizing participation, based both on the above review of the best practices of other agencies and on the Secretariat's own independent analysis of the available options.

In addition to an analysis of the list proposed in paragraph 13 of document WIPO/GRTKF/IC/4/12, this section of the report should provide specific detailed options for:

(i) facilitating the participation of the UN Permanent Forum on Indigenous Issues in the future work of the Committee;

(ii) providing financial support for indigenous and local communities; and,

(iii) a transparent mechanism to determine the number of participants, the process for selecting those eligible under whatever funding process was developed, and the capacity in which they would participate in the future work of the Committee.

The Delegation stated that Group B felt that it would be timely and effective for the Committee to discuss the Secretariat's report and adopt the most appropriate options at the fifth session, as part of the general discussion about the future mandate of the Committee. In that way, the choices made about formalizing participation could be tailored to the recommended future format and mandate of the Committee. The Committee could develop a package of recommendations, which would include recommendations on the future mandate of the Committee, recommendations on formalized mechanisms for participation of indigenous and local communities, and an assessment of the budgetary implications. This overall package could be presented to the September 2003 General Assemblies. In conclusion, the Delegations said that the additional information provided on the various models would allow the Committee to make an informed decision about how to achieve their common objective of facilitating greater participation of local and indigenous communities in the future work of the Committee, and finally, considering this information in the context of the review of the future of the Committee would ensure that the decision would be appropriate in light of the broader package of recommendations to the General Assemblies in September 2003.

22. The Delegation of Barbados, speaking on behalf of GRULAC, stressed the importance and strong support of GRULAC Members for the funding of indigenous peoples and local communities to participate in meetings of the Committee. The Delegation stated the Group viewed the work of the Committee as a special and exceptional circumstance and stressed that the funding of indigenous peoples and local communities should in no way be seen as creating a precedent in terms of other areas of work or as detracting from WIPO's intergovernmental nature. The Delegation thanked the European Union and other delegations that supported funding initiatives for the effective participation of indigenous peoples. The Delegation stated that whether or not these groups were involved in the work of the Committee would have an impact on the success of the Committee and the accomplishment of its mission. The Delegation clarified that the funding of indigenous peoples and local communities was separate and apart from their inclusion on national delegations. Some delegations had already, on their own initiative, included these groups in their delegations but this participation needed to be enabled further. Concerning the modalities, the Delegation stated its preference for the provision of additional resources for this initiative to ensure that there were no negative impacts on WIPO's technical co-operation work or the funding of government delegations to the Committee. The Delegation requested WIPO to provide feedback on the financial resources, if any, that could be made available and the options at Member States' disposal to ensure a result for the next session. The Delegations said that GRULAC was currently not in a position to provide feedback on the specific selection or other criteria to be used in providing funding to local communities and indigenous peoples. They would only be able to provide such feedback after consultation with their respective national local communities and indigenous peoples, a prerequisite for which was a political decision within the Committee for the provision of funding. The Delegation urged other Member States to demonstrate the political will and leadership needed to enable concrete and positive action to be taken on the matter.

23. The Delegation of Algeria, on behalf of the African Group, reiterated its belief in the constructive contribution to be made by local communities and indigenous peoples in the Committee's deliberations. The Delegations supported the participation of representatives from local communities and indigenous peoples as ad hoc observers in full coordination with Member States and taking into account the technical character of WIPO. The Delegation recommended increased cooperation with the permanent bodies of indigenous matters of the UN system. With regard to issue of financing NGOs representing indigenous peoples, the

Delegation agreed to the proposal in accordance with the parameters to be decided on in cooperation with Member States. The Delegation believed that funding should follow equitable geographic distribution, should not affect the level of resources allotted to government delegates, and should be made in close consultation with Member States of which the NGOs are originating, including consultations with regional and local groups. The Delegation of Algeria expressed satisfaction with the equitable and constructive role played by the NGOs representing local and indigenous populations. However, the Delegation cautioned against political and sociological statements and reminded the Committee of the technical nature of the deliberations. The Delegation confirmed its availability for the consideration of proposals to be made by local and indigenous communities with a view to preserve TK from illicit appropriation, and with respect to the principles agreed to by the international community dealing with the rights of local and indigenous communities.

24. The Delegation of Denmark, on behalf of the European Community and its Member States, recalled that, as indicated in paragraph 11 of document WIPO/GRTKF/IC/4/12, the European Community and its Member States took the initiative at these sessions of the Committee in 2001 by proposing financial assistance to ensure the participation of indigenous people and local communities in the Committee's work. Consequently the EC and its Member States, Norway and Switzerland proposed to the WIPO General Assembly in 2002 that the funding be authorized, in principle, for the participation of indigenous people and local communities in the work of the Committee. This funding should take place, with existing resources, without creating a precedent, and through mechanisms to be decided upon at the Committee's sessions. The Delegation stated that, following broad support for its general objectives, the proposal led to the decision quoted in paragraph 12 of document WIPO/GRTKF/IC/4/12. The EC and its Member States were still ready to authorize the funding of the participation in the Committee of indigenous and local communities, and supported the proposal made by Group B that the Secretariat prepare a report as a vehicle for constructive consideration that outlined the range of options and included specific modalities for the participation of indigenous and local communities in the Committee.

25. The Delegation of Norway aligned themselves with Group B's statement on proposals for further procedures and supported the statement of the EC and its Member States. The Delegation emphasized the need to authorize the funding for participation of local communities and indigenous peoples in the Committee. In addition, they emphasized the crucial role of the Permanent Forum in the deliberations of the Committee and noted that it was time to secure their full participation in future meetings. The Delegation reminded the Committee of the political declaration agreed to at the World Summit on Sustainable Development in Johannesburg which emphasized the role of indigenous peoples in all sustainable development policies. This created some obligations as to how indigenous peoples were to be involved in relevant fora, and this clearly applied to the Committee.

26. The Delegation of Switzerland noted with satisfaction that most of the mechanisms listed in paragraph 13 of document WIPO/GRTKF/IC/4/12 had already been implemented or were in the process of being implemented. The one mechanism that had not been implemented, however, was the direct funding of the participation of indigenous peoples' representatives in the Committee. The Delegation held the view that the active and direct participation of local and indigenous communities in the Committee was a crucial prerequisite for the success of its efforts. It was for this reason that Switzerland, co-sponsored, together with the European Communities and their Member States and Norway, a proposal for a decision to be taken by the WIPO General Assembly at its meeting in 2002. This proposal concerned the funding by WIPO of the participation of representatives of indigenous and local

communities in the Committee in the year 2002. The Delegation regretted that the proposal did not find the necessary support at the WIPO General Assembly. The Delegation hoped that a satisfactory and timely solution could be found within WIPO for the funding of the increased participation of representatives of indigenous and local communities in the future work of the Committee. The Delegations supported the proposals submitted by Group B.

27. The Delegation of United States of America supported the Group B position and the participation of local and indigenous communities in the important work of this Committee. The Delegation found that document WIPO/GRTKF/IC/4/12 proved to be a useful guide to mechanisms for facilitating involvement of local and indigenous communities, many of which were already being implemented. The Delegation was encouraged that more Delegations were including representatives of local and indigenous communities, and encouraged others to do so. The Delegation stated that questions still existed on the appropriate funding mechanism. However, the Committee could draw on the experiences of other UN organizations, and that was what the Group B proposals sought to do. The Delegation looked favorably on the use of a voluntary extra-budgetary mechanism. But it had serious concerns about the funding coming from the core budget, not only over the precedent it could set, but because of the likelihood that it could lead to significant cuts in other parts of the Committee's budget, such as the funding of Member States' participation. The Delegation looked forward to the Secretariat's report. In the meantime, the Delegation encouraged other Delegations to include representatives of local and indigenous communities on their Delegations while the Secretariat pursued further outreach activities, such as the regional workshops described in document WIPO/GRTKF/IC/4/12.

28. The Delegation of Romania, on behalf of the Central European and Baltic States, joined the previous delegations in expressing their appreciation of this serious approach that WIPO has demonstrated in addressing the very important issues of folklore, TK and their relation with IP. The Delegation considered that the local and indigenous communities participation in the Committee's meetings was very important and should be supported by WIPO to the extent possible and within the framework of the existing budget, and as long as the support provided by WIPO to facilitate Member States' participation was not affected.

29. The Delegation of Colombia supported the statement made by the Delegation of Barbados on behalf of the GRULAC Group and stated that the participation of local and indigenous communities was crucial to the development of the Committee's work. With regard to mechanisms for facilitating the involvement of these communities, the Delegation emphasized that this was a priority and there was a need to implement international cooperation, the aim being to engage in consultations with indigenous, Afro-Colombian and rural communities, which was a requirement imposed by Colombian law as a prerequisite of any progress in the development of legislation in the subject area concerned.

30. The Delegation of Venezuela supported the statements made by the GRULAC and the African Group. The Delegations said that it had prepared a statement congratulating the Committee for the creation of mechanisms for facilitating the participation of indigenous and local communities but unfortunately they could no longer read the statement. The Delegation wished to emphasize the need for funding of representatives of indigenous communities. They wished clarification from Group B on their understanding of the Committee's role and future sessions. The Delegation stated that it had reservations on the proposals advanced by Group B in regard to the proposed survey of current practices in other organizations and the funding mechanisms used to ensure participation of local and indigenous. This sounded a

warning bells since such a report need not lead to concrete results. By way of example, the Delegation cited the deliberation taking within UNCTAD concerning the funding of experts, even after favorable recommendations in reports prepared by the Secretariat. The Committee could not afford to lose three years discussing funding. The Delegation highlighted the considerable efforts already being made by many delegations of developing countries to incorporate representatives on national delegations, but the financial cost was extremely high for them. The Delegations said that work cannot be done in the Committee if one does not take into account the opinions of those most concerned, interested and affected by the Committee's decisions, namely local and indigenous and Afro-Caribbean communities. Financing should be available to ensure that representatives of indigenous people took part in the next meeting of the Committee. The future work of the Committee rests on two elements, one the content of the follow-up document WIPO/GRTKF/IC/4/8 which would reflect the aspirations of a large number of developing countries, and second, the funding of indigenous persons to participate in the Committee.

31. The Delegation of Bolivia supported the GRULAC statement and expressed the belief that effective mechanisms should be implemented rapidly.

32. The Delegation of Zambia cited the principle "nothing for us without us," and affirmed that this applied to the custodians of TK. It was important that their presence be felt and that their voices be heard. The Delegations said it was grateful that most delegations who have spoken supported the participation of local and indigenous communities in the work of the Committee. This principle clearly pointed to the spirit that the international community must have when discussing issues pertaining to TK. The participation of local and indigenous communities was important for a meaningful and useful outcome of the Committee. It was imperative, therefore, that all means available must be employed to ensure the participation of local and indigenous communities. The Delegation favored direct WIPO support for the participation of representatives of local and indigenous communities in the Committee. It was most desirable that local and indigenous communities be included in national delegations, not merely for Africa but for the entire world. The Delegation considered that local and indigenous communities should be assisted to participate in national and regional consultations aimed at developing focused input in the work of the Committee. The Delegation urged countries to take steps to facilitate the participation of local and indigenous communities in the work of the Committee.

33. The Delegation of Canada endorsed the statement made by Portugal on behalf of Group B. The Delegation referred the Committee to its separate intervention on the Canadian domestic context of the issues surrounding the protection of TK, which corresponded with the decision taken by the General Assemblies and communicated to this Committee in document WIPO/GRTKF/IC/4/12. In particular, the Delegation welcomed the initiative that WIPO and its Members States had taken to invite the Permanent Forum on Indigenous Issues to participate as an observer organization, and hoped that a decision would be taken in the future to fund the Forum's participation. The Forum's presence in the Committee during discussions would create a bridge between the IP focus of the discussions and the broader issues facing indigenous peoples around the world. The nature of the Permanent Forum could be clarified through a brief statement on behalf of the Forum about its functions and operation. Canada had already practiced many of the other suggestions made in document WIPO/GRTKF/IC/4/12. A number of Aboriginal organizations with ties to Canada had sought and received accreditation as *ad hoc* observers (the Assembly of First Nations, the Inuit Circumpolar Conference, the Metis National Council, the Arctic Athabaskan Council, Pauktuutit - Inuit Women's Association and the National Aboriginal Health Organization),

and the Canadian government had offered financial support to the Canadian Aboriginal group that had been accredited as *ad-hoc* observers at meetings of the Committee. Canada would continue to invite representatives of these groups to share with them their views and experiences with issues related to the protection of TK. On the report proposed by Group B on models for facilitating further involvement of indigenous and local communities, the Delegation stressed the importance of exploring and reporting upon the wide range of options available. The Delegation cited the example of the United Nations Voluntary Fund for Indigenous Populations, established in 1985 to assist representatives of indigenous communities to participate in deliberations of the Working Group on Indigenous Issues. Equally important was a careful review of the selection criteria to be applied to applications for funding. The Delegation stressed that any proposals for WIPO-administered funding of indigenous communities should be based on transparent and representative guidelines to determine access to such funding.

34. The Delegation of Botswana stated that document WIPO/GRTKF/IC/4/12 seemed to consider the interests of marginalized communities. The consultations held on this issue to date encouraged the belief that indigenous peoples' participation in the Committee would be active, and would promote their more effective management of their IP assets. The Delegation stated that it was easier to come up with administrative and political policies than policies dealing with the economic administration. The Secretariat should consider this aspect as well as cases dealing with academic and commercial research. There should be a balanced trade between these peoples and those accessing their IP assets.

35. The Delegation of Portugal expressed thanks to all those delegations supporting the proposal of Group B and clarified the proposal with regard to the Delegation of Venezuela's question, recalling that the Committee's mandate would end at their next meeting in July 2003 and that it was therefore necessary to begin thinking how the Committee's work shall continue beyond that date.

36. The Delegation of New Zealand supported the Group B proposal, noting that participation of local and indigenous communities was essential to the Committee's work. The direct participation of these groups would help to ensure that the mechanisms developed by the Committee would ultimately be acceptable and useful to the indigenous and local communities concerned. The Delegation strongly supported the participation of members of the Permanent Forum in the Committee's work and associated itself with the comments made by the delegations of Norway and Canada. The Delegation also supported the direct funding of local and indigenous representatives, in principle, and encouraged the Secretariat to work with other UN organizations with experience in the area and with organizations representing the interests of indigenous peoples in developing a funding model, in particular the Permanent Forum.

37. The Delegation of Brazil fully supported the GRULAC statement and given that the issues discussed directly affected local and indigenous communities it was not only of utmost importance but a priority that their presence be made possible in the Committee. The Delegation stated that indigenous representatives had in the past taken part in their delegations, but due to a lack of funds it was not always possible to accommodate them; hence additional funds should be made available to ensure the participation of these communities in the Committee.

38. The Delegation of Mexico supported the GRULAC statement and added that Group B's proposal contained important information. The Delegation stressed the important element of

facilitating the participation of the Permanent Forum on indigenous issues in the future work of the Committee, and stated that Mexico had already supported this. The Delegation felt that it was also important to have transparent mechanisms with regard to the choice of indigenous representatives and of those that would be included in government delegations. The Delegation believed that the proposal of Group B of submitting a modalities measures package for the participation of indigenous representatives at the same time as the revision of the Committee's mandate would grant sufficient time to ensure that the participation of indigenous peoples be discussed and included in the Program and Budget for the biennium 2004–2005. However this did not preclude having indigenous representatives participating in meetings in 2003. The Delegation also believed that the next session of the Committee might be the last one, and even if progress had been made, there was a need for a specific mandate which would contain elements for the selection and financing for the participation of indigenous representatives. The Delegation stated that Group B's posture also seemed to implicitly include the agreement that the mandate of the Committee be renewed.

39. The Delegation of Denmark introduced the representative of the Greenland Home Rule Government, a member of the Board of Trustees of the United Nations Voluntary Fund for Indigenous Populations. The representative, as a member of the Delegation, provided technical information on the United Nations Voluntary Fund and spoke of the mandate and the administration of the funds.

40. The Delegation of South Africa supported the active participation of indigenous peoples at the Committee's sessions, however it believed it was further down the chain that this matter was important. The Delegation felt that there seemed to be something missing from most of the inputs and statements made by Member States thus far, or perhaps the matter had been taken for granted. It was good to be thinking about the participation and the funding of indigenous peoples for the work of the Committee. However, this matter should not just be addressed at this level. The Delegation believed that participation of indigenous peoples and the related funding started in the respective Member State. The Delegation stated that this should not be a form of tokenism. Their participation should be seen in the context of the whole discussion of TK. In fact, the Delegation felt that it would be interesting to know what the inputs of indigenous peoples had been in all the statements that have been made here. The Delegation suspected that there was very little input and in some cases none in the statements. Documents WIPO/GRTKF/IC/4/12, paragraph 7 and WIPO/GRTKF/IC/4/4 list workshops that were WIPO related that had been organized. However, the question was, what were Member States doing with respect to TK in their respective countries and what was the extent of their involvement of the indigenous peoples, irrespective of how they were defined. The Delegation stated that in South Africa "indigenous peoples" were defined very broadly and was very inclusive in terms of the Indigenous Knowledge Systems Program. The Delegation was of the view that the participation and the funding of indigenous peoples should be a reflection of what was done in the delegations' respective countries. The Delegation said that work on TK in South Africa had increased over the past two years.

41. The Delegation of the Russian Federation joined those delegations in supporting the participation of local and indigenous communities as their contributions would ensure the effectiveness of the Committee's work, especially as the Committee was discussing such documents as the toolkit for TK. Hence, the opinions from these communities concerning decisions to be taken on these documents should be taken into account. With regard to proposals regarding funding, the Delegation was not in a position to make comments at this juncture.

42. The Delegation of China supported the proposal regarding the participation of local and indigenous communities and the mechanisms of the participation. The Delegation felt that considerations should be given to the definition of indigenous and local communities when selecting the participants, and that the participants selected should be compiled in a list for the Member State to consider.

43. The representative of the United Nations Permanent Forum on Indigenous Issues mentioned his prior participation in the round table held by WIPO on Intellectual Property and Traditional Knowledge of Indigenous Peoples where it had remarked, on behalf of the Maskwachi Cree in the Treaty 6 Territory, how important direct and meaningful participation of indigenous peoples was for them. The representative called for respect of their traditional protocols when accessing the TK of indigenous peoples and added that IP and TK was of great interest to the peoples of the Cree Nation. The representative stated that there was much interest expressed on the work of WIPO and of the Committee at the first session of the United Nations Permanent Forum on Indigenous Issues. The representative expressed its desire to work together with the Committee and was encouraged by paragraph 12 on page 4 of document WIPO/GRTKF/IC/4/12, which referred to the need for enhanced cooperation with the United Nations Permanent Forum on Indigenous Issues. The representative welcomed the proposed partnership between the United Nations Permanent Forum on Indigenous Issues and WIPO and believed that it could work together on this important area of IP and genetic resources, TK and folklore through enhanced cooperation. The representative added that for participation of Indigenous Peoples, it was essential and critical that financial assistance be provided to ensure attendance not only of the members of the United Nations Permanent Forum on Indigenous Issues but also of local and indigenous communities' representatives. The representative subsequently affirmed that the participation of Indigenous peoples should include full and meaningful participation, should be effective, and should be as full participants and not only as observers.

44. The representative of SCBD stated that the SCBD placed great importance on the participation of indigenous and local communities, particularly women, in their discussions. It added that the Conference of the Parties (COP) recommended that indigenous and local communities' participation within the work of the Convention on Biological Diversity was important. The representative stated that to ensure indigenous participation the COP had decided to include indigenous and local communities within the discussion of the Convention on Biological Diversity at various levels. It added that one level was to have indigenous and local communities invited to attend meetings held under the Convention on Biological Diversity either as part of government delegations or funded by government agencies, or to participate on expert panels. It added that at the sixth Conference of the Parties, governments and parties were invited to support the participation of indigenous and local communities in advising the Conference of the Parties in the implementation of Article 8(j). The representative stated that it also involved indigenous and local communities as co-chair to sub-working groups. The representative concluded that the participation issue was important and was still ongoing.

45. The representative of IPBN stated that there were many international and national initiatives on IP and TK, where the need for indigenous and local communities participation had been stressed. It added that participation of local and indigenous communities were still an issue in many international processes. The representative added that since indigenous peoples were minority stakeholders in these processes, TK and innovations are still viewed in terms of the concepts and practices of non-indigenous peoples. This, the representative added, was the reason why views on the issues differed and stated that this difference in views

continued to intensify conflict and limited the scope of discussions. It added that the meaningful participation of local and indigenous communities was crucial, as the ongoing work of the Committee would influence the policy and legal framework of recognition and protection of TK. The representative added that appropriate laws and policies on the protection of TK can only be developed if the rightsholders were in the center of the process. It added that capacity building was essential, including national and regional consultations. The representative recommended that: (i) the participation of indigenous and local communities should also include the participation of Indigenous Peoples and experts in the analysis of papers and reports being produced; (ii) participations should be substantive and facilitated; (iii) that the selection of participants should be based on Indigenous Peoples mechanisms; and (iv) that a specialized unit of TK and IP be established staffed by an Indigenous Person following the model of the Secretariat of the Convention on Biological Diversity. The representative added that it supported the proposal made by the Delegation of Venezuela.

46. The representative of First Peoples Worldwide, also intervening on behalf of the American Indian Law Alliance, stated that, with regard to the mechanisms for facilitating the involvement of Indigenous Peoples, she supported the suggestion of direct financial support for the participation of indigenous and local communities in the Committee. The representative recognized the efforts made by the Committee in inviting the expert members of the United Nations Permanent Forum on Indigenous Issues to the sessions of the Committee but suggested that consideration also be given to the funding of additional expert members of the United Nations Permanent Forum on Indigenous Issues to attend the Committee. The representative further suggested that a close working relationship be established with the United Nations Working Group on the Rights of Indigenous Populations. The representative congratulated the Committee for recognizing the need to hold regional consultations and meetings and encouraged participation of Indigenous Peoples. The representative concluded that it supported all initiatives for the full and effective participation of Indigenous Peoples in all aspects of the work of the Committee.

47. The representative of FAIRA stated that TK was recently considered an aspect of title to land in Australia. In Australia, TK must be proved as a basis for recognition of native title of Indigenous people. The representative referred to the recent *Yorta Yorta* case, under the Native Titles Act, in which the High Court ruled that the TK of the indigenous peoples was not sufficient to give them the title to the claimed land. The representative also referred to the *Rose* case in which he indicated the court ruled that TK owners had lost their association to the land as they did not continue with their ceremonies on the land in the most recent twenty-year period, when they were excluded from the land, and subsequently had lost their claim to native title. The representative added that the court in the *Rose* case did not find sufficient proof that the elders were passing the law on to the younger generation. The representative stated that the work of the Committee was important to them also from the point of view of as landholders, and the relationship between TK and the basis of claims to native title in land. The representative believed that Member States did not represent these needs at the meetings and that individuals with these concerns should be the ones to present them. The representative welcomed the proposal of Group B for a study of the issue of enhanced participation, and recommended that it be raised in the third paragraph of the proposal be included in the document to be prepared by the Secretariat.

48. The representative of the Indian Movement *Tupaj Amaru* welcomed the willingness of Member States to support the effective participation of Indigenous Peoples particularly in the Committee and supported the mechanisms proposed by the Secretariat. It added that effective

participation was important as work conducted by the Committee was an effort to correct injustice and raise awareness of responsibilities. The representative stated that the Indigenous Peoples have been the victims of the loss of TK and stated that it was crucial to have participation of Indigenous Peoples, especially that of indigenous experts, in the Committee. The representative stated that she supported the creation of IP seminars at international, national, and regional levels, but did not support participation of indigenous representatives in government delegations. The representative stated that the Committee should propose the participation of indigenous experts in the work of the Secretariat and that a permanent fund should be established for the funding of indigenous participation.

49. The representative of the Saami Council stated that until the Committee had adequate representation of the major stakeholder the outcomes of the Committee would not be relevant to them until there be effective indigenous participation. The representative added that that participation of indigenous and local communities would not solely be beneficial to Indigenous Peoples. The representative added that Indigenous Peoples have been the custodians of TK and therefore could contribute to the protection, preservation, and the development of TK to benefit all peoples. The representative commended government delegations, which had included indigenous representatives in their delegations to the Committee and urged their continuation. It added that participation in government delegations nor consultations on a regional level was sufficient, as political decisions were made by the Committee. The representative urged that a fund for Indigenous Peoples' participation be established without further delay and added that WIPO intensify its cooperation with United Nations Permanent Forum on Indigenous Issues. The representative stated that the funding issues should also include the facilitating of members of the United Nations Permanent Forum on Indigenous Issues to participate in the Committee and other relevant meetings. Mechanisms for selection of indigenous representatives were known to the Indigenous Peoples, it stated and referred to the example presented by the Delegation of Denmark regarding the United Nations Voluntary Fund, as well as the possible selection process by the United Nations Permanent Forum on Indigenous Issues. The representative concluded that at the next session of the Committee, the Secretariat should present several different mechanisms for the process of selection.

50. The representative for INADEV commended WIPO on its efforts made to ascertain the needs and expectations of TK holders through fact-finding missions, national and regional meetings. The representative stated that the real problem was the failure of international IP policy-making bodies to reflect and meet the concerns of Indigenous Peoples. The representative noted that the danger occasioned by this development was that legitimate concerns of Indigenous Peoples were systematically being ignored by non-indigenous groups who lacked an understanding of indigenous concepts, or were reluctant to address them for fear of offending certain vested interests. The representative urged the Committee to take up issues that were more comprehensive and holistic in outlook and added that the involvement of Indigenous Peoples would be a step towards dealing with these issues. The representative emphasized that the physical presence of indigenous representatives would not be sufficient if they were not able to influence the agenda in a meaningful manner. The representative recommended that in addition to regular consultation with indigenous groups, the Committee make available to Member States, unedited documents prepared on issues raised by the indigenous groups and that time be allocated on the Committee's agenda for adequate response from Member States on those issues. The inclusion of such documents and issues would be useful as they would serve to create political pressure for member states to respond to. According to the representative, the Committee would be more likely to respond to indigenous concerns if the members of the

government delegations felt they would be held accountable for their responses at the sessions of the Committee.

51. The representative of ICC welcomed the proposal of Group B. She added that the Inuit Circumpolar Conference themselves could not effectively participate as they too were without adequate resources. The representative expressed concern at the influence that well-resourced non-governmental organizations may have on the Committee. The representative added that for equal presence, equal availability of resources were necessary. The representative encouraged the Committee to include working papers and positions of non-governmental organizations. It added that the Committee should also encourage the WTO Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to include participation of Indigenous peoples in its meetings.

52. The representative of AAC, on behalf of the Assembly of First Nations (AFN) and the Métis National Council (MNC), recognized the efforts of the Delegation of Canada in providing assistance to indigenous organizations to attend the fourth session of the Committee as well as their efforts to begin dialogues with the Indigenous Peoples of Canada. The representative recognized the efforts of the Secretariat in providing briefing to non-governmental organizations and encouraged the continuation of similar briefings in future sessions. The representative highlighted the need to provide indigenous communities with support to ensure that they stay informed of the issues and activities on an ongoing basis. The representative added that for consultations to be meaningful, and for effective participation, indigenous communities must have the ability to be fully informed of the issues under consideration by the Committee. The representative expressed support for the Group B proposal, especially paragraph 3, and for the suggestions made by the representative of SCBD and the United Nations' Permanent Forum on Indigenous Issues.

53. The Chair outlined a draft proposal on this issue, sought the Committee's views, and requested the Secretariat to advise on the questions raised.

54. The Secretariat indicated that the WIPO Program and Budget for 2004 to 2005 was currently being prepared. The draft Program and Budget would be discussed by the Program and Budget Committee in April 2003, and thereafter by the General Assembly of WIPO in September 2003. The Secretariat stated that due to the lack of key decisions that had to be made on this issue as well as concerning the future work of the Committee, draft proposals will be made for the 2004/2005 biennium Program and Budget, which will be subject to the decisions of the General Assembly of 2003. This would also affect recommendations on the future of the Committee and recommendations of funding of the participation of Indigenous Peoples. The Secretariat stated that, if the Committee requested, it would prepare an options paper for the next session of the Committee taking into account all comments provided.

55. The Delegation of Mexico stated that it did not oppose anything in the proposed conclusions but sought information on whether the envisaged allocations for future sessions of the Committee beyond 2003, including possible funding for Indigenous participation, in the WIPO Program and Budget for 2004-05, as had been referred to by the Secretariat, should not be included in the Chair's conclusions. The Chair stated that what had been stated by the Secretariat would appear in the Report and it was not necessary to include it in the Chair's conclusions. This would also preserve the appropriate role of the Secretariat in this matter.

56. The Delegation of Morocco appreciated the conclusions reached by the Chair, adding two comments: first, cooperation and coordination with all the Member States in taking any

decisions was important; and, second, the Delegation expected the document that would be prepared for the fifth session should be made available in all three working languages.

57. The Delegation of France supported the request of Morocco that the documents be available in all three languages by mid-April. While the Delegation had been cooperative until now, it wished that a greater effort be made in this regard in the future.

58. The Secretariat stated that it would endeavor to make the document available in all three languages by mid-April 2003, some three months prior to the Committee's fifth session, but noted that the report would require a great deal of preparation, including a survey of practices in other UN and intergovernmental bodies.

59. The representative of the Inuit Circumpolar Conference (ICC) made a statement also on behalf of ATSIC, FAIRA, the Indian Movement *Tupaj Amaru*, the Assembly of First Nations, the AAC, the Saami Council, the Permanent Forum on Indigenous Issues, and the International Organization of Indigenous Research and Development. First, in addition to a Voluntary Fund, financial assistance should be provided from within WIPO resources and that this should be built into the next budgetary process. Second, Indigenous people ought to be given the opportunity to participate in an effective manner in other related forums. Third, the ongoing work of WIPO would be best established by establishing working groups dealing with specific issues. Fourth, the Indigenous caucus was disturbed to have learned that the WIPO General Assembly had at its most recent session failed to act in accordance with the recommendation of the Intergovernmental Committee to provide funding for Indigenous participation. Fifth, the Committee should intensify its cooperation with the Permanent Forum on Indigenous Issues, and WIPO was urged to facilitate the participation of the Forum in the Committee's meetings and other relevant meetings. Finally, it was suggested that one or more concrete proposals on how such a fund could be administered should be presented to the Committee at its fifth session.

Conclusions

60. On the basis of the draft proposal, the Chair submitted, and the Committee adopted, the following conclusions:

- (i) There was unanimous support for directly involving as much as possible representatives of indigenous and local communities in the work of the Intergovernmental Committee.
- (ii) A number of Delegations expressed support for WIPO directly financing a certain number of representatives of such communities. There was, however, no consensus in this issue and there was a strong need expressed to clarify the modalities in this context.
- (iii) As regards suitable mechanisms for facilitating the involvement of representatives of such communities, the Intergovernmental Committee:
 - encouraged Member States to include such representatives in their national delegations;
 - endorsed and encouraged the other measures in this respect indicated in paragraph 13 of document WIPO/GRTKF/IC/4/12; and

- requested the Secretariat to prepare by mid-April for the Committee's fifth session, a report that outlines a range of options for facilitating a more formalised participation of indigenous and local communities, and indications of modalities on how these options could be implemented by the Committee.

That report should include information on the practice of other United Nations and relevant intergovernmental organizations in facilitating the participation of non-governmental organizations, including the modalities of selection, accreditation and application of funding, if applicable. On the basis of such information about practices in other organizations and on the basis of the Secretariat's own independent analysis, the report should present a range of detailed possible options available to the Committee. These options should include:

- an analysis and update of the list of measures included in paragraph 13 of document WIPO/GRTKF/IC/4/12;
- facilitating the participation of the United Nations Permanent Forum on Indigenous Issues in the future work on the issues dealt with by the Committee;
- providing financial support for the participation of indigenous and local communities; and
- a transparent mechanism to determine the number of participants, the process for selecting those eligible under some funding process, and the capacity in which they would participate.

This report should form part of the basis for the general discussions which are expected to take place at the Committee's fifth session on future work on the issues presently dealt with by the Committee.

AGENDA ITEM 4: FOLKLORE

61. At the invitation of the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/4/3 and WIPO/GRTKF/IC/4/4, as well as the documents WIPO/GRTKF/STUDY/1 and WIPO/GRTKF/STUDY/2, which contained case studies on the legal protection of expressions of folklore or traditional cultural expressions. To provide additional background information on this agenda item and to supplement the information provided in document WIPO/GRTKF/IC/4/3, an informal series of presentations on national and regional experience with the legal protection of folklore was organized in conjunction with this session of the Committee. Information was presented by the delegations of New Zealand, Nigeria, Panama, Tunisia, the Russian Federation and the representative of the Secretariat of the Pacific Community. This material is available in documents WIPO/GRTKF/IC/4/INF/2 to 5.

62. The Delegation of Algeria, speaking on behalf of the African Group, recalled the African Group's initial position on the protection of folklore, which was that *suigeneris* systems should be used for folklore protection. He expressed particular interest in the implementation of these systems, and requested that the Secretariat should examine systems

of IP registrants to see how they could be used to ensure protection of traditional cultural expressions. The African Group recommended that WIPO and UNESCO should update the Model Provisions for National Laws on the Protection of Expressions of Folklore. The Group also favored the establishment of a detailed mechanism on folklore protection, including dispute settlement and a broadening of protection for audiovisual expressions of traditional culture. The Delegation recommended that WIPO enhance its legal and technical assistance for protection of traditional cultural expressions and that regional and subregional cooperation be enhanced with the support of WIPO.

63. The Delegation of Brazil explained there was currently no formal legal protection for folklore in Brazil. A presidential decree, however, had been issued in 2000, which created a register of cultural goods of immaterial heritage and then a national immaterial heritage program. The decree did not establish rights or obligations, but provided for the recognition, description and collection of cultural goods. Governmental bodies and NGOs had consulted in preparation for the present meeting and agreed that IPRs were not appropriate for the protection of folklore. The Delegation noted that copyright systems had several features which limited their application to folklore. Copyright normally required that a specific author be identified, but the notion of authorship was problematic in many traditional societies, it had a limited term of protection and many folklore expressions important to cultural identity warranted permanent protection, and it normally required that protected works be fixed but many folkloric expressions were not fixed.

64. The Delegation of China stated that document WIPO/GRTKF/IC/4/3 could be a guide for legislation in Member States and a basis for WIPO to develop a practical guide on how to protect traditional cultural expressions. China believed that the diversity in legislative experiences in the area of folklore reflect a variety of factors, such as cultural traditions, religious beliefs, economic development and the legislative traditions unique to each country. The scope and means of protection had been the products of choices made according to each country's situation. The 1982 model law established by WIPO and UNESCO was still of guiding significance for *sui generis* protection. New communication technologies, however, might affect uses of folklore and this warranted modification of the model law. Article 6 of China's copyright law, established in 1991, required the State Council to establish regulations for the protection of folklore expressions. In 1997, the Chinese Copyright Office drafted regulations on protection of folklore expressions. Comments on the regulations had been collected and were being considered by the Copyright Office, which was preparing to submit the regulations to the Legal Affairs Office of the State Council for inclusion in the 2003 legislation program.

65. The Delegation of Venezuela stated that the debate on document WIPO/GRTKF/IC/4/3 could not be completed because it had not been circulated in all the official languages, and appealed to the Secretariat to ensure that all documents be available in the appropriate languages. The Delegation of Venezuela believed that it was essential to create *sui generis* forms of protection for all types of expressions of folklore. In addition, existing forms of protection and the 1982 Model Provisions needed to be modified. Referring to document WIPO/GRTKF/IC/4/4, the Delegation observed that legal and technical assistance was referred to in paragraph 4 and stated that it could not understand how this could be provided without international and national norms, standards and models. The Delegation of Venezuela also requested clarification of paragraph 7 of document WIPO/GRTKF/IC/4/4 (which referred to the protection of performances of expressions of folklore under the WIPO Performances and Phonograms Treaty). It was important to understand how this would help

Member States protect expressions of folklore because the Committee had already said these provisions were inadequate. In paragraph 8 of the same document, budgetary and human resource constraints on the Secretariat were mentioned, and the Delegation urged that in the Program and Budget Committee, the Secretariat request an increase in the allocation of resources. The Delegation requested that specific activities on folklore protection be designed and implemented for the Latin American and Caribbean Region.

66. The Delegation of the United States of America stated that it was particularly interested in document WIPO/GRTKF/IC/4/3 which highlighted the diversity of subject matter known as expressions of folklore and the diversity of ways used to protect them. The analysis in the document underscored that “one size does not fit all” and called into question whether an overarching solution was appropriate or effective to protect expressions of folklore. The Delegation suggested that the definition of “expressions of folklore” was too narrow because it left out categories such as religious expressions, foodways, costumes, and other traditional practices. The Delegation noted that the kinds of breaches of confidentiality mentioned in paragraph 36(ix) would violate codes of ethics for scholarly societies and such violations could result in professional censure. The Delegation offered the assistance of the American Folklife Center of the Library of Congress to the International Bureau in developing legal-technical assistance.

67. The Delegation of Colombia stated that, in view of the difficulties that arose with the protection of expressions of folklore under current copyright law, it seemed appropriate that the work going on in the Intergovernmental Committee should include evaluation and analysis of the content of the protection introduced by the 1982 Model Provisions for National Law on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions; such analysis should, in the Delegation’s opinion, result in an updating of those provisions in the light of the studies being conducted within the Committee. The Delegation of Colombia also drew attention to the importance to its country of the subject of folklore, which was why there was so much pressure to take advantage of the present valuable opportunity of working out practical international measures for the protection of expressions of folklore in the framework of a *suigeneris* regime based on the protection that could be afforded by the discipline of intellectual property.

68. The Delegation of the Russian Federation emphasized the need to clearly define the subject matter of protection before deciding what kind of protection to provide. Authentic folklore was linked with local artistic activities and communities. The notion of “indigenous” peoples was more linked to economic and political factors. Regional folklore was more generalized and related to the totality of features that made it different from other folklores. Russian folklore, for instance, had different features from Ukrainian folklore. Protection meant more than legal protection; it also included moral aspects. In Russia, the Law on Copyright and Related Rights, in place since 1993, included all the basic principles of the Berne Convention. A separate system for protecting expressions of folklore had not been adopted. Copyright in Russia did not necessarily protect folklore. Copyright and related rights provided protection to some cases regarding performers, although court interpretations of the Copyright Act had not yet been well developed. Russia had been rethinking its position on TK and folklore.

69. The Delegation of the Islamic Republic of Iran explained that the national law of Iran on the protection of copyright was adopted in 1969 but that it did not define folklore or provide adequate protection for expressions of folklore. A *suigeneris* system would be desirable to prevent unauthorized commercial exploitation of folklore by persons outside local

communities. The Delegation indicated that the definition of folklore should not be limited to the definition in the 1982 Model Provisions but should include all beliefs, technologies and indigenous knowledge. Prohibited methods of use or exploitation should not be limited to traditional copyright concepts of reproduction or communication to the public, but should also include manufacture and marketing of cultural products based on folklore. Centers should be formed to represent all cultures and communities to manage their rights. Amendments to the Iranian Industrial Property and Copyright law have been under consideration since 2001 and special attention had been paid to changes needed for the protection of folklore.

70. The Delegation of Bolivia explained that Bolivia was a multicultural Andean country that valued its diverse folklore, TK and genetic resources. A 1922 Bolivian copyright law contained a section relating to protection of folklore and traditional crafts but little actual experience existed with attempts to extend this protection to folklore. A better system of protection needed to be established that took both moral issues and time issues into account. The Delegation concluded by stating that it wished to learn from the experiences of other countries.

71. The Delegation of Canada indicated that the work of the Committee was important to them. The Delegation pointed out that the Canadian Constitution recognized three separate Aboriginal peoples, the Indians, the Inuit and the Metis, and that these three peoples themselves were further characterized by a significant degree of diversity, spread out over a vast geographical territory and continue to engage to varying degrees in traditional lifestyles and practices. The Delegation indicated that Canada was also a multicultural society, adding to the existing mosaic of Aboriginal traditions. It added that many of these new and old immigrant communities also continued to engage to varying degrees in the traditional practices of their ancestors. The Delegation stated that Canada's official policy was one of support for multiculturalism and respect for cultural diversity, both that of its Aboriginal communities and its numerous immigrant communities, and that this experiment with cultural diversity involved a struggle to balance between the protection and preservation of expressions of culture - traditional or otherwise - and that of being an open society which thrives and prospers on the free exchange of cultural experiences. The Delegation stated that understanding and exploiting the full potential of intellectual property rights as one tool to achieve the correct balance between creators and users of expressions of culture will contribute to Canada's ongoing experiment. The Delegation added in particular that the Committee's work will help better understand the contribution that intellectual property rights may make to the preservation of the cultural heritage of Canada's Aboriginal communities, recognized as one of the most vulnerable collections of communities in Canada. The Delegation of Canada expressed appreciation for the opportunity to make written comments on document WIPO/GRTKF/IC/4/3 and indicated it would encourage Canadian Aboriginal Peoples to provide their views. The Delegation noted definitional complexity in the document, and sometimes confusing use of phrases such as "traditional cultural expressions," "pre-existing cultural heritage," and "modern, evolving cultural heritage." The latter two concepts might warrant expanded treatment as they were helpful in assessing the relative usefulness of existing IPR systems and the need for *suigeneris* forms of protection. The Delegation identified five policy themes in WIPO/GRTKF/IC/4/3 that their preliminary comments were focused on:

- (i) whether pre-existing expressions of culture ought to receive some form of legal protection;

- (ii) whether there should be protection for expressions of folklore when they are in the public domain;
- (iii) whether customary laws can or should be reconciled with existing IPR laws;
- (iv) what term of protection should be given for expressions of culture; and
- (v) whether there should be protection for the “styles” of traditional cultural expression.

The Delegation elaborated that traditional IPRs struck a balance between a public interest in dissemination and some form of time-limited monopoly right. Protecting pre-existing cultural heritage would require a shift in the traditional policy balance and might result in a different balance between the goal of respecting and preserving cultural heritage and goals of sharing, openness and cultural diversity. Some sacred heritages in the public domain might warrant protection while other forms of cultural heritage may not.

72. The Delegation of Japan expressed appreciation for the need to protect folklore as a valuable product of wisdom. The Delegation noted that protection was available under IPRs and also under cultural heritage legislation. The combination of protection under these two systems was believed to provide a good degree of protection for expressions of folklore. It would therefore be important to first identify specifically where this combination did not provide protection. Then, Member States could consider whether or not creating additional protection would be justified. The Delegation also indicated that performers of folklore would enjoy some degree of protection under traditional copyright law that conform to the Berne Convention. The Delegation expressed support for each country adopting systems according to their needs.

73. The Delegation of Switzerland expressed support for the document WIPO/GRTKF/IC/4/3 and specifically for the proposals in paragraph 125. With a view to developing a model contractual clause in relation to expressions of folklore, as referred in paragraph 127, it would be logical to adopt the same approach as was followed for genetic resources, that is, first to develop a collection of existing clauses before elaborating model clauses in so as to take account of what was already in existence. The term “expressions of folklore” should be clarified, particularly relative to TK. In addition, technical and legal assistance needed to be made available to reinforce existing systems, as the Secretariat had pointed out. The Delegation expressed support for finding acceptable systems for protecting folklore.

74. The Delegation of India stated that because the IPR system did not adequately protect the custodians of TK and folklore, modern cultural and manufacturing industries could commercially exploit culturally-based products without the permission of the communities and without sharing the benefits. To ensure just benefit-sharing, such cultural knowledge must be documented, keeping in mind both defensive and positive protection. *Sui generis* systems were appropriate because existing IPRs were not enough. India did not have *sui generis* legislation to protect folklore but, the Delegation advised, was in the process of developing it.

75. The Delegation of Ghana expressed particular appreciation for document WIPO/GRTKF/IC/4/3, since the protection of expressions of folklore was an issue of particular importance to it, and it noted the examples of the misappropriation of Ghanaian

folklore that were cited in the document. The Delegation welcomed the attention to folklore being paid by the Committee which in its view was long overdue. Due to the non-availability of international protection, benefits from Ghana's expressions of folklore were not enuring to the benefit of indigenous Ghanaians. The Delegation, taking its cue from the statement made by the European Commission, provided information on Ghana's copyright law of 1985, which vests expressions of folklore in the Republic of Ghana and protects them in perpetuity. A National Folklore Board of Trustees can grant approval for uses of works of Ghanaian folklore. In conclusion, the Delegation associated itself with the statement made on behalf of the African Group, and reaffirmed its commitment to work for harmonizing the protection of expressions of folklore internationally.

76. The Delegation of Morocco expressed its appreciation for the pertinence of the matters discussed in document WIPO/GRTKF/IC/4/3 and for folklore being dealt with first by the Committee. The Delegation stated it would submit further comments on the document before the proposed deadline of March 31 2003. The Delegation reiterated, as had been said by the African Group at the third session, that existing IPRs offer protection for tradition-based creations of which the authors were known. But, in other circumstances a *suigeneris* system was necessary in which the State was the rights holder. It was necessary to understand better how the registration systems (such as for marks and designs) could be adapted to better protect expressions of folklore, and it was suggested that document WIPO/GRTKF/IC/4/3 be left open for comment even after March 31, 2003. The development of new model provisions for national laws using the 1982 Model Provisions as a starting point was very important for the establishment of effective systems of national, regional and international protection. The legal-technical assistance of WIPO was also crucial, the Delegation stated, as was studies on the economic impact of the commercial exploitation of tangible and intangible expressions of folklore, particularly artisanal products. In conclusion, the Delegation stated that Morocco was exploring the use of existing IPRs to protect expressions of folklore, such as copyright, marks and industrial designs especially in the handicrafts sector.

77. The Delegation of Peru stated that WIPO should continue the line of study as reflected in document WIPO/GRTKF/IC/4/3. Peru was considering a *suigeneris* system for folklore protection. The treatment of prior rights was a key issue to be resolved. The Delegation stated that existing IPRs should be used wherever possible.

78. The Delegation of Mexico stated that it would submit further comments on document WIPO/GRTKF/IC/4/3 before the deadline. In the interim, certain key questions could be identified, such as determining the identity of the rights holders. With reference to paragraph 148 of the document, there were examples of use of geographical indications to protect expressions of folklore in Mexico, which the Delegation would provide fuller information on in its written comments. In conclusion, the Delegation stated that in the next version of WIPO/GRTKF/IC/4/3 it would wish for more detail on the use of geographical indications to protect expressions of folklore.

79. The Delegation of Guatemala endorsed the comments made by the Delegation of Mexico. It specifically referred to Article 14 of their Copyright and Neighboring Rights law which stipulated that expressions of folklore were part of the cultural heritage of the country and that it would be the subject of a specific legislative act.

80. The Delegation of Egypt stated that the presentations made during the informal session on national and regional experiences on the legal protection of expressions of folklore were of great use for the Committee as a whole. They revealed the objective experiences of many

communities who had tried to apply, amend, or legislate new laws to deal with the specific problems being dealt with in the Committee. On the basis of document WIPO/GRTKF/IC/4/3 and the presentations (documents WIPO/GRTKF/IC/INF/2 to 5), the Delegation stated that there were two major challenges before the Committee. First, any discussion on the protection of folklore and TK should be based on well researched information which could be found in archives or databases which were in accordance with the scientific information in the area. Archives or databases were not established with a vague goal in mind but were established to protect their content. The content of these archives was not exhaustive. The Delegation stated that there was a need for these archives to remain open and for them to take into account the specific characteristics of any particular community. The Delegation urged Member States to establish such archives for without them it would be difficult to speak about any kind of protection of expressions of folklore. Secondly, it was necessary to find a *sui generis* system, as any attempt that set out to separate the various works of folklore and fit them into an pre-existing framework would never work. The Delegation stated that doing so could create additional problems which would be difficult to disentangle when it came to applying such a system. Referring to trademark law and the Paris Convention, the Delegation stated that, as an example, trademarks have to be registered to be protected. If a person wished to register a trademark in respect of an expression of folklore, and found that the mark had already been registered, the former registration could only be opposed within the time period set out in trademark law. Existing rules were therefore not necessarily suitable. The creations coming from all cultures were enormous and had contributed to human heritage at a local and universal scale. The Delegation stated that there was a need to recognize that the community of mankind had its own specific characteristics and in order to preserve its cultural contribution there was a need for a common understanding of these diverse expressions of folklore. Hence there was a need to recognize this at the local and regional level to ensure that a culture's tradition and heritage could be preserved for the further development of any specific community and for the enrichment of the international community. In conclusion, the Delegation stated that the Egyptian legislature, while it recognized the important need for the protection of folklore via a *sui generis* system, had set out to protect folklore and TK without waiting for it to be protected through the work of an intergovernmental forum and that was done via Law 82 of 2002 relating to the protection of IP which had recently been published. The Delegation drew the Committee's attention to Chapter 3 of the Law, relating to Copyright and Related Rights. The Delegation stated that Egypt had pursued a specific methodology for defining folklore which was in full conformity with international definitions and it was not done not by an exhaustive list but by examples. All forms, whether they were architectural or musical had been archived and the law protected the right of the creator and stipulated that expressions of folklore were the common property of the people. The law also stated that folklore needed to be promoted and protected. The law would be published in the coming weeks.

81. The Delegation of the European Commission indicated that document WIPO/GRTKF/IC/4/3 confirmed that diverse approaches had been adopted to protect expressions of folklore with varying degrees of success and satisfaction for indigenous communities. Considerable effort was needed on a national level to assist traditional communities through access to legal and technical information. The Delegation confirmed support by the European Commission for the work of the Committee in its attempts to find balanced and effective solutions agreeable to all.

82. The representative of the Andean Community stated that the next version of document WIPO/GRTKF/IC/4/3 should examine in greater detail the limitations inherent in the use of existing IPRs. The representative supported the statement made by the Delegation of

Colombia. There was a need to develop new model provisions for national laws based on updating and revising the 1982 Model Provisions so as to include aspects not protected at present. The indissoluble link between cultural and biological diversity could be explored further, as could the relation between folklore and technical TK. At the same time, the special needs relating to folklore should receive attention, for which a *suigeneris* system was necessary. The representative stated that the distinction between traditional culture and new expressions thereof, made in the document, was not clear to her.

83. The representative of OAPI stated that the document WIPO/GRTKF/IC/4/3 and the other materials made available by the Secretariat (such as the studies in document WIPO/GRTKF/STUDY/2, prepared by Ms. Janke) were very useful resources. OAPI agreed with the comments made by the delegation of Switzerland on paragraphs 125 and 127 of document WIPO/GRTKF/IC/4/3. The representative stated that the Committee ought to proceed with the two tasks not approved – but which had not been rejected as such – at the third session, particularly the development of model provisions for national laws using the 1982 Model Provision as a starting point. One could not rely solely on existing IPRs to protect expressions of folklore, and, agreeing with the delegation of Japan, the representative stated that cultural heritage legislation was also important. OAPI therefore proposed that following the conclusion of the commenting period for WIPO/GRTKF/IC/4/3, a draft of new model provisions for national laws be developed. Collaboration with UNESCO was also suggested. Finally, the representative stated that OAPI would consult with its Member States and submit further comments on WIPO/GRTKF/IC/4/3 before March 31, 2003.

84. The League of Arab States stated that expressions of folklore were a valuable expression of identity. A clear definition of expressions of folklore was needed. Each country had to collect and inventory its folklore, for which international cooperation was necessary. The representative stated that it was important to underline the importance of the protection of expressions of folklore, and to develop methodology for both their safeguarding and promotion. Finally, the representative supported the calls for documents to be made available in Arabic.

85. The representative of ARIPO recalled that during the first session of the Committee, ARIPO had informed the Committee that its Council of Ministers recognized the need for ARIPO to take initiatives on indigenous technologies and consequently mandated the Secretariat of ARIPO to deal with the problem of protection of indigenous knowledge and link its initiatives with those undertaken by WIPO through its active involvement in the WIPO activities in the field. At its Eighth Session held in Mangochi, Malawi from August 25 to 29, 2002, the Council of Ministers extended ARIPO's mandate to include copyright and related rights. The Council further decided that the mandate of ARIPO on initiatives regarding the protection of indigenous knowledge should be extended to cover TK, genetic resources and folklore. The representative of ARIPO stated that it was on this basis that it joined other Delegations in endorsing the extension of the period within which member states and organizations could submit comments to update the information contained in document WIPO/GRTKF/IC/4/3. Referring to paragraphs 108 and 109 of the document, the representative was of the opinion that the issue of sub-regional and regional protection was equally important and therefore should engage the attention of the Committee particularly in relation to national treatment or reciprocity for protecting foreign folkloric works. The representative further considered that TK and biodiversity, especially in Africa, were multicultural in nature and cut across national boundaries. Hence, it was important for the WIPO Secretariat to collect information on national experiences and on existing sub-regional and regional framework and arrangements for the benefit of the Committee. Issues such as

utilization of folklore expressions which formed part of the national heritage of several countries and disputes mechanisms should also be taken into account. The representative of ARIPO concluded by associating itself with the statement made by the Delegation of Algeria on behalf of the African group.

86. The representative of the Indian Movement *Tupaj Ama ru* stated that it spoke on behalf of indigenous peoples of the Andean Community. It referred to the work of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples which *inter alia* was waiting on specific opinions and proposals from the Committee before deciding on articles of the draft declaration relevant to IPRs. It stated that Member States had not been specific as to the protection of folklore, TK and cultural values and that indigenous peoples had had their rights violated and infringed and was awaiting for the application of a *suigeneris* law, international norms and standards, or the codification of international instruments. It added that indigenous peoples recognized the need for a specific instrument and an international legal framework which would be able to harmonize the international provisions, which already existed on these issues. It added that it had suggested to the Working Group that it draw up a legal instrument together with UNESCO, WIPO, and other international organizations working in this area. It stated that there was a legal vacuum which was damaging to expressions of folklore, traditions, languages and various other manifestations of culture which were disappearing as they were left to be exploited by the laws of the market. It added further that many countries had laws which could be used to protect TK, however, did not apply them. It stated further that there were manifestations of cultures which needed to be protected from the effects of globalization.

87. The representative of the Saami Council expressed concerns regarding decisions by WIPO's Program and Budget Committee and General Assembly not to fund indigenous participation in the work of the Committee and reiterated that the process was flawed until there was satisfactory and effective participation of indigenous peoples. The representative referred to footnote 4 of document WIPO/GRTKF/IC/4/3 and stated that the Saami Council used the term "traditional cultural expressions," as it felt that the term better reflected what the Committee was dealing with, and that it was a vital and inseparable part of indigenous peoples' cultures. The representative stated that the Saami Council supported the dual -track approach outlined in paragraph 10 of WIPO/GRTKF/IC/4/3, and agreed that there were examples where existing IPR mechanisms protected traditional cultural expressions, but added that there were also examples where traditional IP mechanisms fell short of providing protection and referred to paragraph 22 of document WIPO/GRTKF/IC/2/9. It added that these examples were in need of "defensive protection" as referred in paragraph 42(ii) of document WIPO/GRTKF/IC/4/3. The representative stressed that the reason for traditional IP rights not adequately protecting traditional cultural expressions was the intrinsic connection between such cultural expressions and the culture and the environment from which they originated. It added further that it was often impossible to identify the individual creators of traditional cultural expressions and that indigenous peoples regarded that as a substantial part of their traditional cultural expressions vested in the people collectively and often looked upon themselves as custodians thereof. It added that cultural heritage of indigenous peoples were both a collective and individual right, therefore the responsibility for its use and management were borne by the people as a whole in accordance with their customary laws and traditions. The representative stated that the Council recognized that existing IP rights could be used to protect collective traditional cultural expressions, it stressed that the fundamental difference called for two different systems of protection. It added that traditional IP rights mechanisms often did not provide the negative protection of indigenous cultural expressions as noted in paragraphs 34 and 181(iii) of document WIPO/GRTKF/IC/4/3. The representative referred

to the workshop arranged for the Nordic countries in cooperation with the government of Sweden, where the Saami Council had described the misuse of the Saami traditional dress which was the bearer of a number of signals and signified the identities of the wearer of the dress. It added that traditional IP mechanisms failed to provide protection for the Saami dress for mainly as the design was already in the public domain. The representative stated that an adequate system of protection would only be provided by a *sui generis* system of protection as stated in paragraph 88 of document WIPO/GRTKF/IC/4/3. The representative of the Saami Council urged the Member States to elaborate on a *sui generis* system which addressed the shortfalls of existing IP rights mechanisms, both on a national and an international level. The representative called upon certain countries to reconsider their position as referred to in paragraphs 90, 91 and footnote 61 of document WIPO/GRTKF/IC/4/3. It added that it was a well established principle under international law for indigenous peoples not to have their culture exploited and referred to Article 27 of the International Covenant on Civil and Political Rights (ICCPR). In conclusion the representative stressed the importance of a *sui generis* system to comply with the customary laws of the relevant indigenous peoples. It added that it did not understand why discussions on copyright were not necessarily in conflict with customary laws as mentioned in paragraphs 68 and 69 in document WIPO/GRTKF/IC/4/3 and disagreed with the statement: “(s)eparate IP rules for traditional and non-traditional creations may be difficult to sustain”, as mentioned in paragraph 104 of document WIPO/GRTKF/IC/4/3, as it felt that it was an obligation under international law specifically to recognize when a creation formed a part of a traditional indigenous peoples culture.

88. The representative of the American Folklore Society (AFS) stated that formal IP systems had important and widespread implications for the social, cultural, and economic well being of individuals and groups. The work of the Committee indicated a general concern for the need to develop IP regimes that were just, accessible, and sensitive to all groups and cultural forms. The representative recommended:

- (i) that WIPO recognize that present IP regimes served primarily to protect commercial interests and that current legal regimes were not designed to address cultural interests or integrity therefore not necessarily sensitive to the content, processes and holders of TK and folklore, and that WIPO should formulate protection systems that address such issues as cultural integrity, rights of attribution, communal ownership and re-creation, and perpetual protection;
- (ii) that WIPO recognize the existence of multiple systems of law and customs in human societies as current IP regimes constituted one system for protection of rights and that customary and traditional systems also existed to protect cultural rights and serve core cultural goals. It encouraged WIPO to formulate governmental and intergovernmental protection systems sensitive to the needs of both the cultural communities and the individual bearers of TK and culture;
- (iii) that WIPO strive to develop protection regimes for TK and folklore which was sensitive to the informal and formal protection regimes developed over time by indigenous peoples and TK communities. It added that national or international regimes should not usurp the legal and customary rights of control already developed by indigenous peoples and TK communities;
- (iv) that WIPO be cognizant of the potential negative consequences of global or international regulatory mechanisms such as the development of a world patent system on local systems;

- (v) that WIPO ensure continuity of rights of traditional and customary uses of TK and folklore by indigenous peoples and TK communities irrespective of national or international IP assignments such as patents of rights; and
- (vi) that WIPO support the communication of patent applications that include or were based upon TK or folklore to appropriate indigenous peoples and TK communities.

The representative added that reliance on presents systems of “prior art” or “prior knowledge” does not provide sufficient awareness of either the TK bases, or the consequences, of patent applications. With regard to prior consent, benefit sharing, and compensation stated that the rights of indigenous peoples and TK communities to their tangible and intangible resources was a major global issue. In this context, the representative recommended that any new mechanisms that attempted to place a “value” on TK and folklore should include provisions that recognized both tangible and intangible values; and that WIPO recognize that compensation issues reflect procedures and criteria acceptable to indigenous peoples and TK communities. It added that WIPO should support the development of systems and standards to allow indigenous peoples and TK communities to negotiate directly the commercial use of their TK and folklore; that doctrines covering “informed prior consent” should recognize the core right of indigenous peoples and TK communities to grant, or not grant, free, prior and informed consent; and that scholarly research of all kinds was essential to the increase of human knowledge. The representative added that WIPO should advocate for responsible scholarship consonant with the needs of indigenous peoples and TK communities. It added that such research should be carried out in partnership with indigenous peoples and TK communities, and it should be in accordance with institutional codes of ethics and professional practice.

89. The representative of the *Mejli* of the Crimean Tatar People noted that there were two basic approaches to culture in different societies, one was “one nation one culture” and the other was that societies were multicultural. The multicultural culture approach was more productive for the protection of expressions of folklore than other kinds of IP protection for indigenous people. The representative, referring to document WIPO/GRTKF/IC/4/3, suggested that there was a need to formulate special concerns on the preservation of indigenous culture where the state had the legal right to manage the use of their expressions of folklore by another state, by foreign citizens or abroad. The representative observed that custodians, creators, and producers had no right to manage their rights. This was not the theory as there were examples where state museums use and commercialize indigenous peoples handicrafts and the proceeds were used for the state budget. However, those peoples who had participated in the production of these folklore objects, did not share in the benefits and were not given funds from the state budget for the preservation and further development of their cultural heritage. It was therefore important to include special provisions for involving indigenous custodians and creators in the process of management and sharing of benefits deriving from the use of their folklore. Special legal measures should also be established for those expressions of folklore that are held by smaller indigenous groups within a state. The Delegation also referred to geographical indications and suggested that where geographical names of a region form or formed part of a peoples’ folklore, TK and cultural heritage, they should be restored and protected.

90. The Secretariat provided information in response to the comments made on document WIPO/GRTKF/IC/4/3, noting that further comments would be provided before the proposed deadline of March 31, 2003, and where possible before February 28, 2003. The study would

maintain a multi-faceted approach to the protection of traditional cultural expressions, considering existing IPRs and *sui generis* measures and systems. It was noted that comprehensive protection for traditional cultural expressions would not be found only within a copyright approach, and other systems of protection were included in the study. A number of delegations had highlighted the importance of cultural heritage legislation and that non-legal measures should also be taken into account (also discussed in WIPO/GRTKF/IC/3/10). The offers of support and requests for legal-technical cooperation program were noted for follow-up. The Secretariat clarified that WIPO/GRTKF/IC/4/4 was not intended to suggest that the protection of performers of expressions of folklore in the WPPT provided complete protection for performed expressions of folklore, but that in surveying the usefulness of existing IPRs, the WPPT should be taken into account. The Secretariat clarified that national and sub-regional workshops organized responded to the need expressed by governmental and non-governmental stakeholders during the fact-finding missions in 1998 and 1999, and that they now played a valuable role in facilitating discussion of the Committee's program of issues at the national and sub-regional levels and in further enhancing the participation of Indigenous peoples and traditional communities in the overall work of the Committee.

Conclusions

91. Upon conclusion of the Chair and the Committee's decision, that:

(i) the comments received on document WIPO/GRTKF/IC/4/3 and the material provided in the panel presentations on the legal protection of folklore would be taken into account in future work on this issue;

(ii) further comments and observations on document WIPO/GRTKF/IC/4/3 should be sent to the Secretariat as soon as possible, and by March 31, 2003 at the latest; and

(iii) further updates to the report on technical cooperation concerning legal protection of folklore, supplementing document WIPO/GRTKF/IC/4/4, would be provided to the Committee at its fifth session.

92. As regards the issues of updating the Model Provisions of 1982 and of an international *sui generis* system for protection of folklore, as referred to by several Delegations, the Chair noted that at the third session there was no consensus about engaging in such work at this point in time, primarily because Delegations felt that not enough information was available about how national protection systems had worked. The Chair suggested that no decision on these issues be taken at this Session but that the Committee should revert to the issues of legislative guidance in the form of model provisions and of elements of a possible international *sui generis* system for the protection of folklore at its fifth session when an updated version of document WIPO/GRTKF/IC/4/3 had been available for some time. The Committee's decision.

AGENDA ITEM 5: TRADITIONAL KNOWLEDGE

Intellectual property toolkit for TK documentation

93. At the invitation of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/4/5.

94. The Delegation of Venezuela reported on a seminar on TK that had recently been organized by the Ministry of Science and Technology, the Ministry of Production and Trade, the Intellectual Property Office and the Ministry of Foreign Affairs in the Venezuelan part of the Amazon, and thanked WIPO for its active participation in this process. The Delegation expressed concern that many documentation processes appeared to concentrate on the defensive protection of TK; yet this was only one way to protect TK. Some documentation processes did not seek any, or any adequate, prior informed consent of the knowledge holders. Accordingly, Venezuela considered that one effective way to preserve TK and associated biodiversity was through the development of broad legal systems that would guarantee the rights of indigenous peoples, Afro-American communities and local communities, and would include programs to improve their living standards, in line with Articles 120 and 124 of the Venezuelan Constitution. Many indigenous communities were very concerned about the issue of documentation of their TK, and Venezuela had therefore started a process of information meetings on this subject. Further, Venezuela preferred to maintain a cautious position in relation to the dissemination of documented TK, in particular as to whether or not such knowledge should be placed on the world wide web. Documentations should not under any circumstances abolish the right of knowledge holder to submit complaints, or to require compensation. The Delegation set out specific points for inclusion in the revised version of document WIPO/GRTKF/IC/4/5. It suggested two versions of the toolkit be prepared: a full text version, and a shorter, simpler text containing non-legal language that could be widely distributed to the general public. The Delegation noted that it was not necessary to define TK, and that it would be sufficient for the toolkit to state the characteristic features of TK. It sought clarification as to why both biological and genetic resources were mentioned in the toolkit, since, to date, the Committee had concentrated its work on genetic resources alone. The Delegation said the toolkit should empower communities to decide for themselves whether or not they wished to document their knowledge and, if so, the IP implications of such documentation. Further, the Delegation hoped that other Regional Groups, such as GRULAC, would be given the opportunity to circulate working documents to the Committee for discussion, as had been done as a precedent by Asian Group in relation to document WIPO/GRTKF/IC/4/14.

95. The Delegation of Algeria, speaking on behalf of the African Group, reaffirmed the position of that group that a mandatory, international *suigeneris* system should be established to protect TK, which would use existing national experience to identify the subject matter of the *suigeneris* protection, the type of protection desired, and the rights to be granted. Such a system would need to be flexible in order to take into account the inherent rights, practices and customary protocol of TK and TK holders, and should address both folklore and other aspects of TK. Such a system could be used to fight against the misappropriation and misuse of TK. The Delegation agreed with the view expressed by the Delegation of Venezuela that it was not necessary to define TK in order to develop a legal system of protection for TK, and that, at this stage, it would be sufficient to identify the characteristic features of TK. It supported the drawing up of TK related documentation to be included in the minimum documentation list of the Patent Cooperation Treaty (PCT), and supported the use of databases of TK as a tool to supplement a *suigeneris* system of protection. The Delegation favored the use of the toolkit to manage the IP aspects of TK, including fixation, and stated that such a toolkit could be used to provide a basis for in-depth discussion at the fifth session of the Committee. The Delegation concluded by expressing its interest in the technical proposal of the Asian Group as put forward in document WIPO/GRTKF/IC/4/14. Such a proposal should be carefully considered as, taking into account the African cultural context, the development of databases such as those already in existence in India and China could

make a major contribution to the African region. It requested the development of enhanced African technical expertise in this area and stated that the African group looked forward to further consideration, at a national and regional level, of the proposals put forward by the Secretariat, which clearly deserved careful consideration.

96. The Delegation of Peru noted that documentation of TK was a useful tool both for the defensive and the positive protection of TK. However it should not constitute the granting of rights. The toolkit made a valuable contribution to the process of documentation. Before starting any documentation process, the prior informed consent of the TK holder(s) must, of course, be obtained and steps must be taken to ensure the continued secrecy of TK that had not previously been disclosed. In any case, no knowledge should be disclosed unless the prior informed consent of the TK holder(s) has been obtained, as was fully recognized in document WIPO/GRTKF/IC/4/5. The Delegation concluded by highlighting the need for on-going technical assistance by WIPO in this area.

97. The Delegation of Mexico agreed with the draft outline of document WIPO/GRTKF/IC/4/5, in particular with the clearly stated objectives of the toolkit, and the explanation given of both the benefits and the drawbacks of documentation. Such information would allow TK holders to make informed decisions prior to documentation of their TK. However, the Delegation would also like the toolkit to address the options for TK holders where their knowledge had already been published without the prior informed consent of the original TK holder(s). At present, Mexico was exploring the establishment of a database of public domain TK to facilitate the work of patent examiners. It would be most useful if the toolkit could analyze this option, including its advantages and drawbacks. The Delegation proposed that there be more information on the identification of stakeholders and on community consultations, in particular information from other countries who had practical experience in this difficult area, such as whether there should be a right of veto, or a right to vote, in those cases where the same knowledge belonged to more than one community? Further, in order to fully inform TK holders, the toolkit should state that, at present, TK was not protected in the international arena. The Delegation ended by saying that, having taken part in the meeting of Megadiverse Countries in Cuzco, Peru, it interpreted the findings of the meeting to mean that it was agreed that analytical work and the proposal of initiatives regarding the protection of genetic resources and TK would continue through the setting up of an *ad hoc* group.

98. The Delegation of New Zealand stated that it supported the development of the toolkit, and the suggested consultation process. It noted that the initiative would provide a valuable and practical resource for indigenous and local communities, including Maori. Accordingly, work on the toolkit, along with the Practical Guide on the Legal Protection of Traditional Cultural Expressions, should be prioritized by the Secretariat. The completion of these initiatives would also enhance the Committee's upcoming report to the WIPO General Assemblies.

99. The Delegation of the United States of America stated that it supported the development of the toolkit, since it could be expected to provide considerable information to TK holders that might not be available elsewhere. Along with the Delegation of New Zealand, it would encourage the Secretariat to give priority to this program. With respect to the draft outline set out in the Annex to document WIPO/GRTKF/IC/4/5, the Delegation strongly supported the promotion of documentation of TK. It stated that, as the demonstrations given by the Tulalip Tribe and the Delegations of China and India had shown at the third session of the Committee, a database can help to preserve TK for the community itself, and can also help to

establish prior art. The Delegation encouraged a revision of the Annex to share these positive experiences. It also suggested that, given the experience of India, where much TK had previously been disclosed in Sanskrit, a language not accessible to patent examiners or scientists worldwide, the toolkit might address the issues of “previously undisclosed” TK, as opposed to TK that was merely “undisclosed”. The Delegation concluded that the revised toolkit must remain balanced in its outlook, and emphasized that without documentation of TK, professional researchers may have no means by which they could decide whether or not to carry out research, and that it may be difficult for patent examiners to properly examine, and where appropriate, reject patent applications based on TK.

100. The Delegation of Zambia began its intervention by thanking the Secretariat for facilitating the participation of a Zambian traditional leader in the fourth session of the Committee; namely, a senior chieftainess of the Basoli People of Zambia Lusaka province. It stated that, since, in Africa, traditional leaders tended to be the custodians of the type of TK under discussion in the Committee, it hoped that other national delegations would give the same opportunity to other traditional leaders in the future. The Delegation continued by endorsing the intervention by Algeria, on behalf of the African Group and affirming its belief that existing systems of IP were not adequate to protect TK and that such protection could only be properly afforded by the development of an international *suigeneris* system of protection for TK. As to the toolkit itself, the Delegation stated that the need for an IP management toolkit could not be over-emphasized. However, the Committee needed to better identify the proposed beneficiaries of the toolkit and ensure that the toolkit was developed with the full participation of the custodians of TK, thereby ensuring their ownership of the toolkit. The Delegation stated that the toolkit should be as user-friendly as possible. For instance, the use of legal languages should be discouraged, and considerations should be given to translating the toolkit into relevant local languages. The Delegation concluded by emphasizing that, in the future, traditional leaders must be given an opportunity to speak for themselves at the Committee.

101. The Delegation of India noted that the proposed toolkit would demystify the issue of documentation, in particular, the fact that documentation did not necessarily mean disclosure of TK. Disclosure would depend upon the objectives behind the documentation process. The Delegation stated that, in its view, the title of the toolkit should be extended to address not only TK, but also associated biological and genetic resources. The Delegation proceeded to make several specific points. As to format, this must depend upon the subject matter being documented. The format for documentation of TK might be mainly textual, whereas the format for documentation of associated biological and genetic resources may need to be a mixture of text and graphics. As to language, the Delegation emphasized that the toolkit would need to be translated into local languages. As to classification, the Delegation noted that although mention had already been made of the IPC Union, this was currently limited to classification of traditional medicinal plants. However, all aspects of TK would need to be classified in the future. As to ownership, in particular of associated biological and genetic resources, there needed to be consideration in the toolkit of the fact that there might be an overlap between nations or regions, which may lead to dispute in the future. Finally, the Delegation noted that the toolkit needed to consider the issue of selective disclosure of TK, and that the toolkit should be developed and disseminated via an extensive public outreach program.

102. The Delegation of Canada reaffirmed its strong support for the development of the toolkit, underscoring the caution with which many Member States and TK holders approached the subject of documenting TK. The choice to document TK needed to be an

informed one, and this initiative, if effectively implemented, would contribute significantly to ensuring that TK holders were able to make more informed choices. However, as the Secretariat pointed out in the document, the choice was not simply a binary one about whether or not to but rather how to document TK, and to what use it would be put. Many Canadian TK holders had expressed deep suspicion of the documentation process, seeing it as simply an attempt to place TK in the public domain, where it could be more readily accessible for uses which they might deem inappropriate. Focussing only on a very open and public form of documentation, however, ran the risk of losing sight of the many benefits that more controlled forms of documentation might provide to TK holders. The key, therefore as had been expressed to the Delegation by Canadian Aboriginal communities was one of control: control over the decision on whether to document TK; control over defining the objective of the community in pursuing documentation efforts (whether that was to make already publicly available TK more widely available for use in prior art searches, or to secretly document the often sacred knowledge of elders to prevent it from being lost); control over what kind of information was documented (whether it be detailed TK about medicinal uses for various genetic resources, or simply the names, contact information, and areas of knowledge of elders in a given community); and finally, control over who accessed the final product and to what use the knowledge would be put. In short, documentation could be a neutral tool at the disposal of TK holders to pursue various objectives that they may define themselves, as long as they were clear on the various implications of doing so, in particular those related to IP. That was why this initiative was so valuable, but that was also why it was critical that it be implemented effectively, the Delegation stated. In addition to these general comments, the Delegation had a number of specific comments largely dealing with accessibility. First, as the toolkit was meant to be used by communities whom might not always be familiar with IPRs, it might be helpful to add to the toolkit's outline a short introductory segment interviewing the origins and functions of IP law. Such a segment would give the toolkit some context and perspectives for users, in particular TK holders. The Delegation also stressed the importance of the toolkit remaining user-friendly for its intended audience. Furthermore, as the final text was developed, a participatory approach should be followed to incorporate the experiential learning of its pilot versions. It was also suggested that a short and less complex "users" handbook be developed to complement the toolkit itself, which could be provided directly to TK holders. The Delegation further requested the Secretariat to consider the simultaneous development of a plan for the toolkit's distribution such that the toolkit would be accessible to all TK holders. More specifically, the Delegation was interested in seeing a concrete plan for mechanisms which might facilitate delivery of the toolkit, including an identification of the intended audience. On the final question of further consultations, the Secretariat was invited to continue to consult with affected communities, including among others accredited NGO and ad hoc observers. The Delegation further requested that if another version of the toolkit was distributed prior to the fifth session, that Canada be provided an opportunity to review it. In closing, the Delegation stated that it looked forward to working with the Secretariat, with other members of the Committee, and with Canada's Canadian Aboriginal communities to ensure that this initiative achieved its full potential.

103. The Delegation of Brazil advised of certain concerns expressed during internal consultations held on document WIPO/GRTKF/IC/4/5. Certain indigenous, traditional and local communities in Brazil might be interested in commercializing their TK and preventing others from using it, and in this case, databases might be an adequate tool, provided that PIC was always respected and that the database did not facilitate biopiracy. However, there were many communities which had little contact with the globalized world and they might not be interested in any commercialization or registration of their TK. They were not convinced that databases both preserved their TK and prevented third parties from using it. The values of

such groups were not market-oriented. Therefore, in Brazil there was general skepticism when discussing databases. The Delegation emphasized its position that, first, databases should be a mechanism for declaring existing rights, not for constituting rights, second, that databases should be planned and managed primarily at the national level, and, third, that Brazil acknowledged the usefulness of a discussion on the advantages and disadvantages of using databases for defensive purposes. There was no agreement however, it was stated, that databases were the most efficient way to prevent biopiracy or the misappropriation of TK more generally. In this regard, Brazil and other developing countries had proposed in the context of the Doha Development Round that Article 27.3 (b) of the WTO TRIPS Agreement be amended. The proposal provided for a different approach to the prevention of misappropriation based on CBD principles, namely identification and disclosure of origin of GR and associated TK, PIC and benefit sharing. In this regard, the Delegation did not agree with the par. 4.2 of the Annex to the document, which suggested that databases would be the most effective means of providing such protection. Finally, the Delegation joined Venezuela in requesting clarification on the use of the term biological resources as opposed to genetic resources.

104. The Delegation of Argentina agreed with the objectives established by the Secretariat in document WIPO/GRTKF/IC/4/5 and that it was not appropriate to define TK. The Delegation requested clarification of the distinction, as referred to in paragraphs 6 and 7, between TK documentation and entry of TK into the public domain. The Delegation stated that IPRs acquired following registration were based upon the disclosure of the protected subject matter. Therefore, if exclusive rights were to be granted and the TK was to be kept confidential, third parties would not know what was in the public domain. They would not be able to oppose applications for protection. Non-disclosure of the TK could be disadvantageous.

105. The Delegation of the Republic of Korea stated that whatever might be the aims of TK documentation, it was important to record TK in a tangible format. The Delegation fully supported the development of a TK documentation toolkit, as well as a database toolkit as suggested in WIPO/GRTKF/IC/4/5.

106. The Delegation of Australia welcomed the draft toolkit and looked forward to the outcome of further consultation to be undertaken and refinements to the proposed toolkit which would result. The Delegation stated that preliminary discussion with Indigenous representatives in Australia had highlighted the belief that the toolkit would be a useful vehicle to take forward domestic consultations and provide a framework for subsequent contributions to the international debate on TK. Australia therefore maintained its strong support for the further development of the toolkit.

107. The Delegation of Switzerland stated that the proposed structure of the toolkit appeared very useful. The Delegation stressed the importance of continuing close cooperation with concerned stakeholders, especially indigenous and local communities. The final version of the toolkit would be an excellent basis for the development of a collection of TK. Finally, the Delegation stated that it would be pleased to see the toolkit finalized at the next session of the Committee.

108. The Delegation of Panama affirmed, as other delegations had pointed out, that the document raised a wider range of questions for TK holders. The draft toolkit met the need for a practical tool. The Delegation attached great importance to the future understanding on the

document that public domain TK would be protected and that it should rather have the effect of positive protection.

109. The Delegation of Turkey stated that document WIPO/GRTKF/IC/4/5 was very comprehensive. The Delegation stated that the documents should encompass new systems of protection and not only IPRs, taking into account the collectivity of TK. The toolkit should not just be a technical guide, and it should constantly develop and evolve. TK documentation systems should be under State control. With respect to the current draft of the toolkit, there was room for simplification and the addition of more information. The proposal by Zambia for the toolkit to be available in national languages was supported. It was important to know how TK could be accessed, and who had authority to grant access, especially with respect to confidential TK. It was also important to know when disclosure was possible. TK should be carefully documented taking into account circumstances in each country. The Delegation shared the view of a number of countries calling for a *suigeneris* system and for the observance of PIC. The Delegation added that there is a clear need for a Clearing House Mechanism for the global information exchange on IP-related TK issues. Thus, it invited the Secretariat to search for possibilities of establishing such a mechanism under WIPO. It also identified the need for an outreach program, as proposed by the Delegation of India, as a key factor for information gathering and proposed that it should be discussed at the next session of the Committee. Finally, the Delegation noted that a Roster of Experts was an important tool that could be of help to developing countries and proposed that the Secretariat should examine possibilities of developing such a list of experts.

110. The Delegation of the Russian Federation stated that the draft toolkit was a good basis, but that the provisions on objectives and recommendations on the different options needed to be convincing. The document reflects rather fully the problems which the TK holders might have when making decisions regarding the forms of TK protection. The efficiency of the Toolkit use will depend on the extent to which the principles of the Toolkit are clearly and comprehensively exposed, especially regarding the targets of documentation. It concerns also the options of TK protection.

111. The Delegation of Kenya supported the statement made by the African Group in support of the toolkit. The toolkit was a good step towards ensuring that the patenting process would not interfere negatively with the practice of TK.

112. The Delegation of Japan stated that it was very important for TK holders to know the meaning of TK documentation as this would enable them to understand that the existing IP system was sufficiently working for the protection of their rights from third parties by making full use of it. To this end, the Delegation welcomed the toolkit. The Delegation strongly supported this project and encouraged the Secretariat to develop the draft further, based on the following points. The toolkit should be operative, functional and workable taking into account the user's needs. It should also be simple and user-friendly. The Delegation suggested using illustrations or animation to facilitate understanding of the toolkit, although this should be done within budgetary restrictions. Finally, the making available of the toolkit on the website and the receiving of comments from actual users and stakeholders was supported.

113. The Delegation of South Africa welcomed the draft toolkit, noting that the use of indigenous languages was central, as had been pointed out by Zambia, Turkey and India and many others, and Member States would need to play a role in this regard. In order for community members to be able to carefully consider all the options and be aware of all

relevant developments, extensive awareness raising campaigns for communities should be undertaken by Member States. Not all States used the term “traditional knowledge,” and this should be taken into account. The characteristics of TK could be included in the toolkit. The Delegation noted that the toolkit referred to codes of conduct and ethical guidelines, which were important in the absence of national legislation to guide both TK holders and researchers. TK holders were at their most vulnerable at the point of documentation and therefore particular caution was needed at that time. The Delegation of South Africa agreed with the statement by Zambia regarding the importance of traditional leaders, and added traditional healers, weavers, beadwork people and others. Finally, the Delegation supported the African Group’s statement.

114. The representative of ARIPO advised that ARIPO’s Council of Ministers had resolved that ARIPOs should carry out a study on the feasibility of establishing, in cooperation with its Member States, a TK database. This decision was in line with the African Group’s position papers submitted to the third session of the Committee, and the representative summarized portions of that paper dealing with TK documentation. The objective of the ARIPO sub-regional database was to establish TK documentation as a searchable prior art tool for the substantive examination of industrial property titles. ARIPO was in full support of the development of the toolkit and hoped it would provide the necessary recommendations on the risks and safeguards relevant to TK documentation. The representative stated that ARIPO would be willing to use the pilot version of the toolkit as a test case in the development of its database. In order for all stakeholders to be involved in the development of the pilot version, regional consultations and awareness raisings should be pursued, and ARIPO would be willing to cooperate with WIPO in these activities. ARIPO supported the preparation of the draft database toolkit proposed in document WIPO/GRTKF/IC/4/5. In order to integrate TK documentation into existing search tools and facilitate electronic exchange and dissemination of standardized documentation, it was necessary for WIPO to speed up work on the TK resource classification. ARIPO was hopeful that the development of databases and registries would not serve as an obstacle to the possible development of an internationally binding *sui generis* system. ARIPO also associated itself with the statement made on behalf of the African group.

115. The representative of the Saami Council supported the preparation of a toolkit for TK documentation. This should however take place in close cooperation with indigenous peoples, and the representative requested clarification on how this cooperation could take place. Second, she stated that the toolkit should make clear that IPRs were not the only rights that indigenous peoples possessed with regard to their TK.

116. The representative of INADEV stated that the Committee’s decision at its third session not to discuss the possible adoption of a norm-setting international instrument was regrettable, and as a result discussions were being diverted to national level measures such as the documentation toolkit. While national measures were useful, international and/or regional measures were needed. Referring to the panel discussion that had followed the folklore presentations, the representative gave examples which demonstrated that without an effective international system of protection, it was not possible for a country to protect its traditional cultural expressions abroad using current IP treaties and approaches. As it appeared that it would not be possible to adopt a binding international instrument in WIPO, INADEV believed it appropriate that the issue of TK protection be referred to other forums such as the WTO where the issue could be discussed as part of trade negotiations with the source countries of TK bargaining with user countries for the protection of TK on the basis of the principle of reciprocity.

117. The representative of AAC, speaking also on behalf of the Assembly of First Nations, the Inuit Circumpolar Conference and the *Métis* National Council, stressed the need for regional capacity building frameworks for indigenous communities. The Committee was urged to explore the skills and capacity that will be required by indigenous communities effectively to use such a toolkit. The representative also highlighted the need for the recognition of customary law in TK protection. Finally, the WIPO Secretariat was encouraged to follow up on its fact-finding mission and revisit Canada to meet with indigenous groups.

118. The Secretariat informed the Committee that in developing a draft toolkit based on the suggested outline, it would seek to follow the many comments that have been made on the toolkit's substance, structure and overall approach, and the process for its further development. The toolkit would not deal in a definitive way with the definition of TK and the role of customary law, since these were substantive issues being addressed separately by the Committee and as a practical resource the toolkit would not pre-empt this discussion, but it would indicate the general characteristics of TK. The suggestion of having a brief version of the toolkit was noted and had been foreshadowed in the draft before the Committee. The Secretariat would do its utmost to consult widely on the draft in the preparation of the full draft for the Committee's next session. The support for a "database toolkit" was also noted, and was relevant to the discussion of technical cooperation and coordination of TK databases, for instance in the context of the Asian Group proposal in document WIPO/GRTKF/IC/4/14.

Conclusions

119. The Chair noted that the TK documentation toolkit was intended to be a practical tool and not to replace other discussions on the legal protection of TK, and commented that there had been support for the development of a complementary database toolkit. The Chair then drew the conclusions, which were agreed by the Committee, that:

- (i) there was unanimous support for further work on this project, and some delegations had mentioned it as a priority;
- (ii) the remarks made during the session would be taken into account in future development of the draft toolkit;
- (iii) the Committee encouraged the Secretariat to have extensive consultations with not only Member States but also and particularly with TK custodians;
- (iv) an updated document, in the form of a draft toolkit, would be prepared for consideration by the Committee at its fifth session; and
- (v) while the toolkit was an important project, it was not the sole important task or only priority for the Committee.

Technical Proposal on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources

120. The Delegation of India, on behalf of the Asian Group, submitted and commented on a document entitled "Technical Proposal on Databases and Registries of Traditional

Knowledge and Biological/Genetic Resources” (WIPO/GRTKF/IC/4/14). The technical specifications and standards for databases and registries were divided into three categories: content and resource identification standards, technological standards and security standards. These standards need additional work but complement the toolkit. The standards were developed in a workshop attended by experts with experience on development of TK databases. Citing paragraph 3.2 on page 4 of the document, the Delegation highlighted the need for technical aspects of databases to be considered in conjunction with related legal questions such as relationships between databases and TK and the possibility of creating a presumption of ownership on the part of TK owners.

121. The Delegation of Germany welcomed the document, but reserved its comments because the document contained detailed proposals on which it had no had an opportunity to consult with its capital.

122. The Delegation of Venezuela thanked the Asian group for its initiative. The Delegation also had no had an opportunity to consult with its capital on the subject document but did take note of the document. In general, the Delegation believed the subject document was interesting and agreed with much of its contents. With regard to the Annex, the Delegation urged that the concerns of traditional communities be considered with regard to the risks associated with databases. The Delegation asked what was meant in paragraph 3.1 by the reference to creating a presumption of property or ownership. Recommendations contained in paragraph 3.2 were supported by the Delegation of Venezuela. Working with FAO and other organizations in this area was also supported. The Delegation expressed a need for clarification of paragraph III.1.3 of the subject document relative to the relationship between databases on genetic resources, agriculture and food. The Delegation also stressed the need for sound security standards. The Delegation requested additional information about WIPO promoting an alternative dispute resolution (ADR) mechanism and requested additional explanation on that topic.

123. The Delegation of Norway supported the Chairman’s preliminary conclusions and expressed need for further studies of the subject document.

124. The Secretariat, in the response to the issue of ADR, raised by the Delegation of Venezuela, observed that ADR procedures were voluntary and consensual and did not create any obligatory or compulsory jurisdiction. ADR is an alternative to litigation that may be agreed to by the parties to a dispute. This voluntary mechanism is pertinent to the current debate as it offers a procedure and forum that is neutral in relation to jurisdiction, culture and tradition. ADR also offers a single procedure and forum, which can be a significant advantage in the context of a dispute over TK, which often involves multiple jurisdictions. Moreover, the parties can control the nature and costs of proceedings. Dispute resolution panels may be formed which have expertise pertinent to the subject TK which would not otherwise be available.

Conclusions

125. The Chair concluded and the Committee decided that:

- (i) The proposal of the Asian Group and the update on technical cooperation on TK databases and the comments received were noted and would be taken into account in future work;

(ii) The Committee reaffirmed its agreement at its third session that a questionnaire be prepared and disseminated on the policy objectives, functional requirements and technical specifications of TK-related databases, in accordance with the proposal in paragraph 112 of WIPO/GRTKF/IC/3/6; and

(iii) This issue would remain on the agenda for the fifth session, including the proposal of the Asian Group set out in paragraph 3.2 of document WIPO/GRTKF/IC/4/14.

Existing Intellectual Property Protection of Traditional Knowledge

126. At the request of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/4/7, noting also the questionnaire, WIPO/GRTKF/IC/Q.1, which formed the basis of input to the Secretariat on national experiences with existing means of IP protection of TK. It advised of additional materials sincerely received by the Secretariat.

127. The Delegation of Peru advised that on 10 August 2002, the Government of Peru had published a new law (Law No. 7,811) that promoted respect for, and protection and preservation of, the collective knowledge of indigenous peoples related to biological resources. The legislation also addressed the fair and equitable sharing of benefits associated with this knowledge and sought to guarantee that such knowledge was only used with the prior informed consent of the relevant indigenous people. The Delegation noted that the purpose behind this legislation was to avoid biopiracy and, in particular, the wrongful granting of patents based on this knowledge. Under the legislation, the Government of Peru would create three registers of TK to preserve and safeguard the collective knowledge of indigenous populations, and would ensure that the Peruvian Competent National Authority had a copy of one of these registers, which would enable it to defend the interests of indigenous peoples in relation to their collective knowledge. Under the legislation, a fund would also be created to share and distribute the collective benefits derived from indigenous knowledge. This fund would be administered, so far as was possible, by using the traditional mechanisms of indigenous people. The Delegation further noted that the TK holders would be able to grant licences to third parties and that it would be obligatory to register all such contractual agreements with the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), the Competent Authority, who would ensure that the licences were in accordance with Article 27 of the new legislation. There was also provision under the new legislation for dispute resolution procedures and sanctions for infringement. The Delegation of Peru concluded by stating that it intended to have the new legislation translated into both English and French for the fifth session of the Committee, and offered to make a more detailed presentation on the new legislation to the Committee at its fifth session.

128. The Delegation of the United States of America stated that it supported the compilation of national experiences on the protection and preservation of TK using existing IP laws, especially since such a compilation could shed light on whether there was a real need for international norm setting with respect to the protection of TK. It noted that where Member States had domestic concerns, these seemed to be addressed at the national level, as had just been described by the Delegation of Peru. Further, only one of the respondents to document WIPO/GRTKF/IC/4/7 had indicated that it had in place some kind of *suigeneris* legal protection for TK; none of the other respondents either had such protection in place, or indicated that they planned to adopt such a system of TK protection. The Delegation

therefore encouraged those delegations that had expressed an interest in the positive, *sui generis* protection of TK to complete document WIPO/GRTKF/IC/Q.1 as soon as possible, and to share their national legislative experiences with the Committee.

129. The Delegation of Japan stated that document WIPO/GRTKF/IC/4/7 was an extremely useful tool, since not only did it enable a comprehensive analysis of the extent to which existing national systems of IP might be used to protect and preserve TK, but it was also a fundamental step in the process of studying possibilities for the *sui generis* protection of TK. The Delegation therefore encouraged the fact-finding task underlying documents WIPO/GRTKF/IC/3/7 and WIPO/GRTKF/IC/4/7 be completed as soon as possible, and recommended that document WIPO/GRTKF/IC/4/7 be updated for the fifth session of the Committee.

Conclusions

130. The Chair concluded that the Committee had taken note of the contents of document WIPO/GRTKF/IC/4/7 and of the statements made. He encouraged Member States to continue to provide information to the Secretariat about new developments in this area.

Elements of a sui generis system for the protection of TK

131. At the request of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/4/8, noting also document WIPO/GRTKF/IC/3/9.

132. The Delegation of Australia stated that it strongly supported the preparation of a composite technical study by the Secretariat for the fifth session of the Committee since this would enable the Committee to have an in-depth look at the issues involved, in particular those that would be highlighted by an analysis of the definitions of TK subject matter.

133. The Delegation of Norway stated that it agreed with document WIPO/GRTKF/IC/4/8, with the following additional observations: some of the arguments for current IP protection systems could also be used to illustrate the need for TK protection; as the patents system did not need a precise definition of invention, similarly there may be a need for a precise definition of TK; if legal TK rights were to be established, as with other IP rights, there must also be some exceptions; IP protection of TK did not necessarily imply active commercialization of TK; it could also be used as a measure against unauthorized commercialization; and, finally, the holistic character of TK did not necessarily mean that elements of TK could not enjoy a measure of IP protection. The Delegations supported the preparation of a composite report and noted that, as part of this process, the Committee should consider more closely the extent to which improved defensive measures for TK protection, such as measures to improve searchable prior art and issues related to the disclosure of origin of TK and genetic resources, might address the concerns that have led many to suggest the development of a new, positive *sui generis* system for the protection of TK at the international level. Work on such improved defensive measures was important, since even if there was agreement as to the need for a positive *sui generis* system, such a system would take time to develop, and effective systems of defensive protection had a role to play in the interim. Further, if there was a need for a *sui generis* system of protection for TK at the international level, then the Committee might need to consider whether it would be appropriate to have a

single, unified system for TK protection across all sectors, or whether a sector -by sector analysis should be undertaken to develop sectorally specific *suigeneris* systems of TK protection. The Delegation cited the development of *suigeneris* systems to protect plant varieties by a number of countries, and referred to the recently concluded International Treaty on Plant Genetic Resources for Food and Agriculture. It noted that such systems might not be appropriate for the protection of traditional medicine, and concluded by stating that there should be further analysis before an informed decision could be made as to the need for, and possible form of, an international *suigeneris* system for the protection of TK.

134. The Delegation of China stated that, in its view, existing national systems of IP already provided a certain level of protection for TK at a national level. Nonetheless, each country could also establish a *suigeneris* system, with clear policy objectives, that was complementary to existing IP systems and that took into account the specific nature of the TK in the relevant country. Such a national approach would need to be coordinated at an international level to resolve certain common issues, for instance in relation to the protection of cross-border TK. It was unclear whether such *suigeneris* systems should be a single law relating to both folklore and TK, or whether there should be separate legislation for each. Ultimately it was a matter to be decided at the national level to meet the specific needs of the country concerned. The Delegation pointed out that laws that were too widely drafted may be difficult to implement and would be weak laws, but went on to note that document WIPO/GRTKF/IC/4/8 addressed many of the specific issues that might need to be addressed in relevant legislation, and could be used as a point of reference by countries wishing to draw up national laws. In addition, national legislations should address the resolution of conflicts, in particular where there may be a conflict between a *suigeneris* system and the existing IP system. In conclusion, the Delegation of China noted that some countries had already enacted laws relating to the protection and preservation of TK. It requested that such laws should be submitted to the Committee, and should be translated into the working languages of the Committee.

135. The Delegation of Switzerland stated that document WIPO/GRTKF/IC/4/8 clearly demonstrated that the establishment of a *suigeneris* system for the protection of TK was a complex task. Many issues needed to be addressed in order for such a system to be practicable and workable and in order to allow for the effective protection of TK. In its view, any discussion on a *suigeneris* system should be closely linked to a further analysis of the usefulness and applicability of existing IP mechanisms for the protection of TK. Such an analysis would demonstrate where existing IP mechanisms might be suitable, and where a *suigeneris* approach may be more appropriate. It wished to highlight two issues as being of crucial importance in this area that need to be clarified at the outset: firstly, the policy objectives of the protection of TK must be determined; and secondly, the issue of terminology must be clarified. It considered at least a working definition of TK to be necessary, and stated that the elements of such a definition, as set out in paragraphs 24 and 25 of document WIPO/GRTKF/IC/4/8, would be a good basis for further work in this area. Only once these two issues had been clarified could the Committee usefully address the many questions raised in paragraphs 47 to 78 of document WIPO/GRTKF/IC/4/8. The Delegation concluded by noting that Switzerland was committed to discussing in this Committee the possibilities of *suigeneris* systems for the protection of TK. It looked forward to hearing from those delegations that had already implemented, or were in the process of implementing, such systems at a national level, and to receiving the composite report of the Secretariat on the issues under discussion.

136. The Delegation of the United States of America stated that it was interested in hearing about national experiences to protect TK using national or regional *suigene ris* laws. However, given that it was possible to protect TK now, using a contractual regime for access to genetic resources, TK and benefit -sharing, it questioned whether it was necessary to develop an international *suigeneris* system of protection for TK. In its view, the toolkit proposed in document WIPO/GRTKF/IC/4/5 was a more constructive way to proceed and would facilitate the contractual approach to access to genetic resources and TK, and sharing of associated benefits. Furthermore, the many complex issues raised in document WIPO/GRTKF/IC/4/8 led the Delegation to believe that, for those delegations seeking additional protection of TK beyond that currently available under existing IP laws, national systems that addressed national policy objectives and national needs would be the most appropriate way forward. The Delegation supported the preparation of a composite technical study and noted that more information in this area would be welcome in order to further understand the need expressed by some delegations to develop an international *suigeneris* system for the protection of TK. It concluded by stating that, whilst it did not wish to discourage other countries from developing their own *suigeneris* systems at a national level (so long as they complied with existing international obligations), so far as it was concerned, the case for an international *suigeneris* system had not yet been made, and further study was needed. Only once it was clear that there was a compelling international problem that could be addressed by IP systems, and that national *suigeneris* systems alone could not solve this problem, should the Committee consider possible international solutions. The international level should not be a first recourse, but rather the last. ld

137. The Delegation of Japan supported the development of a composite document on *sui generis* systems of protection of TK to be discussed at the fifth session of the Committee. It noted that existing levels of protection of TK varied greatly at a national level, and stated that, until the Committee had identified and addressed any problems arising out of such protection, it would be premature to start formulating an international framework for the *sui generis* protection of TK. Further, whilst it was happy to participate in a discussion in this Committee on elements of *suigeneris* protection of TK, in particular where such discussion fully considered the use of existing national systems of IP protection, such discussions should not at this stage aim at formulating legally binding rules at an international level, but should consider the development of non-binding, flexible, guidelines to be implemented on a country-by-country basis. As to the definition of TK, the Delegation was of the view that the Committee should continue to discuss this matter, since it was closely connected to the elements of a *suigeneris* system for the protection of TK.

138. The Delegation of New Zealand expressed its support for on-going exploratory work in this area and stated that, in its view, consideration of *suigeneris* mechanisms was both necessary and important. It noted that it was currently exploring such mechanisms at a national level. It stated that it was appropriate that document WIPO/GRTKF/IC/4/8 referred to the holistic nature of TK systems and, in particular, that any decision to break holistic TK into separate components should be made by the TK holders themselves. Distinct approaches may be required for different categories of subject matter, or to pursue particular policy objectives that are linked to the needs of indigenous and local communities. With relation to documentation initiatives and databases, the Delegation noted that whilst there were merits to such approaches, it was conscious that a number of indigenous peoples, including Maori, were concerned about such initiatives and might not consent to the documentation of their knowledge. These concerns must be carefully managed; the toolkit addressed in document WIPO/GRTKF/IC/4/5 was one example of how such concerns might possibly be addressed. Nonetheless, the Delegation suggested that other approaches, in addition to those relating to

documentation initiatives and databases, should be explored. The Delegations supported the preparation of the composite report, and stated that, in this report, the Secretariat should also consider a range of new mechanisms not necessarily linked to the norms of existing IP rights; for example, alternatives to the fixation and disclosure requirements of patent laws.

139. The Delegation of Venezuela, speaking on behalf of the Indigenous Peoples of the Bolivarian Republic of Venezuela, stated that the knowledge developed by the wise shamans of their country constituted the elements of their wisdom which in the Committee, are called TK. Knowledge, which had been passed down from generation to generation cannot be said to belong to anybody but rather it belonged to everybody. TK was passed on to those people who fulfilled the conditions to use, administer and deal with it. The Delegations said that their medical knowledge was considered to be sacred, and that their TK included their science and methodology. It was their knowledge, their wisdom. Indigenous TK was the interface between man and his world and the harmony between the two was constantly preserved as biodiversity, but given the high diversity in cultures the indigenous people have proposed the formation of a method for indigenous peoples of Venezuela to enable them to protect TK. Hence, they believed such protection was important.

140. The Delegation of India stated that no definition of TK was necessary and that the holders of TK should hold similar rights to those held by a patent holder. The Delegation suggested a grassroots-based approach, according to which control should remain in the hands of the communities and tribes at the national level. The Delegation considered that impractical simplifications should not lead to the conclusion that existing IP rights could provide sufficient protection for TK. It therefore recommended the deletion of paragraphs 38 and 39 in the document currently under discussion. The Delegation stated that a modern and internationally agreed *suigeneris* system was needed and that there was no reason to be concerned about double protection, since such double protection also existed in respect of other subject matter. It referred to certain provisions in the Indian patent law, which included:

(i) mandatory disclosure of the source and geographical origin of biological material used in inventions while applying for patents in India;

(ii) provisions for opposition to patents and revocation of patent if disclosure was not made or wrongfully made; and

(iii) provisions for opposition to patents and revocation of patents if the invention was anticipated by the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

However, the Delegation pointed out that on a practical level these measures were inadequate since unpatentable subject matter had in fact been patented. It therefore urged the Committee to evolve consensus for the uniform implementation of these provisions in the patent laws of all countries, so that biopiracy could be addressed until *suigeneris* systems were created. The Delegation went on to point out that the Traditional Knowledge Digital Library (TKDL) of India was well known, but consensus was needed on an international level so that the TKDL could be provided to patent offices worldwide under a non-disclosure agreement. The Delegation announced that it was the intention of India to make its TKDL available only to patent offices and only under the terms of a non-disclosure agreement. The Delegation recommended that all Digital Libraries, including those which may be established by other countries in the future, should be included in the Minimum Documentation list under the PCT and that IP offices should keep the Digital Libraries confidential. The Delegation maintained

that IP protection would not commodify TK and that transparent legal protection would increase legal certainty in respect of the use of TK. Therefore, the Delegation accorded the highest priority to creating an effective and practical *suigeneris* system for TK protection. It maintained that when creating such a system, the Committee would have to develop novel methods for providing rights to communities for public domain TK, similar to possible *suigeneris* systems for non-original databases, which had been discussed in other WIPO fora and where public domain material was concerned. The Delegation stated its appreciation of the Peruvian law and suggested that an international *suigeneris* system should be a novel in its features as the national Law of Peru. The Delegation supported the preparation of a composite technical study to comprise analysis of definitions of TK, national systems for TK protection, and elements that could be recommended for a *suigeneris* system to protect TK.

141. The Delegation of Peru stated that the Committee had undertaken extensive work and now needed to move from discussing elements of *suigeneris* systems, towards the actual development of a system. The Delegation did not agree with all elements under discussion and added several specific comments on individual paragraphs of the document, including references to public domain, inventories and databases as useful tools for defensive protection but not as a prerequisite for protection. It stated that TK should be protected once the community of origin had been legitimately established. The Delegation felt that concepts of anti-trust were not relevant in this case and references to anti-trust violations should be removed by the Secretariat. The Delegation considered that the interpretation of Article 39 of the TRIPS Agreement in paragraph 60 of the document was unacceptable because only WTO Members had the authority to interpret the TRIPS Agreement and therefore the paragraph should be eliminated. It added that it was not sufficient to provide effective and adequate national protection because protection was also needed outside national protection.

142. The Delegation of Canada supported the manner in which the Committee was pursuing elements of a *suigeneris* system. It expressed its view that there had not yet been a sufficient assessment of how existing IP systems could protect TK. The Delegation agreed that existing IP mechanisms might not be sufficient in all cases, because of the informal nature of TK or because of the limits of existing protection. However, it maintained, this was not the same as acknowledging that there was a need for a *suigeneris* system. The Delegation felt that the Committee had not sufficiently identified the policy objectives of a possible *suigeneris* system and the limitations of the existing IP system. As a further reason, it mentioned the absence of sufficient national experiences with *suigeneris* protection of TK. While citing limits in the Committee's analysis to date on the use of intellectual property and *suigeneris* regimes to protect traditional knowledge, the Delegation affirmed its support for continued comprehensive examination of all appropriate forms of protection of traditional knowledge.

143. The Delegation of Guyana made four comments on document WIPO/GRTKF/IC/4/8. First, it stated that the greatest deficiency in applying existing IP systems to TK was the informal nature of TK. Second, it noted that the complex, distinct and dynamic characteristics of TK made the application of the existing IP system flawed and left scope for abuse of IP rights through the exploitation of TK which accrued benefits to third parties rather than TK holders. Third, the Delegation supported the development of a comprehensive *suigeneris* system and supported the future work of the Secretariat on recommendable elements of a *suigeneris* system. Fourth, it stated that developed countries were taking the lead in today's multimillion dollar biotechnology industry, which was closely linked to TK.

144. The Delegation of the Russian Federation stated that the Committee's deliberations and the document currently under discussion proved that there was a good understanding of

general IP systems and their applicability in cases where subject and holders of TK were identifiable. It added that problems arose in folkloric expressions and a *suigeneris* system was an appropriate approach to solve these problems. It indicated that a further possibility of providing legal protection for folkloric expressions which had been registered and notified was to introduce the element of related rights into folklore protection. The Delegation suggested that there should be two types of rightholders, namely communities or individuals on the one hand and the State on the other. The Delegation supported China in proposing that *suigeneris* systems must be a priority at the national level and that effective national *suigeneris* systems were the key to finding appropriate international solutions. It proposed that the international community should seek to bring together different *suigeneris* systems and establish an efficient toolkit for international protection of folklore. The Delegation added that a national database should be the basis to establish and operationalize a national *suigeneris* system. It requested that among the objectives of TK protection the preservation of national identity for future generations should be added and the protection of TK from distorting use. The Delegation further proposed that the *suigeneris* systems should also include moral measures such as securing the transmission of TK to future generations, education and professional training for traditional culture, and the dissemination of national culture. The Delegation ended by proposing that an international *suigeneris* system for endangered traditional cultures might be helpful to national authorities to protect endangered ethnic cultures.

145. The Delegation of Colombia stated that the proposal to develop a *suigeneris* system in WIPO would not run counter to the Colombian constitution. It noted that there were two essential factors which could be found in document WIPO/GRTKF/IC/4/8. First was the principle of participation of communities within the decision-making on duties and rights regarding TK. The Delegation pointed out that Colombia had participated in many fora, but that the documents were only declaratory and the questions relating to IP had not received sufficient debate. Given this situation, the Delegation believed that there was a conceptual confusion which could lead to a duplication of work. Analysis was needed of the relevant terminology so that it could be used in the forum where protection was needed. Colombia therefore supported the efforts that were being made to create a *suigeneris* system on the strength of the fact that there was a conceptual agreement on the subject. It closed by noting that there are certain communities which do not have concepts of property, but they nevertheless require laws so that their TK could be protected. The Delegation therefore supported the role of States in the protection of TK.

146. The Delegation of Uganda referred to the introduction of document WIPO/GRTKF/IC/4/8, and stated that the work being debated, specifically the importance of traditional knowledge for its creators, the need to foster, preserve and protect such knowledge started in the 1980s with the adoption of the Model Provisions in 1982. The Delegation of Uganda drew a parallel between the work of the Committee and the work of the WTO. The Delegation pointed out that they were committed at a political level to reach an agreement on the protection of TK, as an agreement was reached with the TRIPS Agreement. It noted that had been more than 20 years since the UNESCO -WIPOM Model Provisions were adopted in 1982 and urged the Committee to graduate from the work of studying *suigeneris* elements, and to begin the work of drafting a legally binding international instrument. The Delegation quoted document WIPO/GRTKF/IC/3/17, which referred to a "...a legally binding international instrument that recognizes, protects and rewards traditional knowledge and innovations" and added that while it appreciated the effort to better understand the subject-matter it would be counterproductive to dwell too much on definitions, instead move on towards the next stage, namely drafting.

147. The Delegation of Venezuela commented on the objectives of a *suigeneris* system for TK protection. It observed that the term “protection” was understood by some in the meaning generally given to this term in the field of IP, whereas others saw it as a means of preserving TK and avoiding its erosion. In this latter understanding, the term “protection” had a more positive role in the life and cultures. The Delegation maintained that current IP systems were insufficient when it came to protecting TK, because they did not address all the problems linked to TK protection. It stated that one needed to establish a new system which would be able to protect TK effectively and comprehensively. It reported that the constitution of Venezuela contained provisions which made the protection of TK compulsory, so the public authorities in Venezuela were working hard to protect TK. The Delegation stressed that indigenous communities must play a key role in this process. Referring to Decision 391 of the Andean Pact, it added that the national efforts of Venezuela were insufficient unless there were international measures. The Delegation requested the Secretariat to prepare a new and more concrete version of document WIPO/GRTKF/IC/4/8 debating one element which would be advisable for a *suigeneris* system. It suggested that this document would constitute a basis for an exchange of views and requested that the contents of the documents should focus on operative issues. The Delegation closed by stating that it was not the Committee’s only job to look at national experiences and that it had therefore requested a document for discussing the elements of *suigeneris* systems which could be recommended. The Delegation introduced one of its members, Mrs. Noeli Pocater, representative of the indigenous peoples of Venezuela, who, on behalf of the indigenous peoples of Venezuela, made a statement emphasizing that TK was holistic and was inextricably linked to the lives of communities and TK holders. She stressed that any effective system for TK protection could only work with the active participation of indigenous peoples. She called on the Committee to actively involve the indigenous peoples in the preparation of its fifth Session and thanked the Government of Venezuela for including her in the Delegation.

148. The Delegation of Brazil highlighted that for Brazil no definition of TK was needed in order to develop an effective protection system. It stated that Brazil believed that the protection of TK should be based on a holistic approach. The Delegation supported the proposal made by the Delegation of Venezuela that the Secretariat prepare a document with recommendable elements that could be comprised within a *suigeneris* system for the protection of TK.

149. The Delegation of Ghana highlighted the African Group’s position paper, presented at the third session of the Committee, and in particular the statements made in paragraph 9 of page 3 and paragraph 2 of page 5 of document WIPO/GRTKF/IC/3/15. The Delegation felt the Committee’s main task was to find an effective protection for TK passed from generation to generation. The Delegation believed that it was not only enough to develop national and regional systems of protection but it was also equally important and necessary to develop a flexible *suigeneris* system that took into consideration customary laws, protocols and practices. The Delegation also stated that existing IP mechanisms might not adequately protect TK. It supported the view that a *suigeneris* system should be developed to give a better and more effective protection to TK. The Delegation supported the proposals contained in paragraph 80 of document WIPO/GRTKF/IC/4/8.

150. The Delegation of the Islamic Republic of Iran said that it would be difficult to obtain a specific and complete definition of TK. However, it emphasized that there were already several international agreements, such as the Berne Convention, the Paris Convention and the TRIPS Agreement, in which the subject matter of protection was not defined, but several of

its elements were. By the same token, the national law of Iran on the protection of copyright did not contain a general definition of its subject matter. The Delegation proposed that, in order to limit the scope of protection of TK, the following elements should be taken into consideration: an agreement on the principles and objectives of TK protection; a consensus on the relationship between existing IP mechanisms and customary law; a method to deal with the collective nature of TK; and the need for developing the necessary measures to solve the legislative and practical problems as regards TK. The Delegation noted that there was a growing trend in protecting TK according to two principles. First, existing standards of IP protection were resorted to, namely trademarks, including collective and certification marks, geographical indications, patents, copyrights and related rights, and unfair competition. Second, some governments had adopted new standards, most of which fell under the framework of *sui generis* laws. For instance, some steps had been taken to protect traditional medicine, having in view that holders of traditional medicinal knowledge had criticized and disapproved the current standards. For these reasons, the Delegation was of the view that developing and adopting a *sui generis* system might be useful and effective for all communities and nations.

151. The Delegation of Bolivia supported the Committee as the appropriate forum for the debate and exchange of views on the protection of intangible assets, and it expected to reach a positive outcome so as to guarantee the effective protection of cultural assets, to the benefit of TK holders as well as of the whole humankind. The Delegation agreed that there was no need for an exhaustive definition of TK for that was not a condition for protection, as the experience of patent law showed. The Delegation understood that all forms of documentation and inventorying constituted tools that were instrumental for the search of an integral protection of TK. However, the Delegation understood that, having in view the experience of Bolivia, it was necessary to identify and develop special and effective international mechanisms for the protection of TK without prejudice to the existing mechanisms.

152. The Delegation of Morocco said that, regardless of the experience developed with the implementation of existing IP mechanisms, they were inadequate to protect TK in the manner its holder expected. The Delegation noted that several Member States had adopted indirect protection of tangible cultural expressions, such as trademarks, geographical indications and appellations of origin. However, given the specific and holistic nature of TK, the existing IP mechanisms were of a limited scope. Therefore, it was necessary to explore the possibility of a *sui generis* mechanism. The Delegation supported the proposal by the Delegation of Venezuela regarding the preparation of a document identifying recommended elements of a system for the protection of TK. It also wished to take into account the declaration made by the Delegation of Algeria on behalf of the African Group. The Delegation supported the proposals for a composite study as set out in paragraph 80 of the document.

153. The Delegation of Egypt noted that document WIPO/GRTKF/IC/4/8 constituted a basis from which the Committee could work to achieve an international instrument on the *sui generis* protection of TK, folklore and genetic resources. Such an instrument would acknowledge recent developments in human sciences and the consequential need to develop new fields of IP protection, and would be of particular interest to the developing world. In developing this instrument, the Committee should consider other international conventions which referred to the possible use of *sui generis* systems to protect IP, such as Article 27.3 (b) of the TRIPS Agreement. In other words, the Committee should be aware that there was a precedent for the use of *sui generis* systems to protect IP, albeit for the protection of individual rather than community rights and for the protection of items that demonstrate an inventive step and novelty. A major question to be asked by the Committee was therefore

whether a *sui generis* system could be developed to address TK, which might be community based, and which might not demonstrate an inventive step or novelty. The Delegation stressed that an old system should not be forced onto the issue of the IP protection of TK, folklore and genetic resources. It continued by noting that the Committee should not attempt to define TK, although it may be useful to establish what should not be covered by such a term. As for documenting TK through databases, the Delegation emphasized that this was only one way to provide for the protection of TK, and that TK that was not documented may still be subject to other types of protection. The Delegation informed the Committee that Egypt had recently enacted legislation that provided for the adequate protection of TK, folklore and genetic resources (Law No. 82/2002). Under Article 13 of this legislation, an applicant for a patent must prove that an invention that included biological or animal products, or TK in fields such as medicine or agriculture, was based on knowledge that had been obtained legitimately and lawfully. Further where seeking protection for a plant variety, under Article 200, an applicant was obliged to reveal the source of his knowledge, to confirm that the knowledge had been obtained lawfully and legally, and to share the benefits derived from the claimed invention. The Delegation concluded by stating that the composite study suggested in paragraph 80 of document WIPO/GTKF/IC/4/8 should not be limited to merely analyzing a possible *sui generis* system, but should be directed towards the actual establishment of such a system. In this regard, it fully agreed with the Delegation of Venezuela.

154. The Delegation of Haiti stated that a consideration of national experiences had shown that existing systems of IP had certain limitations when applied to the protection of TK and expressions of folklore, in particular when consideration was given to both the collective nature, and the extraterritorial nature, of such knowledge. This was especially true in the Caribbean where TK was shared across the islands. This particularity meant that the issue of protection of TK had to be considered not simply on a national basis, but also on a regional basis. The Delegation therefore emphasized that the regional dimension of the work should also be addressed by the Committee. The Delegation stated that it would like more information from other nations regarding their national experiences, in particular any difficulties that had been experienced in implementing these chosen systems. This would enable other nations to learn from these experiences. Further, given the extraterritorial nature of TK, the protection of TK should not be viewed solely from a national standpoint, but should also embrace a global, or at least a regional, aspect. The Delegation concluded by stressing the need for a flexible, autonomous system for the protection of TK.

155. The Delegation of the Republic of Korea stated that a *sui generis* system for the protection of TK should be based on the consensus of Member States. Such a consensus had yet to be reached and, at this stage, it would prefer to give priority to a review of how existing systems of IP could be used to protect TK. In this way, Member States could develop adequate experiences at a national level. Document WIPO/GRTKF/IC/4/8 should, however, be left open, so the Secretariat could prepare a more detailed technical study on the development of a *sui generis* system for the protection of TK.

156. The Delegation of Zambia endorsed the interventions of the delegations of Uganda and Egypt and stated that, in its opinion, in the light of the inadequacy of current IP regimes, and the fact that biopiracy was actively taking place now, the Committee should develop a legally binding international instrument of *sui generis* protection for TK. Such a system would prevent communities being pitted against one another in those situations where TK crossed political boundaries. The Delegation noted that the CBD, the Cartagena Protocol on Biosafety and the TRIPS Agreement had all been adopted prior to the existence of relevant

systems of protection at a national level. Further, the considerable knowledge and experience of the custodians of TK should be an integral part of the process of development of a *sui generis* system for the protection of TK – according to the principle “nothing for us, without us.” The essence of a *sui generis* system should be the fair and equitable sharing of benefits arising from the use of TK. Its preamble would acknowledge the important contributions that TK and TK systems continue to play in human development, and it would cover all aspects of TK. The Delegations supported the Delegation of Venezuela on the need for the Secretariat to prepare a document with precise elements of a possible *sui generis* system and, in concluding, suggested that, as part of this preparation, the Committee should consider further the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.

157. The Delegation of Panama congratulated the representative of the Andean Community on its earlier written submission to the Committee, and noted that it agreed with the conclusions in that document; namely, that since existing systems of IP could not provide comprehensive protection for TK, further considerations should be given to the development of appropriate *sui generis* systems of protection. The Delegation stated that this was the rationale behind the development of Panamanian Law (Law No. 20) for the protection of indigenous knowledge. It stated that it was aware of the need to make progress in developing special laws, such as the *sui generis* system developed by Panama. However, in the case of Panama, territorial protection by itself was insufficient and international systems for the protection of TK must also be developed. It supported the Delegation of Peru with regard to certain specific comments on document WIPO/GRTKF/IC/4/8. For instance, with regard to paragraph 54, the right to exclude was not the only way to characterize IP; the right to require remuneration was also important. With regard to paragraph 60 regarding the development of inventories, collections or databases, it noted that whilst these were useful tools for the protection of TK, fixation of TK could never be considered as a precondition for recognizing the protection of TK. Further, such tools were only one way to protect TK, and not the only option available. With regard to paragraph 70, the word “exclusive” should be removed. The Delegation concluded by stating that it looked forward to receiving further examples of national experiences on the protection of TK and cultural knowledge, to continue discussion on these important issues internationally, to the development of national systems of protection for TK that were appropriate to national needs and requirements; and to the establishment of legal regimes that were specifically adapted to the unique characteristics of TK.

158. The Delegation of Argentina stated that it agreed with the Delegation of the Republic of Korea that there was no consensus at present on how to establish a *sui generis* system for the protection of TK. It considered that the Committee should not seek to provide a definition for TK, since there were many different forms or expressions of TK, and TK was linked to specific holistic and cultural dimensions of individual communities. As part of the debate on the *sui generis* protection of TK, there should be a proper analysis of all the mechanisms by which existing systems of IP provided for protection at a national level. There should also be consideration by States, at a national level, of the objectives underlying any proposed *sui generis* protection. In the light of these comments, paragraph 52 of document WIPO/GRTKF/IC/4/8 should be reconsidered. Paragraph 70 of documents should be amended to remove the reference to the word “exclusive,” and to avoid any reference to paragraph 39(iii) of TRIPS, since this would not be in compliance with either Article 10(ii) of the TRIPS Agreement, or Article 2(v) of the Berne Convention.

159. The representative of the Inuit Circumpolar Conference (ICC) commented on recent cases of violations of indigenous peoples' rights in their intangible assets, which constituted not only misappropriation but also misrepresentation as to the nature and identity of the Inuit. The representative supported the development of a *suigeneris* mechanism, since existing mechanisms did not reflect the true nature of TK. The representative suggested that document WIPO/GRTKF/IC/4/8 should elaborate further on an expanded rationale for the protection of TK, namely the need for preserving cultural diversity. The representative encouraged the preparation of an international survey on practices regarding TK protection and emphasized the need for further examination of the legal issues.

160. The representative of IPBN expressed the view that the TK debate was dominated by Western conceptions of IP. This resulted in an notion that *suigeneris* systems for protection of TK should adhere to the standards and principles of western IP systems. That was not acceptable and was worrisome to indigenous peoples who had seen existing systems sanction and facilitate IP claims over materials associated with indigenous knowledge. The IPBN recommended that:

- (i) *suigeneris* systems for the protection of TK be based on indigenous legal systems and customary laws;
- (ii) formal, detailed studies be carried out on the interface between local management systems of innovation and formal IP systems; and
- (iii) identification of the elements of a *suigeneris* system, as well as development and implementation of such a system, should involve the holders of TK through appropriate mechanisms, including funding.

161. The representative of the International Chamber of Commerce (ICC) noted that document WIPO/GRTKF/IC/4/8 clarified that protection of TK might involve many problems, but that they were not insuperable. His organization represented both national and international businesses, and business need not be an obstacle to the protection of TK. On the contrary, business should be a part of the solution. However, for any legal mechanism to operate properly certainty was of the essence, as this document correctly emphasized. The representative noted that two major issues had been detected during the current debate: whether TK should be protected through a general, one-size-fits-all mechanism, or whether it would require specific mechanisms for each technical sector; the second issue was whether international protection would need to wait until a consensus was needed, pending the evolution of national experiences. The representative was of the view that the recent FAO Treaty was an indication that a sectoral approach may apply. His organization was looking forward to contributing to future technical work.

162. The representative of the *Mejli* of the Crimean Tartar Peoples supported the position of the representative of IPBN. The subject documents showed significant progress from prior documents but it did not provide mechanisms for effective participation of indigenous peoples or for control by them over their TK. Such mechanisms should be included. Then on the indigenous environment did not understand or appreciate the knowledge and culture of traditional peoples. The definition of TK was often difficult to apply by traditional peoples. It was often difficult to separate it from religious beliefs and customs, for instance. TK was often the only resource left to indigenous peoples who had been deprived of land and forests. TK and its uses should be left in the hands of indigenous peoples.

Conclusions

163. The Chair concluded, and the Committee decided, that:

(i) based on documents WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/3/9 and other materials, the Secretariat should prepare a composite study incorporating approaches to definition of TK, national experiences in TK protection and analysis of elements of a sui generis system for protection of TK, on the understanding that this would be a more structured, concrete analysis of specific options; and

(ii) the Committee should return to this issue at its fifth session.

ITEM 6: GENETIC RESOURCES

Electronic Database of Contractual Practices

164. Following an informal presentation of an on-line database on contractual practices relating to IP and genetic resources, the Secretariat introduced document WIPO/GRTKF/IC/4/10, which reported on the background and development of the database.

165. The representative of the Food and Agriculture Organization of the United Nations drew attention to the International Treaty on Plant Genetic Resources for Food and Agriculture, which had been adopted in November 2001. The legally binding Treaty – which provides an agreed international framework for plant genetic resources for food and agriculture – established a distinct multilateral arrangement for access and benefit-sharing, for a specific set of plant genetic resources for food and agriculture. He noted that such multilateral arrangements should not be conflated with bilateral or contractual systems of access, such as those addressed by the electronic database, and accordingly suggested that a reference to the distinction between multilateral and bilateral systems, and to the International Treaty, be noted on the entry page of the website.

Conclusions

166. The Chair proposed, and the Committee confirmed, its approval for the proposed extension of time in which the Questionnaire (WIPO/GRTKF/IC/Q2) may be disseminated and answered up to the end of March, 2003, and its approval for the further development of the Contracts Databases as a permanent, freely available resource for contracts concerning IP, access to genetic resources and benefit-sharing, in accordance with paragraph 32 of document WIPO/GRTKF/IC/4/10.

Access and benefit-sharing

167. The Delegation of the United States of America introduced document WIPO/GRTKF/IC/4/13, describing an access and benefit-sharing regime established for national parks and its application to Yellowstone National Park. Access is being granted and monetary and non-monetary benefits have been shared. Non-exclusive research permits have been granted to scientists who require prior informed consent from the Park Service. Benefits must flow back to the parks and activities conducted with the collected resources must be

identified. The regime is IP neutral; that is, whether or not to seek IP protection is left to the researcher.

168. The Chairman concluded that the Committee had duly taken note of the document and the remarks made by the Delegation of the United States of America.

Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge

169. At the request of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/4/11, with reference also to the questionnaire WIPO/GRTKF/IC/Q.3.

170. The Delegation of Botswana commented on the relationship between this issue and the question of access to and use of genetically modified organisms. The Secretariat provided background information in this regard.

171. The representative of the Andean Community proposed that paragraph 15 of document WIPO/GRTKF/IC/4/11 be amended, noting that the FAO ITPGR provides for a multilateral approach to access and benefit sharing but only for a list of phytogenetic resources and solely for food and agriculture purposes, and established a facilitated access mechanism to the listed genetic resources rather than an open exchange mechanism. The CGIAR centers although mentioned in the Treaty are at the moment out of its scope. Finally, the facilitated access mechanism does not equal public domain. The representative also observed that the concluding comments do not reflect all the findings of the survey. The need for disclosure is assessed only over the basis of the sufficiency of the description criterion in the case of genetic resources and novelty assessment, provided the applicant has deliberately avoided prior informed consent in the case of TK. However, it seems that disclosure of origin and PIC are also required for determining non-obviousness, for bibliographic information relevant to the claimed patent right purposes, and for the correct identification of the inventor. It seems also that false or misleading information, whether deliberate or not, leads to several sanctions including revocation of the patent. Even if the concluding comments had a preliminary nature it would be advisable to effectively consider all criteria emerging from the surveyed national legal practice.

172. The representative of the IPBN cited a public letter it had sent for the attention of the Committee, concerning patents or patent applications in several jurisdictions relating to certain applications of the plant known as *maca* or *lepidium*. These raised a range of moral and legal concerns for the indigenous people of Peru who had bred and preserved the maca plant over many generations. The representative proposed that the Committee should take up this matter as a specific case study.

173. The Delegation of Peru expressed support for the proposal of the IPBN representative.

Conclusions

174. The Chair concluded that additional responses to questionnaire WIPO/GRTKF/IC/Q.3 were to be made by March 14, 2003, with a view to shaping a further version of document WIPO/GRTKF/IC/4/11 for distribution in April 2003 and for further consideration at the fifth session. The Chair stated that insofar as the specific cases raised concerned the application of national or regional law in individual

situations, they were outside the mandate of the Committee. On the other hand, the cases could possibly be used as illustrative examples in the work of the Committee. The Committee agreed with these conclusions.

ITEM 7: FUTURE WORK

175. On the basis of conclusions reached under earlier agenda items, the Chair concluded, and the Committee decided, that the following work would be undertaken at the fifth session of the Committee:

(i) consideration of the legal protection of expressions of folklore (traditional cultural expressions), on the basis of an updated and extended version of document WIPO/GRTKF/IC/4/3 that would take into account input provided to the Secretariat. This input should be provided preferably by February 28, 2003, but by March 31 at the absolute latest;

(ii) consideration of an updated version of WIPO/GRTKF/IC/4/4 on technical cooperation on the legal protection of expressions of folklore;

(iii) consideration of whether the Committee should take up the issues of legislative guidance in the form of model provisions and of elements of a possible international *sui generis* system for the protection of folklore, on which no consensus currently existed;

(iv) consideration of a draft toolkit for IP management in the documentation of TK, prepared on the basis of comments submitted on document WIPO/GRTKF/IC/4/5;

(v) consideration of the issue of technical cooperation and possible standards for TK database and registries, including the proposals in document WIPO/GRTKF/IC/4/14;

(vi) consideration of updated information on national experience with the protection of traditional knowledge provided to the Secretariat in addition to the information contained in documents WIPO/GRTKF/IC/3/7 and WIPO/GRTKF/IC/4/7;

(vii) consideration of the elements of *sui generis* systems for the legal protection of traditional knowledge, on the basis of a composite study incorporating approaches to definition of TK, national experiences in TK protection and analysis of elements of a *sui generis* system for protection of TK, drawing in particular on documents WIPO/GRTKF/IC/3/9 and WIPO/GRTKF/IC/4/8;

(viii) consideration of an updated and further developed database on contractual practices concerning IP and access to genetic resources and benefit-sharing;

(ix) consideration of the issue of enhanced participation of indigenous and local communities in the work of the Committee, on the basis of the study to be prepared by the Secretariat before mid-April; and

(x) consideration of patent disclosure requirements relating to genetic resources and associated TK, and in particular consideration of the draft study to be developed by

the Secretariat on the basis of document WIPO/GRTKF/IC/4/11, comments on that document, and further responses provided to questionnaire WIPO/GRTKF/IC/Q.3.

176. The Chair clarified that comments, questionnaire responses or other input was sought between the fourth and fifth sessions of the Committee in particular on documents WIPO/GRTKF/IC/4/3, WIPO/GRTKF/IC/4/5, WIPO/GRTKF/IC/4/7 (WIPO/GRTKF/IC/Q.1), WIPO/GRTKF/IC/4/10 (WIPO/GRTKF/IC/Q.2), WIPO/GRTKF/IC/4/11 (WIPO/GRTKF/IC/Q.3), and WIPO/GRTKF/IC/4/14. In order to allow for meeting documents to be prepared in time for consideration at the fifth session, this input should be provided as soon as possible, and preferably by February 28, 2003, with any later deadline to be seen as an absolute outer limit for such input.

177. The Chair noted also that consideration would need to be given on the nature of continuing work on the issues under consideration by the Committee, in view of the need of the Committee at its fifth session to prepare a report to the WIPO General Assembly.

Timing of the fifth session

178. The Chair noted that the Committee had to consider whether five or seven working days would be required for its next session. The Delegations of Venezuela, Zambia and Algeria called for a meeting of seven working days. The Committee accordingly agreed that its fifth session would be held from July 7 to 15, 2003.

ITEM 8: ADOPTION OF THE REPORT

179. The Committee reviewed the draft report (circulated as document WIPO/GRTKF/IC/4/15 Prov.) and adopted it as the final report of the session, including the summaries and conclusions of the Chair in English, French and Spanish, subject only to any notification by participants of the Committee to the Secretariat of amendments or corrections required to the summary of their own interventions as recorded in WIPO/GRTKF/IC/4/15 Prov. The Chair noted that such amendments or corrections should be provided as soon as possible, and in any event prior to January 10, 2003, to ensure timely conclusion and availability of the report in the Committee's three working languages.

ITEM 9: CLOSING OF THE SESSION

180. The Chair closed the Fourth Session of the Committee on December 17, 2002.

[Annex follows]

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

I. ÉTATS/STATES

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

AFRIQUE DU SUD/SOUTH AFRICA

Mogeege MOSIMEGE, Director , Indigenous Knowledge Systems, Department of Science and Technology, Pretoria

ALGÉRIE/ALGERIA

Nor-Eddine BENFREHA, conseiller, Mission permanente, Genève

ALLEMAGNE/GERMANY

Raimund LUTZ, Federal Ministry of Justice, Bonn

Almuth OSTERMEYER-SCHLÖDER (Mrs.), Deputy Head, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Bonn

Tammo ROHLACK, Judge, Federal Ministry of Justice, Bonn

ARABIE SAOUDITE/SAUDI ARABIA

Ibrahim Muharib AL -MUTAIRI, Patent Examiner, King Abdulaziz City for Science and Technology, Riyadh

ARGENTINE/ARGENTINA

Marta GABRIELONI (Sra.), Consejera de Embajada, Misión Permanente, Ginebra

AUSTRALIE/AUSTRALIA

Joan Marie SHEEDY (Ms.), Attorney - General's Department, Barton

Jessica WYERS (Ms.), Assistant Director, Development and Legislation Section, Intellectual Property Office, Woden

Jyoti LAR KE (Ms.), Third Secretary, Permanent Mission to the World Trade Organization (WTO), Geneva

AUTRICHE/AUSTRIA

Günter AUER, Chief Public Prosecutor, Federal Ministry of Justice, Vienna

BARBADE/BARBADOS

Nicole CLARKE (Ms.), Counsellor, Permanent Mission, Geneva

BELGIQUE/BELGIUM

Michel DEPUYDT, conseiller adjoint, Ministère des affaires économiques, Office de la Propriété Intellectuelle, Bruxelles

BÉLARUS/BELARUS

Irina EGOROVA, First Secretary, Permanent Mission, Geneva

BOLIVIE/BOLIVIA

Edwin Alberto URQUIDIÁLVAREZ, Director Nacional, National Intellectual Property Service (SENAPI), Ministry of Industry and Internal Commerce, La Paz

Mayra MONTERO CASTILLO (Sra.), Consejero, Misión Permanente, Ginebra

BOSNIE-HERZÉGOVINE/BOSNIA AND HERZEGOVINA

Melika FILIPAN (Mrs.), International Trademark Examiner, Institute for Standards, Metrology and Intellectual Property, Sarajevo

BOTSWANA

Montgomery MABUSELETSHWITI, Commercial Officer, Industrial Property Office, Ministry of Trade and Industry, Gaborone

Tshepo MOGOTSI, Third Secretary, Permanent Mission, Geneva

BRÉSIL/BRAZIL

Vanessa DOLCEDEFARIA (Ms.), Third Secretary, Division of New Issues and Intellectual Property, Ministry of Foreign Affairs, Brasilia

Rinaldo MANCIN, Executive - Secretary, Ministry of Environment, Brasilia

CAMEROUN/CAMEROON

Théodore JATENG, chef du Service de l'arréglementation de la documentation à la Sous-direction de la propriété industrielle, Yaoundé

Job René NJILAMOUNTON, sous -directeur chargé du suivi de la coopération avec les Institutions spécialisées des Nations Unies, Ministère des relations extérieures, Yaoundé

CANADA

Robert MCDUGALL, Policy Officer, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade, Ottawa

John CRAIG, Legal Analyst, Intellectual Property Policy Directorate, Department of Industry, Ottawa

Kristen Michelle BEAUSOLEIL (Ms.), Policy Analyst, Intellectual Property Policy Directorate, Department of Industry, Ottawa

Wayne SHINYA, Senior Policy Analyst, Canadian Heritage, Copyright Policy Branch, Ottawa

André DORION, Avocat, Services juridiques patrimoine canadien, Ministère de la justice, Hull

Jock LANGFORD, Senior Policy Analyst, Intellectual Property Rights, Biodiversity Convention Office, Environment Canada, Ottawa

Simon BRASCOUPÉ, Director, Aboriginal Affairs, Environment Canada, Ottawa

Brian ROBERTS, Senior Policy Advisor, International Relations Directorate, Indian and Northern Affairs, Ottawa

Sylvia BATT (Ms.), Senior Counsel, Aboriginal Affairs Portfolio, Department of Justice, Ottawa

Cameron MACKAY, First Secretary, Permanent Mission, Geneva

Ann Marie LABELLE (Mme), Avocate senior/Gestionnaire du groupe de la propriété intellectuelle, Ministère de la justice, Ottawa

CHINE/CHINA

GAOSi (Ms.), Division Director ,National Copyright Administration of China(NCAC) ,
Beijing

SONG Jianhua (Ms.), Division Director, Legal Affairs Department , State Intellectual Property
Office(SIPO) ,Beijing

LI Yanmei, Project Administrator, International Cooperation Department, State Intellectual
Property Office(SIPO), Beijing

HAN Li (Ms.), First Secretary , Permanent Mission , Geneva

COLOMBIE/COLOMBIA

Luis Gerardo GUZMÁN VALENCIA, Ministro Consejero, Misión Permanente, Ginebra

COMORES/COMOROS

Ahmed MALIK, professeur d'anglais et secrétaire général du Groupe folklorique Woulanga,
Moroni

Halima DJAFFARKASSIM (Mme), spécialiste en ressources génétiques, Moroni

Zainaba IBRAHIM (Mlle), chef du groupe folklorique, Moroni

Aboudou NACER, spécialiste en danse folklorique, Moroni

CONGO

Fidèle SAMBASSI, ministre conseiller, Mission permanente, Genève

Delphine BIKOUTA (Mme), premier conseiller, Mission permanente, Genève

COSTARICA

Alejandro SOLANO ORTIZ, Minister Counsellor, Permanent Mission, Geneva

CROATIE/CROATIA

DurdanaSRDELIC(Mrs.),SeniorAdministrativeAdviser,StateIntellectualPropertyOffice,
Zagreb

IrenaSCHMIDT(Mrs.),LegalExpert,StateIntellectualPropertyOffice,Zagreb

ZlataSLADIC(Mrs.),Head,PatentExaminationDepartment,StateIntellectualProperty
Office,Zagreb

DANEMARK/DENMARK

PeterSCHÖNNING,HeadofDivison,MinistryofCulture,Copenhagen

AnneJulieSchmittJENSEN(Ms.),SpecialAdviser,MinistryofCulture,Copenhagen

Niels Holm SVENDSEN,SeniorCounsellor,DanishPatentandTrademarkOffice ,
Copenhagen

ErikHERMANSEN,SeniorTechnicalAdviser,DanishPatentandTrademarkOffice,
Copenhagen

ToveSÖVND AHL PEDERSEN,SeniorAdviser,GreenlandHomeRuleGovernment,
Copenhagen

ÉGYPTE/EGYPT

NaélaGABR(Mrs.),Ambassador,PermanentRepresentative,PermanentMission,Geneva

GamalAbdelRAHMAN , LegalConsultant ,AcademyofScientificResearchandTechnology
(ASRT), Cairo

HassanELBADRAWI,Counsellor,CourtofAppeal,MinistryofJustice,Cairo

AhmedALYMO RSI,Professor,Head,ArabicLanguageandFolkloreDepartment,Faculty
ofLiterature,Cairo

NermineALZAWAHRI(Mrs.),SecondSecretary,DepartmentofSpecializedAgencies,
MinistryofForeignAffairs,Cairo

AhmedABDELLATIF,ThirdSecretary,Permanent Mission,Geneva

ELSALVADOR

JuanCarlosFERNANDEZQUEZADA, Coordinador de Propiedad Intelectual, Dirección de Política Comercial, Ministerio de Economía, San Salvador

RamiroRECINOSTREJO, Ministro Consejero, Misión Permanente, Ginebra

ÉMIRATSARABESUNIS/UNITEDARABEMIRATES

KhalidAbdallahAL -RABOY, Head, International Book Number Section, Ministry of Information and Culture, Abu Dhabi

ÉRYTHRÉE/ERITREA

BereketWOLDEYOHANNSES, Consul, Consulate of the State of Eritrea, Geneva

ESPAGNE/SPAIN

Asha SUKHWANI (Sra.), Técnico Superior Examinador, Departamento de Patentes e Información Tecnológica, Oficina Española de Patentes y Marcas, Ministerio de Ciencia y Tecnología, Madrid

HelenChristabelAnnKEEFE(Ms.), Technical Assistant, Alfonso Martín Escudero Foundation for the Environment, Rey Juan Carlos I University, Ministry of Environment, Madrid

ÉTATS-UNIS D'AMÉRIQUE/UNITED STATES OF AMERICA

Linda LOURIE (Ms.), Attorney - Advisor, Office of External Affairs, Patent and Trademark Office (USPTO), Department of Commerce, Washington D.C.

Richard DRISCOLL, Senior Conservation Officer, Office of Environmental Sciences, Department of State, Washington, D.C.

Michael MEIGS, Counsellor (Economic Affairs), Permanent Mission, Geneva

Dominic KEATING, Intellectual Property Attaché, Office of the United States Trade Representative, Permanent Mission to the World Trade Organization (WTO), Geneva

Daniel ROSS, Office of Intellectual Property and Competition, Bureau of Economic and Business Affairs, Department of State, Washington, D.C.

Eric WILSON, Bureau of Indian Trust, Department of the Interior, Washington, D.C.

Michael TAFT, Folklorist, American Folklife Center, Library of Congress, Washington, D.C.

Peggy A. BULGER (Ms.), Director, American Folklife Center, Library of Congress, Washington, D.C.

ÉTHIOPIE/ETHIOPIA

Esayas GOTTA, First Secretary, Permanent Mission, Geneva

Woinshet TADESSE, First Secretary, Permanent Mission, Geneva

FÉDÉRATION DE RUSSIE /RUSSIAN FEDERATION

Larisa SIMONOVA (Mrs.), Head of Division, International Cooperation Department, Russian Agency for Patents and Trademarks (ROSPATENT), Moscow

Yuriy SMIRNOV, Head of Division, Federal Institute of Industrial Property, Russian Agency for Patents and Trademarks (ROSPATENT), Moscow

Valery KHASANOV, Chief, Division of International Exchanges, Russian National House of Folk Arts, Moscow

FINLANDE/FINLAND

Jorma WALDÉN, Senior Advisor, Legal Affairs, Ministry of Education, Science and Culture, Helsinki

Riitta LARJA (Ms.), Coordinator, International and Legal Affairs, National Board of Patents and Registration, Helsinki

Marjut SALOKANNEL, Research Director, Academy of Finland, Department of Private Law, University of Helsinki, Helsinki

FRANCE

Marianne CANTET (Mme), chargée de mission, Service du droit international et communautaire, Institut national de la propriété industrielle (INPI), Paris

Andrée SONTOT (Mme), chargée de mission, Bureau des ressources génétiques, Paris

Jean-François CLERC, stagiaire, École nationale de l'administration (ENA), Paris

Jean-Christophe BOCCON -GIBOD, Conseiller stagiaire, Mission permanente, Geneva

GÉORGIE/GEORGIA

David GABUNIA, Director General, Georgia National Intellectual Property Center (SAKPATENTI), Tbilisi

GHANA

Bernard Katenor BOSUMPRAH, Copyright Administrator, Copyright Office, Ministry of Culture, Accra

GRÈCE/GREECE

Andreas CAMBITSIS, Minister -Counsellor, Permanent Mission, Geneva

Daphni ZOGRAFOU (Mrs.), Advisor, Permanent Mission, Geneva

Dionyssia SOTIROPOULOU (Ms.), Legal Adviser, member of the Copyright Organisation, Ministry of Culture, Athens

GUATEMALA

Andrés WYLD, Primer Secretario, Misión Permanente, Ginebra

GUINÉE/GUINEA

Thierno Amadou BAH, ingénieur au Service de la propriété industrielle (SPI) pour les ressources génétiques, Conakry

Kerfalla MAKANERA, magistrat, assistant chargé des questions juridiques, Ministère de la culture pour les savoirs traditionnels, Conakry

Omer GUILAVOGUI, professeur, consultant en propriété intellectuelle, Bureau guinéen du droit d'auteur (BGDA), Conakry

GUYANA

Choo An YIN (Ms.), Foreign Service Officer, Department of International Cooperation, Ministry of Foreign Trade and International Cooperation, Georgetown

HAÏTI/HAITI

Willems EDOUARD, directeur du Bureau du droit d'auteur, Port-au-Prince

Moetsi DUCHATELLIER, Conseiller, Mission permanente, Genève

HONGRIE/HUNGARY

Szilvia BAJTAY - TÓTH (Mrs.), Deputy Head, Legal and International Department, Hungarian Patent Office, Budapest

Krisztina KOVÁCS, Deputy Head, Legal Section, Hungarian Patent Office, Budapest

INDE/INDIA

Hardeep Singh PURI, Ambassador, Permanent Representative, Permanent Mission, Geneva

Vinod Kumar GUPTA, Director, National Institute of Science Communication and Information Resources (NISCAIR), New Delhi

Debabrata SAHA, Deputy Permanent Representative, Permanent Mission, Geneva

Preeti SARAN (Mrs.), Counsellor, Permanent Mission, Geneva

INDONÉSIE/INDONESIA

Aray ARDANTASIGIT, Director, Cooperation and Development, Directorate General of Intellectual Property, Ministry of Justice and Human Rights, Jakarta

Dewi M. KUSUMA ASTUTI, First Secretary, Permanent Mission, Geneva

IRAN (RÉPUBLIQUE ISLAMIQUE) / IRAN (ISLAMIC REPUBLIC OF)

Mohammad Reza ALIZADEH, Deputy Head of the Judiciary, Head of State Organization for Registration of Deeds and Properties of the Islamic Republic of Iran, Tehran

Ali A. MOJTEHED SHABESTARI, Ambassador, Deputy Permanent Representative, Permanent Mission, Geneva

Seyed Hassan MIRHOSSEINI, Deputy Head, State Organization for the Registration of Deeds and Properties of the Islamic Republic of Iran, Tehran

Ali HEYRANINO BARI, Counsellor, Permanent Mission, Geneva

Yadollah TAHER NEJHAD, Managing Director, Organization for Handicrafts, Tehran

Mohammad Ali MORADI - BENI, Director General, Legal Department, Ministry of Agricultural Jihad, Tehran

Yonos SAMADI, Director General, Legal Department, Organization for Cultural Heritage, Tehran

Mahmoud KHOUBKAR, Legal Expert, Ministry of Foreign Affairs, Tehran

Behrooz VOJDANI, Expert, Organization for Cultural Heritage, Tehran

Hojjat KHADEMI, Legal Expert, Ministry of Agriculture, Tehran

Mohammad Reza BAZEGHI, Expert, Organization of Handicrafts, Tehran

Zoreh TAHERI (Mrs.), Expert, Ministry of Industries and Mines, Tehran

Mehrnaz DASHTI (Mrs.), Expert, Industrial Property, Tehran

IRAQ

Muhanad Z.A.AL -ZUBAIDI, First Secretary, Ministry of Foreign Affairs, Baghdad

Jassim A.ABDALLA, First Secretary, Ministry of Foreign Affairs, Baghdad

Nawfal T.AL -BASRI, Second Secretary, Permanent Mission, Geneva

IRLANDE/IRELAND

Jacob RAJAN, Head of Section, Intellectual Property Unit, Department of Enterprise, Trade and Employment, Dublin

ITALIE/ITALY

Raffaele FOGLIA, conseiller juridique, Ministère des affaires étrangères, Rome

Marcello BROGGIO, Institut agronomique pour Outre-mer, Florence

Sem FABRIZI, premier secrétaire, Mission permanente, Genève

Mario MARINO, fonctionnaire, Ministère de politique agricole, Rome

Fabrizio GRASSI, Rome

JAMAHIRIYA ARABE LIBYENNE/LIBYAN ARAB JAMAHIRIYA

Suleiman ELGUIL, Secretary, Administrative Committee, Council for Cultural Creativity, Permanent Mission, Geneva

JAMAÏQUE/JAMAICA

Loreen WALKER (Ms.), Executive Director, Jamaica Intellectual Property Office (JIPO), Kingston

Symone BETTON (Ms.), First Secretary, Permanent Mission, Geneva

JAPON/JAPAN

Jun KOIDE, Deputy Director, Seeds and Seedlings Division, Agricultural Production Bureau, Ministry of Agriculture, Forestry and Fisheries, Tokyo

Taizo HARA, Assistant Director, International Affairs Division, Patent Office, Tokyo

Masashi NAKAZONO, Deputy Director, International Affairs Division, Commissioner's Secretariat, Agency for Cultural Affairs, Tokyo

Takashi HAMANO, Deputy Director, International Affairs Division, General Administration Department, Patent Office, Tokyo

Hitoshi WATANABE, Director, International Cooperation Office, International Affairs Division, General Administration Department, Japan Patent Office (JPO), Ministry of Economy, Trade and Industry, Tokyo

Ken-Ichiro NATSUME, Assistant Director, Tokyo

Takashi YAMASHITA, First Secretary, Permanent Mission, Geneva

Toru SATO, First Secretary, Permanent Mission, Geneva

Masayoshi MIZUNO, First Secretary, Permanent Mission, Geneva

KENYA

Amina Chawahir MOHAMED (Mrs.), Ambassador, Permanent Representative, Permanent Mission, Geneva

Paul OMONDI MBAGO, Registrar General, Attorney General's Chambers, Department of the Registrar - General, Nairobi

Norah K. OLEMBO (Mrs.), Managing Director, Kenya Industrial Property Institute, Ministry of Trade and Industry, Nairobi

Juliet M. GICHERU (Mrs.), First Secretary, Permanent Mission, Geneva

Stanley Shikhule ATSALI, Patent Examiner, Kenya Industrial Property Institute, Ministry of Trade and Industry, Nairobi

Mboi E. MISATI, Patent Examiner, Kenya Industrial Property Institute, Ministry of Trade and Industry, Nairobi

LESOTHO

Mampoi TAOANA, Crown Attorney, Registrar General, Ministry of Law and Constitutional Affairs, Maseru

LETTONIE/LATVIA

Janis KARKLINS, Ambassador, Permanent Representative, Permanent Mission, Geneva

Mara ROZENBLATE (Mrs.), Senior Examiner, Head, PCT Section, Department of Examination of Inventions, Patent Office, Riga

Dina PODVINSKA (Ms.), Third Secretary, Permanent Mission, Geneva

LITUANIE/LITHUANIA

Rimvydas NAUJOKAS, Director, State Patent Bureau, Vilnius

MADAGASCAR

Bicclair ANDRIANANTOANDRO, chargé d'affaires a.i., Mission permanente, Genève

Olgatte ABDU (Mme), première secrétaire, Mission permanente, Genève

MALI

Djibril DRAME, ingénieur agro-alimentaire, chercheur, Institut d'économie rurale, Laboratoire de technologie alimentaire, Bamako

MALTE/MALTA

Michael BARTOLO, Ambassador, Permanent Representative, Permanent Mission, Geneva

Godwin WARR, Director, Policy and Regulatory Services Directorate, Commerce Division, Ministry for Economic Services, Valletta

Owen DEGABRIELE, Policy and Regulatory Services Directorate, Ministry for Economic Services, Valletta

Tony BONNICI, Second Secretary, Permanent Mission, Geneva

MAROC/MOROCCO

Benali HARMOUCH, administrateur, chef du Service des dessins et modèles industriels, Office marocain de la propriété industrielle et commerciale (OMPIC), Ministère du commerce et de l'industrie, Casablanca

Khalid SEBTI, première secrétaire, Mission permanente, Genève

MEXIQUE/MEXICO

Fabián Ramón SALAZAR GARCÍA, Director, Divisional de Patentes, Instituto Mexicano de la Propiedad Industrial (IMPI), México, D.F.

Alejandra ÁLVAREZ TAMAYO (Sra.), Directora, Divisional de Asuntos Jurídicos, Instituto Mexicano de la Propiedad Industrial (IMPI), México, D.F.

Juan Carlos FERNÁNDEZ -UGALDE, Head, Environmental Economics, National Institute of Ecology, México, D.F.

Karla ORNELAS LOERA (Ms.), Tercera Secretaria, Misión Permanente, Ginebra

NAMIBIE/NAMIBIA

Moses MOLATENDIMOSE, Control Information Officer, Division Copyright and Neighboring Rights, Ministry of Information and Broadcasting, Windhoek

Tileing S. ANDIMA, Registrar of Companies, Trade Marks, Patents and Designs, Ministry of Trade and Industry, Windhoek

Maria POGISHO (Mrs.), Chief Control Officer, Office of the Registrar of Companies, Close Corporations, Trademarks, Patents and Designs, Ministry of Trade and Industry, Windhoek

NÉPAL/NEPAL

Kashi Nath SHARMA, Joint Secretary, Ministry of Culture, Tourism and Civil Aviation, Kathmandu

Shambhu Ram SIMKHADA, Ambassador, Permanent Mission, Geneva

Jib Raj KOTRALA, Deputy, Permanent Mission, Geneva

NICARAGUA

Lester MEJÍASOLÍS, Embajador, Representate Permanente, Misión Permanente, Ginebra

Santiago URBINAGUERRERO, Primer Secretario, Misión Permanente, Ginebra

Patricia CAMPBELL (Ms.), Primer Secretario, Misión Permanente, Ginebra

NIGER

Soule SALIFOU, directeur de la recherche scientifique et de l'innovation technologique,
Ministère des enseignements secondaires et supérieurs, de la recherche et de la technologie,
Niamey

NIGÉRIA/NIGERIA

Aliyu Muhammed ABUBAKAR, Counsellor, Permanent Mission, Geneva

E.S. NWAUCHE, Director General, Copyright Commission, Abuja

NORVÈGE/NORWAY

Jan Petter BORRING, Senior Adviser, Ministry of Environment, Oslo

Inger HOLTEN (Mrs.), Adviser, Ministry of Foreign Affairs, Oslo

Johannes OPSAHL, Senior Executive Officer, Ministry of Justice, Oslo

Constance URSIN (Mrs.), Adviser, Ministry of Church and Cultural Affairs, Oslo

Jostein SANDVIK, Senior Legal Adviser, Norwegian Patent Office, Oslo

Morten W. TVEDT, Research Fellow, The Fridtjof Nansen Institute, Oslo

NOUVELLE-ZÉLANDE/NEW ZEALAND

Kim CONNOLLY-STONE (Ms.), Senior Advisor, Intellectual Property, Competition and
Enterprise Branch, Ministry of Economic Development, Wellington

Anne HAIRA - TEHIRA (Ms.), Senior Policy Analyst, Cultural Heritage and Indigenous
Issues Maori Development Policy, Ministry of Maori Development, Wellington

PANAMA

Romel ADAMES, Embajador, Representante Permanente ante la Organización Mundial del
Comercio (OMC) y otras organizaciones especializadas en Comercio, Misión Permanente,
Ginebra

Luz Celeste RIÓSDÉDAVIS (Sra.), Directora General, Dirección General del Registro de la
Propiedad Intelectual, Dirección Nacional de Comercio, Panamá

Lilia H. CARRERA (Sra.), Analista de Comercio Exterior, Representante Permanente ante la
Organización Mundial del Comercio (OMC), Ginebra

PÉROU/PERU

BettyBERENDSON(Mrs.),MinistraConsejera,MisiónPermanente,Ginebra

DiegoBELEVAN,TercerSecretario,MisiónPermanente,Ginebra

PHILIPPINES

RobertNereoSAMSON,AttorneyIII,IntellectualPropertyOffice,MakatiCity

PORTUGAL

NunoManuelDASILVAGONÇALVES,directeur,Cabinetdudroitd'auteur,Ministèrede
lacultur e,Lisbonne

JoséSérgioDECALHEIROSDAGAMA,conseillerjuridique,Missionpermanente,Genève

QATAR

AbdullaQAYED,Director,CopyrightOffice,MinistryofEconomyandCommerce,Doha

RÉPUBLIQUEDECORÉE/ REPUBLICOFKOREA

Jae-HyunAHN,IntellectualP ropertyAttaché,PermanentMission,Geneva

Eul-SooSEO ,SeniorDeputyDirector,InternationalCooperationDivision , Korean
IntellectualPropertyOffice(KIPO) ,Daejeon

Hyung-MeeHAN(Mrs.),SeniorDeputyDirector,PharmaceuticalChemistryDivision,
KoreanIntellectualPropertyOffice(KIPO),Daejeon

KiseokOH,ResearchAssociate,CopyrightDivision,MinistryofCultureandTourism,Seoul

SungChunYOON,DeputyDirector,CopyrightDivision,MinistryofCultureandTourism,
Seoul

RÉPUBLIQUETCHÈQUE/C ZECHREPUBLIC

Lenka JIRSOVÁ(Mrs.), Lawyer,CopyrightDepartment ,MinistryofCulture, Prague

EvaKRAUTOVA(Mrs.),ProfessionalCounsel,IndustrialPropertyOffice,Prague

ROUMANIE/ROMANIA

Gheorghe BUCSÀ, Head, Industrial Designs Section, State Office for Inventions and Trademarks, Bucharest

Angela Elisabeta LUNGU (Ms.), Expert, Head, Translations Bureau, Patent Directorate, Bucharest

Rodica PARVU (Mrs.), Director General, Romanian Copyright Office, Bucharest

Raluca TIGAU (Ms.), Adviser, Romanian Copyright Office, Bucharest

ROYAUME-UNI/UNITED KINGDOM

Elizabeth COLEMAN (Ms.), Deputy Director, Intellectual Property Policy Directorate (IPPD), Patent Office, Department of Trade and Industry, London

Brian SIMPSON, Assistant Director, Copyright Directorate, Patent Office, Department of Trade and Industry, London

Linda BROWN (Ms.), Head, Global -Local Linkages Team, Environment Policy Department, Department for International Development (DfID), London

Julyan ELBRO, Senior Policy Advisor, Intellectual Property Policy Directorate (IPPD), The Patent Office, Department of Trade and Industry, Newport

Martin SMITH, National Focal Point for Access and Benefit Sharing under the CBD, Department for Environment, Food and Rural Affairs (DEFRA), London

Rashmi PANDYA, Environment Directorate, Department for Trade and Industry, London

Sue COTTON (Ms.), Attaché, Permanent Mission, Geneva

SAINT-SIÈGE/HOLYSEE

Antonella CASATI (Mlle), experte, Mission permanente, Genève

Anne-Marie COCANDREA (Mme.), experte, Mission permanente, Genève

SAOTOMÉ -ET-PRINCIPE/SAOTOME AND PRINCIPE

Adérito DE OLIVEIRA BONFIM DOS RAMOS BORGES, ingénieur chimiste, Direction du commerce et de l'industrie, São Tomé

SÉNÉGAL/SENEGAL

Ousmane CAMARA, ambassadeur, représentant permanent, Mission permanente, Genève

Cheikh Oumar ANNE, Directeur général, Agence sénégalaise pour l'innovation technologique (ASIT)

Mohamed SANE, conseiller technique, Agence sénégalaise pour l'innovation technologique (ASIT), Ministère de l'artisanat et de l'industrie, Dakar

Daouda MALIGUEYE SENE, ministre conseiller, Mission permanente, Genève

André BASSE, premier secrétaire, Mission permanente, Genève

SIERRALEONE

Aiah Deniel KONOYIMA, Deputy Administrator and Registrar General, Administrator and Registrar General's Office, Freetown

SINGAPOUR/SINGAPORE

Dennis LOW, Senior Assistant Director, Intellectual Property Office, Singapore

SLOVAQUIE/SLOVAKIA

Barbara ILLKOVA (Mme.), Counsellor, Permanent Mission, Geneva

SLOVÉNIE/SLOVENIA

Mojca PECAR, Head, Legal Department, Intellectual Property Office, Ministry of Economy, Ljubljana

SOUDAN/SUDAN

Babiker Ibrahim HASSAN, Secretary General, Federal Council for Literary and Artistic Works, Ministry of Culture, Omdurman

Muzamil Abdalla MOHAMED, Registrar General, Intellectual Property, Ministry of Justice, Khartoum

Christopher JADA, Second Secretary, Permanent Mission, Geneva

SRILANKA

Prasad KARIYAWASAM, Ambassador, Permanent Representative, Permanent Mission, Geneva

Himalee ARUNATILAKA (Ms.), Second Secretary, Permanent Mission, Geneva

Sugeeshwara GUNARATNA, Second Secretary, Permanent Mission, Geneva

SUÈDE/SWEDEN

Henry OLSSON, Special Government Adviser, Ministry of Justice, Stockholm

Frida COLLSTE (Ms.), Desk Officer, Ministry of Foreign Affairs, Stockholm

Per WRAMNER, Chairman, National Research Council on Biological Diversity, Stockholm

Patrick ANDERSSON, Senior Examiner, Swedish Patent and Registration Office, Stockholm

Frantzeska PAPADOPOULOU - ZAVALIS, Doctorate Candidate, Stockholm

Magnus ANDERSSON, Second Secretary, Permanent Mission, Geneva

SUISSE/SWITZERLAND

Martin A. GIRSBERGER, co-chef du Service juridique brevets et designs, Division droit et affaires internationales, Institut fédéral de la propriété intellectuelle (IFPI), Berne

Marie WOLLHEIM (Mme), conseillère juridique, Service juridique brevets et designs, Division droit et affaires internationales, Institut fédéral de la propriété intellectuelle (IFI), Berne

Nikolaus THUMM, conseiller économique, État major économie, Division droit et affaires internationales, Institut fédéral de la propriété intellectuelle (IFI), Berne

Robert LAMB, adjoint scientifique de la Division des affaires internationales, Office fédéral de l'environnement, des forêts et du paysage, Berne

François PYTHOUD, adjoint scientifique de la Section biotechnologie et flux des substances, Office fédéral de l'environnement, des forêts et du paysage, Berne

Andreas WERTHMÜLLER, adjoint scientifique, Secrétariat d'État à l'économie, Département fédéral de l'économie (DFE), Berne

Alwin R. KOPSE, adjoint scientifique, État major, Office fédéral de l'agriculture, Département fédéral de l'économie (DFE), Berne

THAÏLANDE/THAILAND

Sopida HAEMAKOM, Director, Legal Division, Department of Agriculture, Ministry of Agriculture and Cooperatives, Bangkok

Bundit LIMSCOON, Counsellor, Department of Economic Affairs, Ministry of Foreign Affairs, Bangkok

Supark PRONGTHURA, First Secretary, Permanent Mission, Geneva

TUNISIE/TUNISIA

Mohamed Kheireddine ABDEL -ALI, directeur général de l'Organisation tunisienne de protection des droits d'auteur (OPTDA), Tunis

TURKMÉNISTAN/TURKMENISTAN

Sulgun KURBANOVA (Mrs.), Main Specialist -Expert, Patent Department, Ministry of Economy and Finance, Ashkhabad

TURQUIE/TURKEY

Vehbi ESER, Deputy Director General, General Directorate of Protection and Control, Ministry of Agriculture and Rural Affairs, Ankara

Yasar ÖZBEK, conseiller juridique, Mission permanente, Genève

OUGANDA/UGANDA

A. Denis MANANA, First Secretary, Permanent Mission, Geneva

URUGUAY

Alejandra DEBELLIS (Ms.), Second Secretary, Permanent Mission, Geneva

VENEZUELA

Blancanieve PORTOCARRERO (Sra.), Embajadora, Representante Permanente, Misión Permanente, Ginebra

Virginia PÉREZ PÉREZ (Srta.), Primer Secretario, Misión Permanente, Ginebra

Lourdes Cristina BALDODANOGUZMÁN (Sra.), Directora General, Coordinadora de Asuntos Internacionales, Ministerio de Ciencia y Tecnología, Caracas

Mary FERNÁNDEZ (Sra.), Directora de Relaciones Internacionales, Ministerio de Ciencia y Tecnología, Caracas

Maria Adela RODRIGUEZ (Sra.), Consultor Jurídico Adjunto, Fonacit, Ministerio de Ciencia y Tecnología, Caracas

Isabel Cristina DELGADO (Sra.), Directora de Difusión y Cooperación, Servicio Autónomo de la Propiedad Intelectual (SAPI), Caracas

Noeli POCATERRA (Sra.), Representante de los Pueblos Indígenas, Caracas

José Gregorio MIRABAL, Representante Indígena, ORPIA

ZAMBIA

NKOMESHYAMUKAMAMBOI, Senior Chieftainess, Lusaka

Elizabeth NKOMESHYA (Mrs.), Senior Chieftainess, Permanent Mission, Geneva

Mwananyanda Mbikusita LEWANIKA, Principal Scientific Officer, Lusaka

ZIMBABWE

John NANGOMBE, Law Officer, Ministry of Justice, Legal and Parliamentary Affairs, Harare

II. DÉLÉGATION SPÉCIALE/ SPECIAL DELEGATION

COMMISSION EUROPÉENNE (CE)/EUROPEAN COMMISSION (EC)

Jean-Luc GAL, Seconded National Expert, Directorate General Internal Market, Unit E -2
Industrial Property, Brussels

Patrick RAVILLARD, Counsellor, Permanent Delegation, Geneva

Barbara NORCROSS-AMILHAT (Mrs.), Directorate General Internal Market - Unit E3
Copyright and Neighbouring Rights Unit, Brussels

III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/ INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

CONFÉRENCE DES NATIONS UNIES SUR LE COMMERCE ET LE DÉVELOPPEMENT (CNUCED)/UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

Promila KAPOOR (Ms.), Consultant, Division on International Trade in Goods and Services, Geneva

Sophia TWAROG (Ms.), Economic Affairs Officer, Division on International Trade in Goods and Services, Geneva

THE UNITED NATIONS UNIVERSITY

Alphonse KAMBU, JSPS/UNU Postdoctoral Fellow, UNU/Institute of Advanced Studies, Tokyo

UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

Wilton LITTLECHILD, Indigenous Expert, Canada

SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY (SCBD)

Henrietta MARRIE (Ms.), Social Affairs Officer, Traditional Knowledge, Montreal

ORGANISATION INTERNATIONALE DU TRAVAIL (OIT)/INTERNATIONAL
LABOUR ORGANIZATION (ILO)

Marianne JENSEN (Ms.), Chief Technical Adviser, Project to Promote ILO Policy on
Indigenous and Tribal Peoples, Geneva

Finn ANDERSEN, Cooperatives Branch, Geneva

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

Clive STANNARD, Senior Liaison Officer, Secretariat of the Commission on Genetic
Resources for Food and Agriculture, Rome

Álvaro Luís TOLEDO CHÁVARRI, Consultant, Secretariat of the Commission on Genetic
Resources for Food and Agriculture, Rome

BANQUE MONDIALE / THE WORLD BANK

Reinhard WOYTEK, Consultant, Washington, D.C.

ORGANISATION MONDIALE DU COMMERCE (OMC) / WORLD TRADE
ORGANIZATION (WTO)

Jayashree WATAL (Ms.), Counsellor, Intellectual Property Division, Geneva

Xiaoping WU, Legal Affairs Officer, Intellectual Property Division, Geneva

UNION INTERNATIONALE POUR LA PROTECTION DES OBTENTIONS
VÉGÉTALES (UPOV) / INTERNATIONAL UNION FOR THE PROTECTION OF NEW
VARIETIES OF PLANTS (UPOV)

Rolf JÖRDENS, Vice-Secretary General, World Intellectual Property Organization (WIPO),
Geneva

Makoto TABATA, Senior Counsellor, World Intellectual Property Organization (WIPO),
Geneva

ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (OAPI)/AFRICAN INTELLECTUAL PROPERTY ORGANIZATION (OAPI)

François KOUAKOUN'GUESSAN, expert, Abidjan

Jean-Marie FONDOUN, expert en ressources génétiques, Yaoundé

Drissa DIALLO, expert en savoirs traditionnels, Bamako

Hassane YACOUBAKAFFA, chef de Service, Yaoundé

ORGANISATION RÉGIONALE AFRICAINE DE LA PROPRIÉTÉ INDUSTRIELLE (ARIPO)/AFRICAN REGIONAL INDUSTRIAL PROPERTY ORGANIZATION (ARIPO)

Mzondi Haviland CHIRAMBO, Director General, Harare

Emmanuel SACKE, Patent Examiner (Bio - Chemistry), Technical Department, Harare

UNION AFRICAINE (UA)/AFRICAN UNION (AU)

Francis MANGENI, Counsellor, Geneva

GENERAL SECRETARIAT OF ANDEAN COMMUNITY

Mónica ROSELL (Ms.), Responsable Principal del Programa de Propiedad Intelectual, Lima

OFFICE EUROPÉEN DES BREVETS (COEB)/EUROPEAN PATENT OFFICE (EPO)

Johan AMAND, Deputy Director, International Technical Cooperation, Munich

Bart CLAES, Examiner Biotechnology, Munich

Pierre TREICHEL, Lawyer, Munich

LIGUE DES ÉTATS ARABES (LAS)/LEAGUE OF ARAB STATES (LAS)

Saad ALFARARGI, Ambassador, Permanent Observer, Permanent Delegation, Geneva

Mohamed Lamine MOUAKIBENANI, Counsellor, Permanent Delegation, Geneva

INTERNATIONAL CENTER FOR SUSTAINABLE DEVELOPMENT

David VIVAS

SECRETARIAT GÉNÉRAL DE LA COMMUNAUTÉ DU PACIFIQUE/SECRETARIAT
OF THE PACIFIC COMMUNITY

Rhonda GRIFFITHS (Ms.), Cultural Affairs Adviser, Cultural Affairs Programme , Noumea

Sylvine AUPETIT (Ms.), Research Assistant, Fribourg

SOUTH CENTRE

Sisule Fredrick MUSUNGU, Consultant, Intellectual Property, Geneva

IV. ORGANISATIONS INTERNATIONALES NON GOUVERNEMENTALES/
INTERNATIONAL NON - GOVERNMENTAL ORGANIZATIONS

Action Aid: Pushendra KUMAR (Policy Analyst , New Delhi); Ruchi TRIPATHI (Ms.)
(Food Trade Policy Analyst , London)

Ainu Association of Sapporo : Kazushi ABE (Executive Director, Sapporo);
Kaori TAHARA (Ms.) (Coordinator of International Affairs, Corcelles);
Philippe DALLAIS (Assistant)

American Association for the Advancement of Science (AAAS):
Stephen A. HANSEN (Senior Program Associate, AAAS Science and Human Rights
Program, Washington, D.C.); Justin VAN FLEET (Program Assistant, AAAS Science and
Human Rights Program, Washington, D.C.); Rosemary J. COOMBE (Ms.) (Science and
Human Rights Program)

American Folklife Center : Michael TAFT (Folklife Specialist, Washington, D.C.);
Peggy BULGER (Mrs.) (Director, Washington, D.C.)

American Folklore Society: Timothy LLOYD (Executive Director, Columbus);
Burt FEINTUCH (Professor of Folklore, Durham)

Arctic Athabaskan Council (AAC): Brian MACDONALD (Legal Counsellor, Whitehorse)

Assembly of First Nations: Ignace LAWRENCE (Senior Policy Analyst, Ottawa)

Association Benelux pour le droit des marques et modèles (BMM)/Benelux Association of Trademark and Design Agents (BMM):
Edmond SIMON (directeur adjoint, La Haye)

Association Bouregreg: Abdel krim AOUAD (secrétaire général, Président du consortium "Lyre & Luth", Casablanca); Fawzia TALOUT (Mrs.) (membre du Bureau de l'Association, Casablanca)

Association Internationale du barreau/International Bar Association (IBA):
Jonathan CURCISTAFFLER (Geneva)

Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI): Silke VON LEWINSKI (Ms.) (Munich)

Association pour l'épanouissement des femmes nomades TINHINAN:
Mohamed ABOUBACRINE (Burkina Faso); Talkalit WALETT (Burkina Faso)

Association TAMAYNUT: Hassan ID BALKASSM (Rabat); Abdallah HITOUS (secrétaire général, Ratat)

Biotechnology Industry Organization (BIO): Christian LAU, Trade Analyst, Geneva

Brazilian Association of Intellectual Property (ABPI):
Maria Thereza WOLFF (Mrs.) (Coordinatrice du Groupe de Travail sur la Biotechnologie, Rio de Janeiro)

Centre de documentation, de recherche et d'information des peuples autochtones (DoCIP):
Pierrette BIRRAUX-ZIEGLER (Mrs.) (directrice scientifique, Genève); Gonzalo OVIEDO (Genève)

Center for International Environmental Law (CIEL)
Julia OLIVA (Mme) (avocate et chercheuse, Washington D.C.)

Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC):
Timothy ROBERTS (Principal, Roberts and Company Bracknell);
Maria Tereza WOLFF (Mrs.) (Patent Attorney at Industrial Property, Rio de Janeiro);
Bo Hammer JENSEN (Patent Office, Bagsvaerd)

Comisión jurídica para el autodesarrollo de los Pueblos Originarios Andinos (CAPAJ):
Maria PEÑALOZA (Mrs.) (Consultora agrónoma, Tacna); Tomás ALARCÓN (Presidente,
Tacna)

Commission des aborigènes et des insulaires du détroit de Torres (ATSIC)/Aboriginal and
Torres Strait Islander Commission (ATSIC) : William Brian BUTLER (Commissioner,
Canberra), Anne MARTIN (Ms.) (Advisor, Woden)

Confédération internationale des éditeurs de musique (CIEM)/International Confederation of
Music Publishers (ICMP): Jenny VACHER (Ms.) (Chief Executive, Paris)

Conférence circumpolaire inuit (ICC)/ Inuit Circumpolar Conference (ICC) :
Violet FORD (Ms.) (Vice -President, Ottawa)

Conseil SAME/SAAMI Council : Mattias ÅHRE N (Legal Adviser, Stockholm);
Anne NUORGAM (Ms.); Aile JAVO; Pii NUORGAM (Ms.) (Law Student, Ohcejohka);
Ellen-Margrethe EIRA (Ms.) (Representative, Tromsø)

Copyright Research and Information Center (CRIC): Mitsue DAIRAKU (Ms.) (Professor of
Law, Faculty of Law, Hokuriku University, Tokyo)

CropLife International: Patricia POSTIGO-MCLAUGHLIN (Ms.) (Manager, Global
Political Affairs and Society Issues , Brussels)

Déclaration de Berne/Berne Declaration: François MEIENBERG (Food and Agriculture ,
Zurich); Corinna HEINEKE (Ms.) (External Researcher, Zurich); Manon RESS (Ms.)
(Washington, D.C.)

Droitset Démocratie:

Jean-Louis ROY (President, Montreal); Love ST -FLEUR (Ms.) (Interim Coordinator;
Indigenous Peoples' Rights Programme, Montreal); Sonia HENRIQUEZ (Ms.) (Consultant,
Montreal); Aurélie ARNAUD (Ms.) (Consultant, Montreal)

FARMAPU -Inter&CECOTRAP –RCOGL : Yvonne UMURERWA (Mme) (coordinatrice
nationale, Kigali)

Fédération internationale de l'industrie du médicament (FIIM)/International Federation of Pharmaceutical Manufacturers Associations (IFPMA):

Eric NOEHRENBURG (Director, Intellectual Property and Marketing Issues , Geneva);
Ariane MCCABE (Ms.) (Policy Analyst, Intellectual Property and Marketing Issues , Geneva)

Fédération internationale des conseils en propriété industrielle (FICPI)/International Federation of Industrial Property Attorneys (FICPI):

Danny R. HUNTINGTON (Chair, Commission on Traditional Knowledge)

Fédération internationale des musiciens (FI M)/International Federation of Musicians (FIM):

Benoît MACHUEL (secrétaire général , Paris)

First Peoples Worldwide: Rainy Blue Cloud GREENSFELDER (Ms.) (Program Associate)

Foundation for Aboriginal and Islander Research Action (FAIRA):

Leslie MALEZER (International Officer, Woolloongabba); D.J. AHKEE (Project Officer, Geneva)

Fundación Nuestro Ambiente (FUNA): Orlando Hipólito SAND (International Coordinator, Posadas)

Genetic Resources Action International (GRAIN): Peter EINARSSON (Consultant, Umeå)

Indian Confederation of Indigenous and Tribal Peoples (ICITP -NEZ):

Gandadhar RAMCHIARY; Praneswar BASUMATARY; Banendra Kumar MUSHAHARA (Member, Assam); Usha HAZOWARY (MUSHAHARY) (Mrs.) (Member, Assam)

Indian Movement "Tupaj Amaru" Bolivia and Peru: Lázaro PARY (General Coordinator, Geneva)

Industrie mondiale de l'automédication responsable (WSMI)/World Self Medication Industry (WSMI): Yves BARBIN (Pierre Fabre Santé, Plantes et Industrie, Gaillac)

Institute for African Development (INADEV): Paul KURUK (Executive Director , Accra)

International Environmental Law Research Centre (IELRC):

Philippe CULLET (Research Programme Director , Geneva)

International Seed Federation (FIS): Bernard LEBUANEC (Secretary General , Nyon);
Radha RANGANATHAN(Director, Technical Matters, Nyon)

International People Biodiversity Network (IPBN): Alejandro ARGUMEDO (Coordinator,
Cusco); Kent NNADOZIE (Legal Adviser, Lagos)

Max-Planck-Institute for Intellectual Property, Competition and Tax Law:
Silke VONLEWINSKI (Ms.)(Head, Department of International Law , Munich);
Thomas RAMSAUER (assistant, Université de Lausanne, Centre de droit comparé et
européen, Lausanne)

Mejlis of the Crimean Tatar People:
Nadir BEKIROV(Head of Department on Political and Legal Issues , Simferopol)

Native American Rights Fund: Kim GOTTSALK (Attorney, Boulder)

Netherlands Centre for Indigenous Peoples (NCIV): Frank MIRIAMANNE (Environment
Coordinator, Amsterdam)

Organisation des volontaires acteurs du développement et Action -Plus (OVAD -AP):
Koto MAWOUTCHONÉ (coordinateur, Lomé)

Patent Documentation Group: Ralf Holger BEHRENS (European Patent Attorney, Patent
Documentation Group, Secretary General, Basel)

Programme de santé et d'environnement/Health and Environment Program:
Madeleine NGOLOUGA (Ms.) (Executive Coordinator, Yaoundé);
Mbousnoum DORCAS (Mrs.); Bakobog NGO; Flavienne ABADAALONG (Mrs.)

Ralliement National des Métis/The Métis National Council: Paul HEIGHINGTON (National
Project Development, Ottawa)

Russian Association of Indigenous Peoples of the North (RAIPON):
Nikita KAPLIN (Vice President , Moscow); Mikhail TODYSHEV (Vice President, Moscow)

Société Internationale d'Éthnologie et de Folklore (SIEF): Valdimar HAFSTEIN (chercheur,
Reykjavik)

The Rockefeller Foundation: Joan SHIGEKAWA (Mrs.) (Associate Director, New York);
Carolyn DEERE (Ms.) (Assistant Director, New York)

The World Trade Institute of the University of Berne: Philippe CULLET (Berne);
Susette BIBER - KLEMM (Ms.) (Berne)

Tsentsak Survival Foundation: Etsa Marco CHIRIAPKUKUSH (Director, Cosilla)

Union internationale des éditeurs (UIE)/International Publishers Association (IPA) :
Benoît MÜLLER (Secretary General , Geneva); Carlo SCOLLAVIZZARI (Legal
Counsel, Geneva)

Union mondiale pour la nature (IUCN)/World Conservation Union (IUCN):
María-Fernanda ESPINOSA (Ms.) (Indigenous Peoples' Senior Advisor, Quito)

Working Group of Indigenous Minorities in Southern Africa (WIMS.A):
Joram USEB (Coordinator, Windhoek)

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

Francis GURRY, sous -directeur général, conseiller juridique/Assistant Director General,
Legal Counsel

Antony TAUBMAN, directeur par interim et chef, Division des savoirs traditionnels, Bureau
des affaires juridiques et structurelles –Système du Traité de coopération (PCT)/Acting
Director and Head, Traditional Knowledge Division, Office of Legal and Organization Affairs
and PCT System

Nuno PIRES DE CARVALHO, chef de la Section des ressources génétiques, de la
biotechnologie et des savoirs traditionnels connexes, Division des savoirs traditionnels,
Bureau des affaires juridiques et structurelles –Système du Traité de coopération
(PCT)/Head, Genetic Resources, Biotechnology and Associated Traditional Knowledge
Section, Traditional Knowledge Division, Office of Legal and Organization Affairs and PCT
System

Richard KJELDGAARD, conseiller principal, Division des savoirs traditionnels, Bureau des
affaires juridiques et structurelles –Système du Traité de coopération (PCT)/Senior
Counsellor, Traditional Knowledge Division, Office of Legal and Organization Affairs and
PCT System

Wend WENDLAND, chef de la Section de la créativité et des expressions culturelles et
traditionnelles, Division des savoirs traditionnels, Bureau des affaires juridiques et
structurelles –Système du Traité de coopération (PCT)/Head, Traditional Creativity and
Cultural Expressions Section, Traditional Knowledge Division, Office of Legal and
Organization Affairs and PCT System

Shakeel BHATTI, administrateur principal de programme, Section des ressources génétiques,
de la biotechnologie et des savoirs traditionnels connexes, Division des savoirs traditionnels,
Bureau des affaires juridiques et structurelles –Système du Traité de coopération (PCT)
/Senior Program Officer, Genetic Resources, Biotechnology and Associated Traditional
Knowledge Section, Traditional Knowledge Division, Office of Legal and Organization
Affairs and PCT System

Donna GHELFI (Mrs.), administrateur de programme, Section de la créativité et des
expressions culturelles et traditionnelles, Division des savoirs traditionnels, Bureau des
affaires juridiques et structurelles –Système du Traité de coopération (PCT)/Program Officer,
Traditional Creativity and Cultural Expressions Section, Traditional Knowledge Division,
Office of Legal and Organization Affairs and PCT System

Phyllida MIDDLEMISS (Mrs.), consultante, Division des savoirs traditionnels, Bureau des affaires juridiques et structurelles – Système du Traité de coopération (PCT)/Consultant, Traditional Knowledge Division, Office of Legal and Organization Affairs and PCT system

Susanna CHUNG (Miss), consultante, Division des savoirs traditionnels, Bureau des affaires juridiques et structurelles – Système du Traité de coopération (PCT)/Consultant, Traditional Knowledge Division, Office of Legal and Organization Affairs and PCT system

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