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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

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

**Fifth Session**  
**Geneva, July 7 to 15, 2003**

REPORT

*prepared by the Secretariat*

## TABLE OF CONTENTS

	Paragraphs
INTRODUCTION.....	1 to 10
AGENDA ITEMS	
(see document WIPO/GRTKF/IC/5/1)	
Item 1: OPENING OF THE SESSION .....	11 and 12
<i>Election of the officers</i>	
Item 2: ADOPTION OF THE AGENDA .....	13 to 24
<i>General Statements</i>	
Item 3: ACCREDITATION OF CERTAIN ORGANIZATIONS .....	25 and 26
Item 4: FOLKLORE .....	27 to 59
<i>Legal protection of expressions of folklore/traditional cultural expressions</i>	
Item 5: TRADITIONAL KNOWLEDGE .....	60 to 110
<i>Intellectual property toolkit for traditional knowledge documentation</i>	
<i>Technical proposals on databases and registries of traditional knowledge</i>	
<i>Existing intellectual property protection of traditional knowledge</i>	
<i>Elements of a sui generis system for the protection of traditional knowledge</i>	
Item 6: GENETIC RESOURCES .....	111 to 121
<i>Disclosure requirements related to genetic resources and traditional knowledge</i>	
<i>Contractual practices</i>	
Item 7: FUTURE WORK.....	122 to 209
<i>Future mandate</i>	
<i>Participation of local and Indigenous Communities</i>	
Item 8: ADOPTION OF THE REPORT .....	210
Item 9: CLOSING OF THE SESSION .....	211

## 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 fourth session (see document WIPO/GRTKF/IC/4/15), the Committee held its fifth session in Geneva, from July 7 to 15, 2003.
2. The following States were represented: Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Haiti, Honduras, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Latvia, Lesotho, Lithuania, Madagascar, Malawi, Mali, Malta, Mexico, Morocco, Myanmar, Namibia, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Pakistan, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Sao Tome and Principe, Saudi Arabia, Senegal, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, and Zambia (105). The European Community 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), Eurasian Patent Organization (EAPO), European Patent Office (EPO), Food and Agriculture Organization of the United Nations (FAO), International Labour Organization (ILO), *Organisation Internationale de la Francophonie (OIF)*, Secretariat of the Convention on Biological Diversity (SCBD), South Centre, United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), United Nations Permanent Forum on Indigenous Issues (‘Permanent Forum’), The United Nations University (UNU), and the World Trade Organization (WTO) (15).
4. Representatives of the following non-governmental organizations (‘NGOs’) took part as ad hoc observers: Aboriginal and Torres Strait Islander Commission (ATSIC), American Folklore Society, Arctic Athabaskan Council (AAC), American Intellectual Property Law Association (AIPLA), Benelux Association of Trademark and Design Agents (BMM), Berne Declaration, Brazilian Association of Intellectual Property (ABPI), Brazilian Indigenous Institute for Intellectual Property (INBRAPI), 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)*, Creators’ Rights Alliance (CRA), CropLife International, FARMAPU-Inter and CECOTRAP-RCOGL, First Peoples’ Worldwide, Friends World Committee for Consultation and Quaker United Nations Office (FWCC), Foundation for Aboriginal and Islander Research Action (FAIRA), *Fundación Nuestro Ambiente (FUNA)*, Genetic Resources Action International (GRAIN), Global Education and Environment Development

(GEED-Foundation), Health and Environment Program, Indian Movement *Tupaj Amaru* Bolivia and Peru, Indigenous Peoples' Biodiversity Network (IPBN), Institute for Food and Development Policy, Institute of Social and Cultural Anthropology, International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), International Chamber of Commerce (ICC), International Environment Law Research Centre (IELRC), International Federation of Industrial Property Attorneys (FICPI), International Federation of Pharmaceutical Manufacturers Associations (IFPMA), International Federation of Reproduction Rights Organizations (IFRRO), International League of Competition Law (ILCL), International Literary and Artistic Association (ALAI), International Plant Genetic Resources Institute (IPGRI), International Publishers Association (IPA), International Seed Federation (ISF), Inuit Circumpolar Conference (ICC), Max-Planck-Institute for Intellectual Property, Competition and Tax Law, *Métis* National Council (MNC), National Aboriginal Health Organization (NAHO), Native American Rights Fund (NARF), *Organisation des volontaires acteurs de développement et Action-plus* (OVAD-AP), *Pauktuutit* - Inuit Women's Association, The Rockefeller Foundation, SAAMI Council, *Société Internationale d'Éthnologie et de Folklore* (SIEF), Tebtebba Foundation - Indigenous Peoples' International Centre for Policy Research and Education, Tsentsak Survival Foundation, Tulalip Tribes of Washington Governmental Affairs Department, World Trade Institute of the University of Berne, World Conservation Union (IUCN), and the World Self Medication Industry (WSMI) (52).

5. A list of participants is annexed to this report.
6. A summary of the Committee's current working documents and a selection of other relevant documents was provided in document WIPO/GRTKF/IC/5/INF/5. A summary of the work of the Committee, setting these documents in a broader context, was provided in document WIPO/GRTKF/IC/5/12, "Overview of Activities and Outcomes of the Intergovernmental Committee."
7. 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/5/1 Prov.1)
  - Accreditation of Certain Non-Governmental Organizations (WIPO/GRTKF/IC/5/2) (WIPO/GRTKF/IC/5/2 Add)
  - Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/3)
  - Update on Technical Cooperation on the Legal Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/4)
  - Draft Toolkit on Intellectual Property Management (WIPO/GRTKF/IC/5/5)
  - Practical Mechanisms for the Defensive Protection of Traditional Knowledge and Genetic Resources Within the Patent System (WIPO/GRTKF/IC/5/6)
  - Consolidated Survey of Intellectual Property Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/7)
  - Composite Study on the Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/8)
  - Contractual Practices and Clauses relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing (WIPO/GRTKF/IC/5/9)
  - Draft Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge (WIPO/GRTKF/IC/5/10)
  - Participation of Indigenous and Local Communities (WIPO/GRTKF/IC/5/11)

- Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12)
- Patent Referring to *Lepidium meyenii* (Maca): Responses of Peru (document submitted by the Delegation of Peru) (WIPO/GRTKF/IC/5/13)
- Isfahan Declaration (document submitted by the Delegation of the Islamic Republic of Iran) (WIPO/GRTKF/IC/5/14) and
- Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources (document submitted by the Asian Group) (WIPO/GRTKF/IC/4/14).

8. The following documents provided additional background information:

- Information on National Experiences with the Intellectual Property Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/INF/2)
- Comparative Summary of *Sui generis* Legislation for the Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/INF/3)
- Comparative Summary of Existing National *Sui generis* Measures and Laws for the Protection of Traditional Knowledge (WIPO/GRTKF/IC/5/INF/4).

9. Five questionnaires have been circulated and continue to form the basis of several documents prepared for the sessions of the Committee. Subject to decisions of the Committee, further responses to these questionnaires would be relevant for the continuing work program of the Committee:

- 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)
- Questionnaire on Various Requirements for Disclosure Relating to Genetic Resources and Traditional Knowledge in Patent Applications (WIPO/GRTKF/IC/Q.3)
- Questionnaire on Databases and Registries Related to Traditional Knowledge and Genetic Resources (WIPO/GRTKF/IC/Q.4) and
- Questionnaire on National Experiences with the Legal Protection of Folklore (WIPO/GRTKF/IC/2/7).

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

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

11. 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. Kamil Idris.

#### *Election of the officers*

12. At its fourth session in December 2002, the Committee had 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 fifth session of the Committee.

## AGENDA ITEM 2: ADOPTION OF THE AGENDA

13. The Agenda was submitted by the Chair, and adopted by the Committee on the understanding that some flexibility in the ordering of interventions on substantive items would be permitted.

### *General Statements*

14. The Delegation of France thanked the Secretariat for the very significant efforts undertaken so that the documents were translated into French before the commencement of the session. The Delegation noted that the problem was not diminishing: it concerned a global question which, in the future, would be treated as such. The Delegation commented that the work of the Committee was founded on three elements: intellectual property (IP), which had been long established, with an uncontested legitimacy; sustainable development, founded on the equitable sharing of benefits and the use and preservation of global resources; and cultural diversity, since no model for development can be conceived in uniformity or in ignorance of the traditions, identities and knowledge of all peoples. It was necessary to promote the better use of the IP system for the benefit of developing countries, including the use of appellations of origin which protect and permit the development of products of the earth and the links between natural elements and traditional cultures, certification and collective marks for the protection of traditional products the quality of which is based on knowledge, and patents, even though this tool may present the most difficulty for access by developing countries. The Delegation recognized, however, that it may be necessary to go beyond the existing IP tools. The IP system of today, which dated from the European renaissance and enlightenment, had been important for the progress of Europe and other regions had also made use of IP tools. Even so, it was likely that these tools may not be totally adapted to the needs of developing countries; this applied especially in the domain of genetic resources (GR), traditional knowledge (TK) and folklore and the better sharing of benefits from use of TK. While promoting a better sharing of the benefits linked to exploitation of IP and promoting better use and evolution of existing tools, the Delegation suggested that one should not hesitate to develop new tools and new concepts where these were necessary, especially to promote the interests of indigenous and local communities. The Delegation observed that there had been progress made, but further work was needed. Local and indigenous communities should be involved in the work of the Committee, with the welcome participation of the United Nations Permanent Forum and the development of means for financing participation. Concerning folklore, the Delegation noted that the Committee had already shed light on practical experience, allowing for reinforcement of legal and technical assistance. Creating a *sui generis* IP regime may be a complementary solution, but may not perhaps be the only one: further reflection was needed. On TK, France favored defensive measures to avoid illicit appropriation and to promote benefit sharing. The toolkit was therefore timely, ensuring TK holders would not compromise their interests when their TK was documented. Patent examiners needed to take account of TK when conducting prior art searches. A system for positive protection could also be envisaged. On genetic resources, close study was needed of questions linked to patentability of life forms, and countries' choices needed a balance between economic and ethical considerations. National access regimes for genetic resources were needed, supplemented by the database on contractual practices. The Delegation recalled that Members of the European Union had made a proposal

regarding disclosure of origin of TK and GR used in inventions, provided this did not become a criterion of patentability.

15. The Delegation of Burkina Faso indicated that it had only received an invitation to the meeting only two months before, and that the letter of invitation specified that documents in French would follow. These documents had not been received by the commencement of the session, which did not allow for effective participation in the work. This should be done much earlier to allow all delegations to contribute.

16. The Delegation of Myanmar observed that it was very useful to engage in substantive policy discussions and to review legal approaches concerning GR, TK and folklore. It welcomed the exchange of national experience with laws in this area. It was necessary to undertake substantive work to produce concrete results, and in particular to develop an international instrument for the protection of TK. Developing countries were rich in GR, TK and folklore, and their protection was vital for those countries. Unauthorized piracy and misuse of this material continued unabated. The Delegation accordingly favored the development of an international treaty. Myanmar itself had a rich heritage of indigenous medicine, TK and GR. It attached the utmost importance to protecting, promoting and developing TK, and this process would be complemented and reinforced by an international legal instrument. Systems for TK protection varied between countries, creating a need for harmonization. Since there was a diversity of national systems, the best approach at the international level would be a *sui generis* system. The Committee should be result-oriented, and make preparations for substantive negotiations on a treaty.

17. The Delegation of the Islamic Republic of Iran reported on the WIPO Inter-Regional Meeting on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore which had been organized in Isfahan, Iran from June 16 to 18, 2003, in cooperation with the Government of the Islamic Republic of Iran and the Iran Handicrafts Organization. The Delegation outlined the 'Isfahan Declaration,' a statement adopted at the meeting (distributed to the Committee as WIPO/GRTKF/IC/5/14). The Delegation also pointed to the rich treasury of folkloric cultural heritage in Iran, which had very diverse handicrafts and important experiences in the field. The importance attached to its millennia-old cultural identity and heritage led to steps for documenting traditional cultural expressions (TCEs). Over two hundred different lines of traditional artifacts had been identified, and there had been consideration to collecting documents on handicrafts that were in disuse or were dying out. Verbal or intangible traditional culture should also be preserved. This would increase public awareness of their past, community and identity. Simply collecting and archiving cultural documents did not create a relationship between present and past, and strengthen cultural identity. The possibilities for commercial exploitation of TCEs, whether verbal or tangible, were limited because of the lack of applicable IP protection in relation to databases of documented material.

18. The Delegation of Italy, on behalf of the European Community and its Member States, referred to the documents on TK, in particular the consolidated survey of IP protection of TK (document WIPO/GRTKF/IC/5/7) and the consolidated analysis of the legal protection of TK (document WIPO/GRTKF/IC/5/8). The Delegation stated that the European Community and its Member States supported the on-going work by the Committee on TK and would continue to participate actively in the work. In this respect, the Delegation recalled that the European Community and its Member States submitted a communication entitled "Traditional Knowledge and IPRs" at the third session of the Committee (document WIPO/GRTKF/IC/3/16). The Delegation stated that the European Community and its

Member States remained committed to find appropriate, effective and balanced solutions for TK protection agreeable to all parties. The Delegation stated that the European Community and its Member States reiterated their support for the further work towards the development of internationally agreed *sui generis* models for the legal protection of TK. The Delegation added that this work should be pursued, where possible, on the basis of the experience acquired by countries protecting TK at local or regional level. With regards to the two documents under consideration, the Delegation stated that the European Community and its Member States agreed with the general direction proposed for future work as set out in paragraph 28 of document WIPO/GRTKF/IC/5/7 and paragraph 149 of document WIPO/GRTKF/IC/5/8.

19. The Delegation of Zambia stated that the key to note was that document WIPO/GRTKF/IC/5/7 included comments made on the limitations of conventional IP systems and it recognized the growing number and importance of national *sui generis* systems. With regards to document WIPO/GRTKF/IC/5/8, the Delegation stated that the Composite Study on the Protection of Traditional Knowledge was useful as it emphasized that conventional intellectual property mechanisms may not be fully consistent or adequate to protect TK and analyzed potential elements of a *sui generis* system of protection, as well as examined the notion of protection of TK and possible approaches to defining TK. The Delegation added, however, that seeking to better define the subject-matter and to use national experiences to identify what would be protected, and how, should not delay concrete efforts to develop a legally binding international instrument that recognized, protected and rewarded TK. The Delegation stated that the document (WIPO/GRTKF/IC/5/8) thus should direct future work towards the actual establishment of such an international *sui generis* system of protection. It added that some elements of an international instrument for TK would be its application in trade-related activities and in all matters that affect the equitable development and integrity of local communities; mutual cooperation and support with the WTO; respect for the right of holders of TK to choose whether to commercialize their knowledge or not; a dispute settlement mechanism; review by the Standing Committee on Genetic Resources, Traditional Knowledge, and Folklore; and progressive documentation of TK at the national level. The Delegation concluded that documents WIPO/GRTKF/IC/5/8 and WIPO/GRTKF/IC/5/3 proposed the development of policy options as a possible basis for guidelines/recommendations/model provisions and that it supported the development of guidelines as a step towards a more binding solution within specific timeframe.

20. The representative of the Secretariat of the Convention on Biological Diversity (SCBD) provided an update on recent developments including an expert meeting on potential impacts of genetic use restriction technologies on smallholder farmers, indigenous and local communities and on Farmers' Rights; an expert group meeting on TK and the Clearing House Mechanism of the Convention on Biological Diversity (CBD); and developments with respect to the composite report on status and trends regarding the knowledge, innovations and practices of indigenous and local communities. With respect to the issue of access to GR and benefit-sharing, the representative reported that the Plan of Implementation adopted by the World Summit on Sustainable Development in paragraph 44 (o) calls for action to "negotiate within the framework of the Convention on Biological Diversity ....an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources." An Inter-sessional meeting on the Multi-Year Programme of Work of the Convention, in March 2003, recommended that the Working Group on Access and Benefit-sharing should consider the process, nature, scope, elements and modalities of an international regime at its next meeting, in December 2003, and provide advice to the Conference of the Parties (COP) at its seventh meeting, in March 2004, on how it may wish to



address this issue. The representative advised that the issue of disclosure of origin of GR and relevant TK in IP applications, where the subject matter of the application concerned or made use of such knowledge in its development, was to be considered during the discussions on measures to support compliance with prior informed consent and mutually agreed terms in Contracting Parties with users under their jurisdiction. The technical study carried out by the WIPO Secretariat following the invitation of COP (document WIPO/GRTKF/IC/5/10) would therefore provide a good basis for discussions during the meeting of the Working Group. It was therefore crucial that the study be available at the meeting of the Working Group in December 2003 as this would provide the opportunity for an early consideration of these issues within the framework of the Convention. The representative indicated that technology transfer and cooperation under the CBD was one of the main issues for consideration at the seventh meeting of the COP, in February 2004, and she outlined avenues for further collaboration between the CBD and WIPO on this topic, including linking the Clearing House Mechanism to WIPO patent databases, and an invitation for WIPO further to explore and analyze the role of IP rights in technology transfer in the context of the CBD.

21. The representative of the United Nations Environment Programme (UNEP) welcomed the establishment of an Intergovernmental Committee and stated that the work of the TK Division within WIPO was complementary to the various aspects of UNEP's work, as well as supported the implementation of the provisions for the CBD. The representative referred to a joint study, aimed to identify and explore the role of IPR in the sharing of benefits arising from the use of biological resources and associated TK, which was presented jointly by UNEP and WIPO at the sixth meeting of the the Conference of Parties to the CBD. The representative went further to describe the activities of UNEP in this area.

22. The representative of the Indian Movement *Tupaj Amaru* commented that despite four sessions of the Committee, there had been the sad outcome of the compilation of reports. For indigenous peoples, the compilation of statements and information was not sufficient for the restitution of property and the cultural values of indigenous communities, who were the victims of the deprivation of their resources yet had not been given the resources to attend the Committee despite years of asking for them. Indigenous communities were in the grasp of market forces and their heritage and cultural values were being plundered. The Committee should protect TK and GR, yet these were being handed over to corporations. This showed that an international legal framework had to defend and protect these resources, especially for developing countries, yet the Committee had not yet developed a definition of TK. Each country had its own definition, but an acceptable definition for indigenous peoples had not been developed. The Committee should accordingly harmonize national legal systems.

23. The representative of the Health and Environment Program pointed to the limited financial resources which affected the capacity of her organization to take part in the Committee. Local communities had a valuable cultural heritage but lacked the means and the laws to preserve their TK and to subsist on their wisdom. Her organization deplored the fact that local communities had to submit to the increasing theft of their knowledge for the benefit of researchers and others. She hoped that the current meeting would reduce divergences in views and permit Africa's regional and sub-regional organizations to enhance their role and to realize synergies with WIPO for the sustainable promotion of IP in the world and the putting into effect and implementation of national legislation.

24. The representative of the International Chamber of Commerce (ICC) recommended that the mandate of the Committee be extended for at least two additional years and believed that the Committee had proven to be a valuable resource for accurate information and counsel on

the role of the patent system in encouraging access to GR, sharing the benefits, and access to the resources. It stated that there did not appear to be any other institution with the expertise and experience to fill these needs within the immediate future. The representative urged the continuation of the Committee based on its existing mandate and recommended that it encourage the exchange of national experiences and case studies on issues related to GR and IP and that it undertake initiatives to clarify further issues related to the protection of GR. Concerning indigenous participation, it was of the view that the contribution of indigenous and local people to the work of the Committee was indispensable. It added that it was essential for the Committee to listen to and learn from the holders of TK. It added that appropriate means must be found to support them. The representative went further to commend the Secretariat for document WIPO/GRTKF/IC/5/10 which analysed some of the questions that arose when considering the disclosure of origins of genetic materials in patent applications. The representative supported the transmission of the study to the SCBD, and stated that that the study raised many important questions which now needed to be answered.

### AGENDA ITEM 3: ACCREDITATION OF CERTAIN ORGANIZATIONS

#### *Accreditation of certain non-governmental organizations*

25. At the invitation of the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/5/2 and WIPO/GRTKF/IC/5/2 Add, which gave details of ten additional organizations that had requested ad hoc observer status for the sessions of the Committee since its fourth session.

26. The Committee unanimously approved accreditation of all the following organizations as ad hoc observers: Canadian Indigenous Biodiversity Network (CIBN), Consumer Project on Technology (CPTech), Creators' Rights Alliance (CRA)/*L'Alliance pour les droits des créateurs (ADC)*, *Fédération des Organisations Autochtones de Guyane (FOAG)*, Franciscans International, HealthChek, Innu Council of Nitassinan (ICN), Institute for Food and Development Policy, International Indian Treaty Council (IITC), and the Kaska Dena Council (KDC).

### AGENDA ITEM 4: FOLKLORE

#### *Legal protection of expressions of folklore/traditional cultural expressions*

27. At the invitation of the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/5/3, a consolidated analysis of the legal protection of traditional cultural expressions (TCEs) or expressions of folklore, and WIPO/GRTKF/IC/5/4 (an update on technical cooperation on the legal protection of traditional cultural expressions. Supplementary information was provided in document WIPO/GRTKF/IC/5/INF/3, a comparative summary of *sui generis* protection of TCEs.

28. The Delegation of Italy, on behalf of the European Community and its Member States, stated that the wealth of information so far collected indicated that the attempt to protect expressions of folklore, or TCEs, in a formal manner were very varied and for the most part very recent. The Delegation stated that the European Community and its Member States encouraged WIPO to continue its activities such as technical assistance and training in the context of TCEs so as to allow indigenous communities the greatest access to the established IP system and other options and possible mechanisms which were most suited to their requirements. The European Community and its Member States took note of the documents prepared by the Secretariat which represented a good basis for future discussions and supported the development of an “annotated menu” of policy options for future works of the Committee as set out in paragraph 34 in document WIPO/GRTKF/IC/5/3.

29. The Delegation of Norway expressed support for focused discussions on the possible establishment of a functional international regime for the protection of folklore or TCEs and continued examination of existing national systems for the protection of TCEs. The discussion on what constitutes “protection” had been constructive and useful. The Delegation supported the development of an annotated menu of policy options, which would help further to clarify and structure the debate. The Delegation supported continued work on these matters as well as future work on determining whether TCEs were sufficiently protected within the existing IP systems, or whether elements of *sui generis* protection were appropriate. It was too early to clearly define what the end result of the work should be, in particular to decide whether one should be working towards new legally binding rules. Only further discussions and analysis within the WIPO system should determine what conclusions should be drawn.

30. Regarding document WIPO/GRTKF/IC/5/3 which distinguished between pre-existing, underlying cultural heritage and traditional culture, and contemporary literary and artistic tradition-based productions, the Delegation of Japan commented that these were relative concepts and that it was difficult to draw a firm distinction between the two or to clearly define them. As regards providing additional protection for folklore beyond the existing copyright system, the Delegation stated that one must

be careful in keeping a balance of rights and interests between folklore holders and the holders and users of IP rights. Finally, the Delegation supported the Secretariat's proposal contained in paragraph 34, inviting Committee Members to continue to provide new or updated information on folklore protection to them.

31. The Delegation of India noted that the document introduced a distinction between traditional cultural expressions that were part of the cultural heritage *per se* and those that were contemporary, tradition-based creations. The Delegate explained that this distinction was artificial and contrary to the well-established position and progress made so far by the Committee. Therefore it should, in the opinion of the Delegation of India, be removed. No appropriation of TCEs should be permitted for commercial gain until the holders of TCEs had given their consent and an opportunity to benefit.

32. The Delegation of Morocco drew attention to the Arab Regional Seminar on the protection of TCEs held in Rabat in May 2003, in cooperation with WIPO and the government of the Kingdom of Morocco. This Seminar highlighted the importance of cooperation in protection of folklore, GR and TK. The delegations at the Seminar affirmed the importance of: coordination between all concerned bodies to provide an international mechanism for protection of TCE; providing a center to compile and collect documents related to TCEs; technical and financial assistance to national committees. The assistance would help collect and document TCEs in Arab countries so they were protected against unlawful exploitation and provide technical mechanisms for protection. The protection of TCEs should be taken up as an issue in international meetings; and a meeting should be organized for experts on the collection and protection of Arab cultural heritage. The Delegation called on WIPO: to provide general guidelines for the protection of TCEs, taken from experiences in Arab countries; to provide Model Laws designed especially for Arab countries; and to enable other countries to draw benefit from these projects. This Committee must work towards a *sui generis* protection system. WIPO needed to play a role to settle the matters related to GRTKF issues. The Delegate hoped that the outcomes of the May seminar in Rabat would be taken into account in future versions of document WIPO/GRTKF/IC/5/4.

33. The Delegation of the Russian Federation referred to the International Forum on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore held in Moscow from June 3 to 5, 2003. At that forum 160 representatives were present, including representatives of ministries and other institutions outside Russia as well as representatives of indigenous peoples' organizations. Speakers from WIPO, Kenya, India, and other countries addressed protection of TK and traditional culture. Presentations were made by Russian speakers on problems associated with protection of TK and cultural expressions of indigenous peoples in the Russian far East and the Russian far North. They also spoke of the establishment of a book on indigenous flora and fauna which will enhance protection of GR in Russia generally. A CD-ROM presentation was provided during the meeting on Russian legislation on the protection of GR, TK and folklore. Research on these areas conducted by the Russian Patent Agency was also discussed. Round Table discussions were held and a statement voicing recommendations for WIPO on these issues was adopted. Participants in the international forum were satisfied with the forum and its outcomes, particularly with respect to the exchange of information on these issues. The participants emphasized the increasing importance of national policies of many countries on these issues and also stressed the need for international cooperation to achieve national policy aims. The participants encouraged additional forums on these issues and continued attention to them by WIPO. The declaration from the meeting was provided in written form.

34. The Delegation of Malawi stated that it valued folklore and TK highly, and therefore considered that it should be given all the necessary protection that it required and that the rightful owners should benefit in the end. For this to be possible, there was a need to sensitize indigenous and local communities, relevant organizations and other stakeholders in order for them to have a clear idea of the work and mandate of the Committee. Considering there was much cross-border folklore and TK in the African region, the Delegation requested that WIPO organize a sub-regional workshop in conjunction with ARIPO similar to the earlier OAPI workshop in Dakar. Further to this, the Delegation expressed reservations on the use of the term "traditional cultural expressions" in place of "expressions of folklore." The Delegation stated that the term "folklore" had been in use for so many years that it was how it was known under Malawi's copyright laws, and that changing it would lead to some legal and technical problems in many countries.

35. The Delegation of Egypt stated that the folklore issue was a priority and wished that folklore be given full attention during the discussions of the Committee. The Committee should reach an agreement, based on solid scientific standards that would take into account the interests of the stakeholders. The Delegation expressed reservations with the use of

the term 'traditional cultural expressions.' The use of the terms 'folklore' or 'expressions of folklore' had been in international use for many years, and references to TCEs obscured key questions such as what was actually being protected; why was it protected; how was one to protect it; who was being protected; who was to be protected; and who was going to provide the protection? None of these questions had been clarified so far. Further, it was not clear if TCEs were oral or written, and whether they were expressions of community or of an individual.

Enormous difficulties were foreseen in the use of this term, similar to the problems arising from the use by UNESCO of the term 'intangible cultural heritage.' The

Delegation stated that the term 'folklore' should be retained because: TCEs were not necessarily collective but individual and were attributed to the creator known by the society and preserved by the community; traditional cultural expressions were mostly fixed and were registered, preserved and the creators known; any term may be appropriate to certain cultures but not necessarily appropriate to all cultures, so that caution was required when using certain terms and defining its features. There must be care when generalizing especially, for example, when small communities were described as local people, indigenous peoples or ethnic groups that are characterized by cultural diversity due to their specific conditions. Defensive protection in the form of documenting folklore did not replace positive protection in the form of finding a *sui generis* protection system that involved the sharing of benefits from the lawful use of expressions of folklore. Without positive protection there would be more piracy and misuse of folklore and therefore rightholders would have no rights whether moral or material. TCEs were not limited to obtaining material benefits or economic profits, and protecting cultures was more important. The positive protection of folklore implicated moral rights depending on place and the creator and thus prohibited the legal use and misuse of these rights. The Delegation emphasized that the preparation of a "toolkit" for the creators of folklore for capacity building would raise awareness with regard to the misuse of expressions of folklore, but this must be conducted in consultation with the relevant rightholders. The Delegation stated that the evolving nature of folkloric expressions required that a *sui generis* system must be adaptable. The Delegation emphasized the necessity to prepare a document on possible elements of an international framework to protect all forms of expressions of folklore, i.e. an international treaty. The Delegation stated that the Committee needed to be specific with regard to national and international terms and that comprehensive lists, open to folkloric expressions, were needed. The Delegation stated that it was in the Committee's common interest to create an international instrument which could be used as a reference framework by all. The Delegation emphasized that the problems were cultural and specific in nature. Although they had economic and political implications, there were still some cultural aspects to consider.

36. The Delegation of the Islamic Republic of Iran referred to paragraph 69 of the annex of document WIPO/GRTKF/IC/5/3 concerning the use of the four classifications of the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, with regard to traditional cultural expressions. It stated that it believed that although the classification of expressions of folklore by WIPO simplified the work of researchers, it also aided in the finding of samples and classifying them. The Delegation noted that in many countries

including Iran, where traditional culture was present in every aspect of peoples' lives, most of the expressions of folklore were intertwined with each other and that it was not easy to separate them. It added that some of the tangible expressions were defined in intangible areas, for example, in clothing, food, perfumes, plants, drinks, musical instruments, decorations and ornaments, symbols and handicrafts were virtually defined in national and religious ceremonies and generally in intangible cultural heritage. The Delegation stated that it found that the UNESCO Recommendations of 1989 in respect of the protection of folklore were incomplete and insufficient as they placed an emphasis on the end products and did not pay any attention to the production processes for creation of cultural and artistic works. Ignoring such processes in determining the original owners of expressions of folklore would confuse them and consequently the rights of the real owners of the works would be violated and neglected. The Delegation believed that in addition to the organic and large relationship among various expressions of folklore a strong connection existed between these expressions and TK. It added that separating or removing any of these expressions would cause problems in a traditional system and would weaken the applications and general role of a given tradition because the general public in a traditional society had always experienced a set of both material and moral expressions, tangible and intangible, in traditional and religious ceremonies. The Delegation suggested in this respect that the Committee place "mixed traditional cultural expressions" (tangible and intangible) as the fifth classification of TCEs for consideration. Referring then specifically to document WIPO/GRTKF/IC/5/3, the Delegation expressed their support for the document, referring to pages 18 and 19 of the Annex to the document and paragraphs 53 to 55, and 61 of the same document in their statement. The Delegation stated that in the Islamic Republic of Iran, which held the most diverse and most valuable treasures of cultural heritage, concepts such as "traditional culture" and "cultural heritage" were usually used with one single meaning and their expressions did not differ much. The Delegation added that expressions of folklore, like cultural heritage, traditional art, TK and intellectual cultural heritage had been established and created during the course of thousands of years of social life of Iranians and had been handed down orally from a skillful master to a young apprentice. It added that their national and cultural identity had been maintained in this manner to date. The Delegation stated that the only difference in their folklore and traditional culture had been from a geographical point of view; in other words, the people of Iran understood folklore to mean a kind of culture and art which existed in rural and tribal areas only, whereas "traditional culture" meant an entirely different form of traditional culture which belonged to the urban people. The Delegation added that Iranian traditional arts, like folkloric arts, had been formed under the influence of numerous factors such as social, economic, political, historic and environmental factors in the course of thousands of years, and had been mostly preserved verbally, although some have been documented.

37. The Delegation of Nigeria joined with the other delegations in stressing the importance of the protection of folklore. The Delegation also voiced concern with the use of the term "traditional cultural expressions" in place of "expressions of folklore." The Delegation stated that there were other instruments which could address the issue of the preservation of folklore and that IP law could not sufficiently address all concerns expressed. There tended to be confusion between folklore and cultural heritage and African countries had always separated "folklore" from "cultural heritage." There was no confusion between traditional expressions of folklore and contemporary expressions of works derived from folklore. The Delegation stated that the Committee should reduce the issues under the discussions and narrow the options, which would then speed up the discussions. Caution should be used when referring

to folklore as being in the “public domain” in the copyright context. The Delegation explained that the expression “public domain” tended to indicate something which had once been protected when this protection had lapsed. While protected under customary legal systems, expressions of folklore had never been protected under IP laws, yet this should not suggest that because a work was accessible it was already in the public domain and available freely. The Committee should look into the possibility of a *sui generis* regime even if it might fall within IP law. The Delegation added that the *sui generis* regime could be a combination of the workable aspects of different existing frameworks. The current analysis of issues and the call for a *sui generis* instrument had overlooked some policy options. For instance, concerning the duration of protection of folklore, the concerns for perpetual duration tended to look backwards, whereas an approach setting a term, such as 150 years from the present, might be adequate. The Delegation drew attention to the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, as well as the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999, and stated that all such previous work should not be ignored or go to waste. Instead the Committee should focus on compiling a new instrument by learning from these model laws. The Delegation stated further that the Tunis Model Law on Copyright for Developing Countries, 1976 had influenced many national legislations, such as that of Nigeria, and that insufficient experience at the national level should not be an obstacle. It added that countries which had provisions concerning the protection of folklore might require additional technical assistance to make such protection more workable and that the Committee should look further at regional and sub-regional cooperation. The Delegation stated that it was doubtful whether the menu of options proposed in the document would enhance the process; it may rather dilute the protection of expressions of folklore. Therefore, rather than focusing on the menu of options, the Delegation supported the decision made at the fourth session of the Committee as quoted in paragraph 32 of document WIPO/GRTKF/IC/5/3.

38. The Delegation of United States of America summarized some recent national activities, including actions by the US Department of the Interior’s Indian and Crafts Board concerning protection afforded to Indian craftspersons under the Indian Crafts Act, and dissemination of information regarding the Tulalip Tribes ‘Cultural Stories’ database, which had been presented to the third session of the Committee. Several government agencies held an information and consultative meeting parallel to the national Congress of American Indians mid-winter meeting. The work of the Committee and the National Cancer Institute’s access and benefit-sharing model were discussed. At a special session of a working group on a draft declaration on the rights of indigenous peoples of the Organization of American States (OAS), the USPTO articulated the views of the US government with respect to the various protections available to US tribes, American Indians and Alaskan natives under domestic law. The Delegation welcomed Canada’s hospitality in hosting a North American regional workshop in October 2003. Turning specifically to document



WIPO/GRTKF/IC/5/3, the Delegation of the United States of America supported the development of a menu of policy options to provide to practical support for TCEs protection and to serve as the basis for the development of non-binding model provisions, recommendations or guidelines such as the non-binding recommendations such as those concluded at the Standing Committee on Trademarks (SCT). The Delegation stated that it envisioned that this menu of options would also set out an analysis of the benefits and drawbacks of the various options and that such an approach would allow each Member States to tailor their own needs, while still providing broad guidance on the best ways to approach the issues. It agreed that further work was still needed to clarify and focus many of the policy issues raised by the various options as the possible basis for recommendations and guidelines. The Delegation stated that documents WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/5/INF/3 were helpful in developing understanding and evaluation of various options for *sui generis* protection. Regarding the various *sui generis* systems set out in document WIPO/GRTKF/IC/5/INF/3, the Delegation raised questions concerning the protection of individual rights of indigenous peoples, as well as how these systems handled disputes amongst different communities, in particular the authorization and consent of use and the sharing of benefits. The Delegation expressed its interest in how an indigenous group gained recognition as a separate community entitled to protection under the various laws. The Delegation noted the variety of approaches to the subject matter protected. The Delegation noted the differences shown between customary law approaches to dispute resolution, and stressed that care should be taken to safeguard these localized protection measures from preemption by any international attempts at harmonization. The Delegation stated that some laws addressed the relationship between traditional copyright and TCE protection and provided copyright protection for original derivative works of TCEs, and that consent needed to be obtained for use of underlying TCEs. The requirement for consent may stifle innovation and creation. The Delegation concluded by expressing its interest in learning the practical experiences of the countries in enforcing the laws concerned.

39. The Delegation of South Africa queried the approach undertaken by the Secretariat in relation to its mandate to explore how IP interacts with these issues. Decisions could be taken on a differentiated basis. For example, in relation to folklore and GIs, if there was a consensus, then a decision should be taken to move to another level of exploration, for example to move to discussions on an international treaty. If one spoke of folklore and trademarks, collective marks, certification marks, and the like, a decision should also be taken. The same applied to the law of competition, trade secrets, and customary practices and law. The Delegation hence suggested that the proposals should be looked at very closely and not generally in an undifferentiated way. The issues should be identified and decisions taken to move forward where possible. The Delegation considered that with respect to the policy guidelines being suggested in WIPO/GRTKF/IC/5/3, it would like to see the establishment of an expert committee with the task of drafting treaty guidelines and then reporting back to Member States. The Delegation stated that when referring to TK and TCEs,

the discussions should not be considered as groups but rather as nations, as it is a part of all cultures. The Delegation differentiated between individual rights and collective rights, stating that a balance was needed. There was no need for a debate as to whether things were written or not written, as there were many international instruments that dealt with such issues. The Delegation stated that the issue of policy guidelines were equally important for a nation, a region, as well as an international organization and added that it was therefore necessary to differentiate for what purposes these guidelines should be developed. The Delegation added that although nationally there was a prerogative to follow the guidelines, there would also be various regions which also be guided by the work conducted by the Committee. The Delegation stated that at the current level of discussions on policy guidelines, there was a need for a committee of experts to be established.

40. The Delegation of Trinidad and Tobago stated that the protection of TCEs was borne out of a number of needs, one of the most important being the increase in IP rights granted in jurisdictions other than the jurisdiction of the holders of these rights and the prosperity of non-national and non-right holders to use them in ways that seemed to be abusive, as well as the commercial use thereof without some benefit reverting to the holders of these rights. The Delegation stated that the existing legislation in Trinidad and Tobago did not formally address the needs of holders of TCEs. The Delegation added that Trinidad and Tobago had previously welcomed a WIPO fact-finding mission, held regional consultations on these issues and continued to explore them in various other fora and workshops. The Delegation added that an attempt would be made to have the protection of TCEs discussed at the next Ministers of Culture of the Caribbean, as well as the next meeting of the Heads of Intellectual Property Offices of the Caribbean which was to take place in 2003. The Delegation stated that the work that was undertaken by the Committee was an essential prerequisite before the development of an international instrument could be considered. It added that the analysis, studies and so forth, undertaken by WIPO were appreciated and useful to them in their deliberations on national legislation or *sui generis* protection for TCEs.

41. The Delegation of New Zealand stated that document WIPO/GRTKF/IC/5/3 provided an excellent resource for policy makers, legal practitioners and indigenous communities interested in the protection, and where appropriate, commercial use, of TCEs. The Delegation supported the development and extension of the document into an annotated menu of policy options to provide practical support for protection of TCEs. Regarding the use of the updated resource for the development of recommendations or guidelines, the Delegation stated that it would support this direction as guidelines or recommendations would assist Member States in developing domestic policies or mechanisms based on the menu of options. The Delegation stated that it was premature, at this stage, to embark on a process to develop or negotiate a *sui generis* law of international application. It added that once the policy options were tested across a wide range of domestic environments and by a range of indigenous or local communities, the Committee could begin to build consensus regarding what might be required in terms of mechanisms of international application. The Delegation stated that it was particularly important for government policy makers to work with indigenous and local communities to gauge their objectives for the protection and use of their knowledge. It added that while there might be a number of similarities across these groups, it was also likely that there were quite diverse objectives and views concerning the protection of cultural expressions in an IP sense. The Delegation added that the Committee should wait for

the domestic analysis and implementation of options proposed in the annotated menu, or already identified. The Delegation made suggestions concerning the composite study and what it might include, starting first with a query concerning the scope of the document, namely protection of TCEs in an “intellectual property sense” and the distinction between “traditional knowledge” and “traditional cultural expressions.” The Delegation invited Member States and the Secretariat to think about multi-disciplinary approaches to the protection of TCEs when preparing for the consolidated study. It added that while indigenous and local communities might find the use of IP mechanisms useful in some circumstances, in others non-IP approaches may be called for. The Delegation suggested that the Secretariat should investigate the relationship between IP and non-IP approaches and invited Member States to think further about whether IP approaches best serve the objectives and vision for the knowledge of indigenous and local communities within their jurisdictions, and to engage with these communities about these issues. It added that some consideration of the distinction between TK and TCEs may be appropriate. In thinking about the objectives of indigenous and local communities for their knowledge, the Delegation stated that they were mindful that the many Maori groups in New Zealand were seeking a dual approach to IP matters which sought to protect TCEs, when and where appropriate, and which allowed these groups to use their knowledge in order to participate and benefit from a market economy. The Delegation stated that recent initiatives demonstrated their desire to use their TCEs in a way that preserved the integrity of their culture whilst at the same time yielded benefits for them through trade in products created upon or inspired by TK. The Delegation concluded by noting that a number these comments applied equally to TK more generally, as distinct from TCEs

42. The Delegation of Canada acknowledged how much, on a conceptual level, the Committee had achieved during its existing mandate, and added that with more time, the process would be rewarding with many innovative solutions that may take various forms. The Delegation stated that the document under consideration requested two types of comments, firstly on the issues raised in the document and its annex, and secondly, on possible directions for future work. The Delegation directed their first comment to the expanded treatment of the policy context, and the related question of the meaning of “protection.” It noted that there might be many objectives for protecting TCEs, from preservation of intangible cultural heritage, to promoting diversity, to promotion of creativity and innovation. The Delegation stated that depending on which objective was paramount to a given country or community, the policy response might be different and a number of technical issues, such as definitions, might also vary. It added that as it worked towards focusing the role of IP in the protection of TCEs the Committee needed to arrive at a clearer notion of its common objectives. The Delegation found that the distinction between pre-existing cultural heritage and contemporary tradition-based artistic production useful. The Delegation added that this distinction, along with the renewed emphasis on the concept of the public domain, helped to further focus on the objectives of protection, as each case may require a different response. The Delegation concluded by reiterating its preference for the term ‘traditional cultural expressions’ over the somewhat less descriptive term of expressions of folklore as the former term provided three descriptive concepts from which definitions may more easily

flow, and the label situated the concept more firmly within the context of the broader TK discussions.

43. The Delegation of China stated that it supported the efforts and understandings reached on TCEs. The Delegation expressed its support for document WIPO/GRTKF/IC/5/3 that updated and expanded on the previous document WIPO/GRTKF/IC/4/3. The Delegation stated that the main developments mentioned paragraph 6 of document WIPO/GRTKF/IC/5/3 were beneficial especially the sections on the relevant policies and policy options, TCEs as economic and cultural assets, and the section on cultural heritage collections and databases. The Delegation stated that China was abundant in TCEs, and was supportive of the protection TCEs in appropriate forms, and had been closely following progress in this area. With regards to policy options, the Delegation believed that the Committee should bring into full play the role of IP protection systems, and added that diversified policy options should be encouraged such as the possibility of *sui generis* protection. Clarifying the distinctions between preservation/safeguarding and protection was necessary: the former concerned preservation of TCEs within the local areas and in local museums and archives, while the latter concerned a legal system that would adjust the relationship amongst the relevant rightholders, users and the public in order to make TCEs a source of creativity while respecting the property and moral rights of the relevant rightholders. The Delegation felt that both preservation and safeguarding were necessary for the full protection of TCEs. The Delegation referred to the second part of the document, referring specifically to paragraph 42 to 58, which provided the distinction between TCEs and technical TK as well as the implications thereof and stated that the Committee should use this as a basis for future work. The Delegation agreed in principle with the legal analysis contained in paragraph 242 in the annex of the document. The Delegation concluded by supporting paragraphs 254 to 276 which discussed the protection of databases, documented TCEs and the possibilities of contractual practices and that discussions on these issues should also continue as part of the future work.

44. The Delegation of Denmark provided an overview of the Greenland Home Rule Government stating that Greenland was a distinct community within the Kingdom of Denmark, hence Greenland's legal system was part of the Danish legislative tradition yet still retained the Inuit tradition as its basis with the existing self-government arrangement. Greenland had developed an harmonious system in which there was also a process of adapting the system to accommodate all peoples of Greenland. The indigenous cultural heritage was the basis for the cultural and educational legislation and administration in Greenland combined with the Danish tradition, since they had had a cultural influx from Denmark as part of their present cultural background. For the past 150 years, they have had a tradition of written literature in Greenlandic Inuit language. This early written literature provided the documentation of their cultural heritage. These circumstances indicated that the Danish administration, in early stages, recognized Greenlandic cultural heritage in all its aspects, in equal setting, side by side with the general perception of cultural activities. It was therefore natural for them to make use of the term "cultural heritage" as a dynamic setting of cultural life. They recognized the dynamic character of cultural life and did not restrict it to the traditional aspects alone. In fact, their traditional and modern cultural expressions included

the respect for both. Present-day Greenland operated with traditional cultural expressions side by side with rap music having Greenlandic Inuit text. Hence, the term “folkloric” alone would not accommodate this context. The Delegation stated that the time was probably ripe to initiate international standards to protect the IP rights of indigenous peoples taking into account the character of the cultural diversity of nations. In conclusion the Delegation invited WIPO to organize a seminar for the Inuit of Chukotka, Alaska, Canada and Greenland in order to educate and train regional and local stakeholders.

45. The Delegation of Romania expressed its appreciation for the valuable document WIPO/GRTKF/IC/5/3. It stated it was concerned about its traditional cultural heritage, and indeed had a tradition of being concerned: this preoccupation was not merely a *jeu de mots*. During the 21<sup>st</sup> century, developed societies were amazing producers and consumers of traditions. It was sufficient to listen to the speeches intended to promote agricultural or artistic products in order to understand the dimension of the references to the tradition bound to a certain place, a certain community or a specific history. Traditional cultural expressions had been an issue for Romania since the middle of the nineteenth century when the Act to establish the Romanian Academy in 1866 had, among its responsibilities, the identification and preservation of folkloric traditions. Other national developments included the establishment of the Romanian Institute for Ethnology in 1926, the foundation of a National Village Museum in 1934 in Bucharest, and Romania’s contribution at the international level, for example the Romanian personality Constatin Brailoiu, who was bound to the foundation of the International Archives of Folkloric Music in Geneva in 1944. The Delegation said that Romania was trying to regain its place among other European countries. In this context they referred to Dr. Paul Rivet who established the *Musée de l’Homme* in Paris. This unique institution has had a European Department since its opening and has enabled the setting up of an ethnographic fund of all European countries, except France, a fund continuously enriched. An important part of its collection came from Central, Eastern European or Baltic States just after the changes in economic and political systems. The Delegation said it was convinced that the background of their European culture remains a base for its construction. The cultural inheritance, material or spiritual, was the real root of real integration, a reality in which one does not speak of separation or disintegration but of unification and integration. From this perspective, the Delegation said that Romania appreciated the work of the Committee. With regard to national legislation, the Delegation said that Romanian traditional cultural expressions benefited in some measure from the protection granted through the specific legislation on copyright and related rights. The law on the National Cultural Patrimony was one of the most important legal acts outside the IP system also containing provisions on the protection of certain TCEs. In conclusion the Delegation informed the Committee, that as a follow up to a study conducted by a National Commission by the Ministry of Culture, a draft law on the *sui generis* protection of TCEs was under preparation.

46. The Delegation of Venezuela thanked the Secretariat for document WIPO/GRTKF/IC/5/3 and noted that there were difficulties with the use of the word ‘folklore,’ leading the Secretariat to use the term TCEs. The possible consequences and impact were still being analyzed in Venezuela, but there were groups in Venezuela who were concerned about use of the term ‘folklore.’ The menu of policy options proposed in paragraph 34 should be the basis for future work of the Committee as far as this item is concerned. The Delegation noted that a recent WIPO regional workshop held in Lima, Peru had discussed the protection of TCEs, and that the workshop had been much appreciated. Nonetheless, the Delegation stated such sensitization and capacity building activities should not lead to conclusions or recommendations that could in some manner be used to affect the

positions of the countries. In addition, members of the Permanent Missions in Geneva of the countries concerned should be involved in such activities.

47. The Delegation of Qatar thanked WIPO for its valuable documents and studies as well as for organizing regional and international seminars and meetings to identify and synthesize, in a clear manner, positions and options. It believed that any legislation to be adopted should take into account new changes in local and contemporary culture, which were essentially linked to the cultural and social change brought about by globalization. Regarding legal protection, specialized legal expertise should continue to be relied on to identify, with the legislative and executive authorities, emerging issues in legislation of international nature regarding scientific and practical protection. In Law No. 7 of 2002 of Qatar on the Protection of Copyright and Related Rights, the legislator considered that protection of folklore and cultural heritage fell within the scope of the Law which acted as a safeguard for such heritage. Article 32 of the said Law provided that “national folklore shall be the public property of the State. The State, represented by the Ministry shall protect national folklore by all legal means, and shall act as the author of folklore works in facing any deformation, modification or commercial exploitation.” In view of the importance and sensitive nature of matters under discussion, namely, TK, GR and protection of expressions of folklore, the GCC Member States created, in 1982, a specialized center in Qatar, to deal with such matters and provide services to researchers, scholars and the public sector. Regardless of the legal form to be adopted by the international community, the Delegation considered that a number of regulations and requirements should be taken into consideration, namely a system on GR for Arab countries should be explored, as they seem to converge; a database accessible to all should be created; the original rights of the indigenous population and communities should be respected; assistance and technical support should be provided by WIPO to such communities to ensure the documentation, maintenance and use of such rights; some sort of protection and support should be provided by WIPO for cultures of developing communities, through programs to be created for the conservation and protection of such rights against distortion and counterfeit in the context of globalization; emphasis should be made on the prevention of illicit commercial exploitation of the various expressions of folklore; efforts should be made to provide a legal framework for expressions of folklore and TK.

48. The Delegation of Zambia stated that document WIPO/GRTKF/IC/5/3 was a valuable starting point for the establishment of effective systems of national, regional and international protection. For national policymakers, it stated that the document was a helpful contribution as it examined existing IP systems to see how they could be used to ensure protection of expressions of folklore while also recognizing that the broader policy context of the issue, the enormous variety of customs, traditions, and forms of artistic expression, and the needs and expectations of the custodians of these expressions necessarily limit using any pre-existing framework. The Delegation stated that the establishing of a *sui generis* system with detailed and broad reaching mechanism of folklore protection became indispensable and the elements developed by the document become the natural basis for WIPO and UNESCO to update the Model Provisions for National Laws on the Protection of Expressions of Folklore. The Delegation stated further that the comprehensive analysis of the protection of expressions of folklore was also fundamental for the Committee to continue exploring potential sub-regional and regional framework and arrangements. Folklore, especially in Africa, it stated, tended to be multicultural in nature and cut across national boundaries. The Delegation stated therefore that enhancing regional and sub-regional cooperation in this sense should be a priority for WIPO, particularly from the perspective of legal and technical assistance. It added that it was important to consider, however, that national or regional

attempts to achieve the protection of folklore would continue to be hindered by the non-availability of international protection as long as a treaty for the protection of folklore was not developed, as has been repeatedly requested by the African Group. With regards to document WIPO/GRTKF/IC/5/4, the Delegation emphasized the importance of legal and technical capacity building, and the recognition of broader policy context, social, cultural and even commercial issues. The Delegation was of the view to explore how holders of traditional cultural expressions could benefit from them. The Delegation called for practical outcomes of the Committee, which was fundamental, and adequate resources for continued legal-technical cooperation.

49. The Delegation of Saudi Arabia, on their own behalf and on behalf of the Delegations of the United Arab Emirates and Qatar, concurred with the statement of the Delegation of Egypt regarding the confusion that can arise from the phrase “expressions of traditional cultural expressions.” The Delegation noted that the phrase “expressions of folklore” had been used in the past internationally and regionally, to identify popular and community heritage, especially in the Arab world.

50. The representative of the African Intellectual Property Organization (ARIPO) supported in principle the concerns expressed by other delegations on the use of “traditional cultural expressions.” Analysis on the conceptual issues related to regional and international mechanisms as specified in policy options contained in paragraphs 30 (f) and (i) of document WIPO/GRTKF/IC/5/3 was inadequate. The representative said that since the protection of expressions of folklore might be new to the existing regional IP offices, it was possible that information regarding regional experiences on harmonized systems might not be available. The representative expressed ARIPO’s concern on the conceptual issues regarding regional and international mechanisms, such as originality, authorship and utilization of TK which formed part of national heritage of several countries and the possible regulatory, dispute and benefit-sharing mechanisms and added that such issues should be adequately covered to guide the work of the Committee. The representative believed that one of the objectives of the analysis of the study was to examine policy and conceptual constraints that may be relevant to considering the desirability of providing specific IP protection for expressions of the cultural heritage of Member States. It added that even though certain existing forms of regional and international legal protection of TCEs had been covered in paragraphs 219 to 222 of the annex of document WIPO/GRTKF/IC/5/3, very little had been mentioned on the multidisciplinary and multicultural approaches leading to the harmonization and cooperation in the field. The representative stated that in view of these considerations, it was ARIPO’s view that the issue of national treatment or reciprocity would not necessarily lead to sub-regional, regional and even inter-regional systems of protection as had been suggested in the document. The challenges of multicultural and multidisciplinary approaches would eventually confront the Committee especially the regional IP organizations represented at the meeting. The representative stated that efforts should therefore be made to broaden the information base of the study to include regional and international mechanisms to enhance the understanding of the different dimensions and implications of the issues to enrich information gathering.

51. The representative of the African Intellectual Property Organization (OAPI) endorsed the statement of the Delegation of South Africa concerning document WIPO/GRTKF/IC/5/3. The representative also endorsed the comment of the Delegation of India in regard to the various distinctions amongst the different types of expressions of folklore. The representative stated that to make a parallel between expressions of folklore and non-traditional expressions

such as textile works was risky, since the suggestion that works were in the public domain implied that IP laws had already applied to them. The representative queried whether, since expressions of folklore were already in the public domain, defensive protection was really necessary. The representative stated that even though the works were already in the public domain, some form of protection should exist. It concluded that the protection should not restrict the protection and uses of folklore.

52. The representative of UNESCO noted the various linkages between the Committee's work and UNESCO's activities in several fields. Among the fields that called for close cooperation between the two institutions was the safeguard of intangible cultural heritage, which was also a priority task for UNESCO. There was an obvious complementarity in concerted action by the two organizations within their respective mandates: by UNESCO, for the protection of the cultural heritage as a whole, and by WIPO, on the other part, on issues concerning IP rights. This would combine efforts in the recognition and the protection of intangible cultural heritage in all its traditional forms and its expressions so as to prevent, as far as possible, the loss of this richness for the living heritage of all humanity. UNESCO's work on intangible cultural heritage commenced at the beginning of the seventies, and included cooperation with WIPO on the elaboration of model provisions on the protection of expressions of folklore in 1982, and the conduct of meetings including the Phuket Forum on folklore, followed by four regional meetings in 1999. On a normative level, in 1989 UNESCO adopted a recommendation on the safeguard of the traditional and popular culture. While this recommendation was currently the only international normative instrument in this field, its non-binding nature weakened its impact. UNESCO decided in 2001 (resolution 31 C/30), that intangible heritage should be regulated by an international convention; the universal declaration on cultural diversity, adopted at the same time, referred to the need for preserving, highlighting and transmitting to future generations all forms of heritage. The representative drew attention to the draft convention, which aimed at ensuring a legal framework for effective and practical safeguarding of intangible heritage. The establishment of mechanisms for international co-operation and assistance should allow for concrete projects for safeguarding intangible cultural heritage on a national, regional and international scale. The draft Convention envisages national inventories and a UNESCO list of representative intangible cultural heritage and a list of heritage in need of urgent safeguarding. The representative highlighted two aspects of the draft Convention: first, the definition of intangible cultural heritage, which referred to "the practices, representations, expressions, knowledge and know-how" as well as the "instruments, cultural objects, artifacts and spaces which are associated for them - that communities, groups and, if necessary, the individuals recognize as belonging to their cultural inheritance." This heritage, transmitted from generation to generation, is maintained permanently by the communities and groups according to their medium, of their interaction with nature and their history, and a feeling of identity and continuity gets to them, thus contributing to promote the respect of cultural diversity and human creativity. The Convention also took account of international instruments relating to the human rights. A second aspect related to co-operation between UNESCO and WIPO: intellectual property in the safeguarding of intangible cultural heritage was mentioned many times within UNESCO. Faithful to its mandate, UNESCO endeavored to ensure coordination of normative activities with WIPO where they touch on intellectual property. The draft Convention specified that it would not affect rights and obligations arising from intellectual property treaties. As WIPO has indicated, the representative considered that the cooperative work would lead to the creation of complementary tools, within the framework of present and future co-operation. The complementarity of the two institutions, UNESCO and WIPO, also concerned GR and issues relating to genetic data. Conscious of the urgency of defining international principles and standards, UNESCO



convened the International Committee on Bioethics, to reflect on the possibility of an international instrument on this subject. The Preliminary draft of the declaration recognizes the specificity of human genetic data compared to the other personal and medical data, and emphasizes international co-operation, which is particularly significant for the developing countries which, very often, are the sources of samples used by laboratories in developed countries. Thus the future declaration calls for sharing of the benefits. It also concerns the need not to create obstacles to science so that all humanity may benefit from science. The representative also reviewed UNESCO's support for TK and customary management systems, for instance at the World Conference on Science held in Budapest in 1999, where the plurality of knowledge systems - both scientific and indigenous - was given official recognition, and through the World Summit on Sustainable Development held in Johannesburg in 2002, where the vital role of indigenous peoples and to their knowledge was strongly re-affirmed. UNESCO launched in 2002 the Local and Indigenous Knowledge Systems (LINKS) project which promoted indigenous knowledge and worldviews to help achieve the Millennium Development Goals of environmental sustainability and poverty eradication. The project also focussed on maintaining the vitality and dynamism of TK within indigenous communities by strengthening the transmission of knowledge from elders to youth in order to strengthen to their role in resource management processes, and ensure the length-term vitality and dynamism of TK transmission within indigenous communities, including by coupling new information technologies with TK.

53. The representative of the Saami Council commended the acknowledgement in paragraph 8, document WIPO/GRTKF/IC/5/3, that IP policies need to address respect for cultural rights. While potentially helpful in certain aspects, such as providing protection for contemporary literary and artistic productions created by current generations, IP mechanisms could never completely provide adequate protection for indigenous TCEs. The representative supported the reference to the need to combine IP and non-IP mechanisms in order adequately to protect TCEs, but expressed concern about the lack of discussions on TCEs in other international fora, meaning that international work proceeded only from an IP aspect. To some extent, a balance had to be struck between the protection of indigenous peoples' TCE and the promotion of creativity and innovations, but no such balance existed. Commercial and other interests were continuously exploiting indigenous pre-existing, underlying, cultural heritage, claiming these expressions to be in the "public domain," and therefore free for exploitation. Indigenous peoples had rarely placed anything in the so-called "public domain," a term without meaning to them. The Committee should acknowledge that the public domain is a construct of the IP system and does not take into account domains established by customary indigenous laws (as noted in paragraph 23 of document WIPO/GRTKF/IC/5/3). The representative objected to any suggestions that protection of TCEs in the public domain constituted a threat to indigenous artists and their creativity, since this it overlooked customary laws on use of TCEs. The representative stated that the recognition and understanding of indigenous customary laws could further address the concerns regarding the relationship between individual and collective rights, as raised by the Delegation of the United States of America. The representative called on the Secretariat to complete its study on the relationship between IP and customary law, and as to avoid such misunderstandings in the future. As to future policy towards pre-existing, underlying cultural heritage, generally not protected by the IP-system today, as acknowledged by paragraph 13 in document WIPO/GRTKF/IC/5/3, the representative reiterated its demand for a *sui generis* system providing adequate protection for such expression commence without further delay. The representative was encouraged by the Delegation of New Zealand's emphasis on the need to

consult with indigenous peoples, in order to discern their visions with regard to their TCE and the protection thereof. It therefore urged the Committee to explore this further, stating that all background information necessary for an informed decision as to whether to commence on such work were already available in the various documents prepared by the Secretariat. The representative objected to any further investigations, and called for immediate action in order to stop the exploitation of indigenous pre-existing, underlying, cultural heritage. The representative stated that the absence of such protection was detrimental to many indigenous peoples, and which would result in the dilution of the border between the indigenous people and the majority society thus risking the extinguishing of indigenous culture. The representative stated that such a *sui generis* system might find it useful to focus on so called negative protection, acknowledging that underlying TCE generally is collectively held, as recognized in the document (WIPO/GRTKF/IC/5/3, paragraph 20 (i)). With regards to the proposals for future action, the representative supported the proposal that the Committee start to elaborate on an international convention on protection of TCE. Should it not be possible to agree on a convention, the representative stated its support for the development of model provisions and guidelines, as proposed in paragraph 34, but with concrete and unambiguous language outlining clearly the rights and obligations with regard to TCE. The representative concluded that such guidelines must recognize the need for using a combination of both IP and non-IP measures for the protection of TCEs (as noted in paragraph 46).

54. The representative of the Tebtebba Foundation referred to the issue of public domain and to materials being illegitimately acquired and queried how the situation was dealt when indigenous peoples wish to have such materials repatriated. The representative inquired as to what form of technical assistance had been provided and also as to whether there was the possibility of providing some form of technical assistance to allow indigenous peoples to discuss their customary laws, and allowing their customary laws to be recognized by governments and international organizations as it felt that the problem was that customary laws were not considered seriously. The representative asked whether there was the possibility of building customary laws in relation to *sui generis* legislation as it believed that customary laws were *sui generis* in essence although they were not entirely in form with IP laws.

55. The representative of the Indian Movement *Tupaj Amaru* referred to the questions by the Delegation of the United States of America concerning communities' rights and how the communities solved their differences when it was a matter of handing over cultural heritage to future generations. It responded by stating that the concept of IP rights was a western concept and had not taken into account the interests of indigenous peoples, and the protection of cultural identity and all its values. It added that the collective rights of indigenous populations were not recognized and that the rights of indigenous peoples were in their nature collective. The representative stated that these rights were not recognized by the current IP laws. The representative stated that international standards and rights should recognize the rights of indigenous populations and that despite the declaration by the international community, the states continued not to recognize indigenous populations as peoples and subjects of law. The representative stated that indigenous communities had for many years had their activities regulated by indigenous customary laws and that these were not being recognized by national law. The representative added that when the WIPO/UNESCO Model Provisions were drawn up in 1982, there had not yet been globalization, biotechnology and biopiracy. The representative concluded that the Model Provisions were not able to defend folklore under current day circumstances. The represented pointed out to continuities of marginalization and colonization of indigenous peoples that extended from colonial times to

the present time. The representative pointed out that there had been progress in some countries with the legal protection of folklore but that many countries had also ignored the WIPO/UNESCO Model Provisions. The representative concluded by supporting the statement of the Delegation of Egypt on the need for an international legal framework for TCEs.

56. The representative of the Tulalip Tribes of Washington underlined the importance of a clearer understanding of the role, contours and boundaries of the public domain in the development of an appropriate policy framework for the IP protection of TCEs, as was referred to in document WIPO/GRTKF/IC/5/3. The concept of the public domain was not accepted by many indigenous peoples. The representative suggested that the history of the concept and its relation to the development of IP rights would show that the two had developed hand in hand, as an outcome of Western intellectual movements during the late Enlightenment and the Age of Reason. The representative recalled that as property had been wrested from the sole right of sovereigns, it had been carved into two major domains, one which proposed a particular theory of human nature and the private incentives needed for people to perform labor, innovate and create wealth; and another creating the public domain of knowledge and resources for the free and unfettered use by the public, while Western society moved from a largely religious world view to a more secular world view. The representative emphasized that indigenous peoples did not fit easily into this model, many regarding this view as a historically constructed worldview that had helped to create social and political institutions, preferences and tastes that conformed to its premises. The representative emphasized that the theory was self-reinforcing and actively constructed the kinds of societies that accepted it as natural law. Indigenous peoples had their own sources of natural law, and the values of the secularized, individual property-based model was not the values that commonly moved indigenous peoples. The representative explained that in indigenous cosmology, knowledge was a gift from the Creator. There was no clear distinction between sacred and other kinds of knowledge, as indicated in WIPO/GRTKF/IC/5/3. Indigenous peoples had collective systems for using the Creator's gifts, and these generally had complex systems of regulating the use of knowledge, in which some knowledge was held by individuals, clans, or other groups. Although sometimes superficially similar to Western concepts of property rights, they were not the same. The representative illustrated this by adding that for the Maori it made no sense to talk about rights without also talking about obligations for the use of knowledge and resources: this view was common, if not universal, among indigenous peoples. Although individuals might hold knowledge, their right was collectively determined, and it was rare that individuals had the right to use knowledge in a free and unconstrained manner; they were bound by the laws of their tribe and of the Creator. In this perspective, the idea of "already disclosed" and "non-disclosed" knowledge was also a false distinction. The Western IP system often made a distinction between knowledge for which there had been an attempt to keep it secret, and disclosed knowledge which had fallen or been placed into the so called "public domain," but this distinction was not typically made in indigenous communities. Certainly, the representative noted, some knowledge was held in secret, whereas other knowledge was shared openly. Open sharing, however, did not automatically confer a right to use the knowledge. Many songs or stories, for example, were held by individuals or families. These songs and stories were performed in public, and might be known by all members of a community. However, the representative explained, the right to sing these songs or tell these stories fell only to the individuals or families who were caretakers of the Creator's gifts. The representative noted that even if knowledge was shared and used widely, it did not fall into the public domain: it was shared among those who were trusted to know their roles and responsibilities in using the knowledge. The representative noted that misuse of this knowledge was not only "derogatory, libelous, defamatory, offensive

and fallacious,” as described in the secular language of document WIPO/GRTKF/IC/5/3, but that it could cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator’s gifts were properly used, even if misuse was used by others outside of the tribe, or by tribal members who were outside of the control of customary authority. For this reason, the representative concluded, misappropriation and misuse was not simply a violation of “moral rights” leading to a collective offense, but a matter of cultural survival for many indigenous peoples. The representative also illustrated the rejection of the use of the term “property” by many indigenous peoples. The representative noted that, for them, there were certainly concepts of a kind of ownership, but this was not the kind of relatively absolute ownership often presented in Western IP system. Indigenous peoples, he clarified, often conceive of themselves more as custodians or caretakers of knowledge rather than absolute owners. In their view, knowledge, lands and resources had been given to them for their collective, and sometimes exclusive, use, but only if they fulfilled the obligations to their Creator, their ancestors and their spirits. The representative explained that the rights were also not considered to be permanent, and were contingent on their continued stewardship and meeting of obligations by their indigenous custodians. The representative provided the example of the Tulalip Tribe, which, like many of the tribes in the Pacific Northwest of the United States of America, had an annual salmon homecoming and renewal ceremony which not only expressed their deep kinship with their totem relative, but also was necessary for the renewal of this relationship: anything that interfered with their ability to perform this ceremony could lead to great cultural harm. The representative noted that the “public domain” was only one kind of collective property or commons, in which knowledge or resources were open to all for free and unfettered use. The representative offered that the Tulalip Tribes of Washington would be happy, through their Cultural Stories project, which had been presented to the Committee at its third meeting, to provide the Secretariat and interested parties with a database of thousands of studies that documented the complex systems of customary law that characterized the commons of indigenous peoples. The representative referred to major research initiatives which were summarized in the recent American National Academy of Sciences report “The Drama of the Commons.” The representative explained that they all demonstrated that the kind of open access commons presented in the public domain were far less common than those that had complex rules for governing the access to and use of knowledge and resources. The representative specified that it was not the intent of the Tulalip Tribes to suggest that these studies should be used to help define indigenous concepts and customary law, because the Tribes believed it to be a matter for indigenous peoples themselves to express in their own terms. It was also, in his view, an indicator of the Western scientific awareness of the limits of the application of the concept of public domain to the knowledge, innovations and practices of indigenous and local communities. It was for this reason that indigenous peoples had generally called for the protection of knowledge that the Western system had considered to be in the “public domain,” because it was the position of indigenous peoples that this knowledge had been, was, and would continue to be regulated by customary law. TCEs were not in the “public domain” because indigenous peoples had failed to take the steps necessary to protect the knowledge in the Western IP system, but from a failure of governments and citizens to recognize and respect the customary law regulating its use. The representative also noted that the fears raised in document WIPO/GRTKF/IC/5/3 about the possible repercussions to cultural innovation were expressed in terms of theories under the Western IP regime, and did not reflect the motivations of many of the world’s indigenous peoples. Indigenous innovation, while sometimes associated with a profit motive, more commonly came as an expression of a deep interrelationship between tribal members, their Creator and their homelands. The representative recommended that the Secretariat continue with a more in-depth analysis of the issues in close consultation with indigenous and local communities. The

representative also urged the adoption of language that more accurately reflected indigenous conceptions of knowledge, its use and misuse, and property. The representative urged governments to continue seeking ways to protect knowledge currently considered to be in the public domain and recalled that some of this protection could be achieved without having to wait on international regimes or national law. Through their funding and policy-setting powers, governments could discourage activities that could lead to the misappropriation of the TK of indigenous and local communities. In the United States of America, for example, presidential Executive Orders had been used. While not setting out new laws, these clarified ambiguities of interpretation of existing laws, for example by directing that when such ambiguities occur, they must be interpreted in such a way that are in the tribe's best interests. The representative recalled that under constitutional law, the United States of America applies the "canons of interpretation" in cases concerning treaty rights, in which the treaty rights were to be interpreted using the concepts that the tribes had had of their rights when they signed their treaties. The representative recommended that governments refuse to fund programs and initiatives that acted to disclose TK and TCEs, even if they were currently considered to be legally in the public domain. The representative requested that governments work with indigenous peoples as full and effective partners in recognizing customary law for the use of their knowledge and resources, and the limits of the public domain.

57. The representative of the American Folklore Society suggested that the term "folklore" included, but was not limited, to the knowledge of indigenous peoples. The representative expressed the Society's wish that the work of WIPO on folklore be sensitive to all traditional cultural groups who were entitled to IP protection of traditional culture, in addition to indigenous peoples, such as the Cajuns in Louisiana, the Amish in Pennsylvania, and African, Asian and Latin American communities. The representative wished to expand the concept of "traditional group" to be expanded so that it could be ascribed to various identities, such as regional, religious, ethnic or familial identities.

58. The representative of the International Federation of Reproduction Rights Organizations (IFFRO) considered the protection of traditional cultural expressions of folklore as an important issue to be tackled on the international IPR agenda within the realm of WIPO and merited proper attention and answers. The representative stated that there were other issues in a similar position, such as the protection of non-original databases and that these different issues had common points. It added that the proper way of securing protection for TCEs was in their view important and that document WIPO/GRTKF/IC/5/3 illustrated these in the policy options available. It stated that IFFRO looked forward to the future work based on the development of policy options and guidelines or recommendations. It added that it was their experience that proper IP protection was necessary prerequisite. The representative concluded that it looked forward to the crystallization and further development of the subject matter, in the form of a menu of policy options and recommendations or guidelines.

59. The Committee noted the contents of document WIPO/GRTKF/IC/5/3 and its Annex and the observations made in the course of the discussion and encouraged its Members to continue to provide new or updated information on the issues dealt with in the document under discussion. The Committee also noted the contents of documents WIPO/GRTKF/IC/5/4 and WIPO/GRTKF/IC/5/INF/3.

## AGENDA ITEM 5: TRADITIONAL KNOWLEDGE

*Intellectual property toolkit for TK documentation*

60. At the invitation of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/5/5. It indicated that the proposal for a toolkit was developed initially at the request of TK holders, who had sought such practical information during the WIPO Fact Finding missions in 1998-1999, since there were many TK documentation programs under way which may not fully take account of the potentially negative implications of this work. The objective of the Toolkit was not to initiate or to encourage the documentation of TK, but rather to provide a note of caution and to highlight the potential drawbacks of documentation without appropriate safeguards.

61. The Delegation of Brazil stated that the majority of indigenous peoples in Brazil did not wish to document their TK, and viewed TK documentation with scepticism. This was because TK had been passed on from generation to generation and indigenous peoples were unfamiliar with the complex discussions concerning TK documentation. There were some 200 languages in Brazil and a document such as the proposed Toolkit would have to be translated into indigenous languages to be understood. For these reasons, the Toolkit would not, the Delegation stated, meet its own objectives.

62. The Delegation of Senegal expressed support for document WIPO/GRTKF/IC/5/5.

63. The Delegation of South Africa supported the Toolkit. The Delegation added that while it was aware of the scepticism surrounding TK documentation, TK documentation was just one among several solutions and that those communities who wished to document their TK could take advantage of the Toolkit.

64. The Delegation of Zambia considered practical assistance to TK holders important. It added that it was also vital to recognize that documentation of TK may have negative effects on the rights of local communities. The Delegation stated that it was also essential to consider interests, needs and concerns of principal stake-holders. It stated further that there was also a need to link activities of the Committee with other WIPO bodies and that it was essential to focus on concrete and practical means of protection. The Delegation added that it was important to consider that most TK in Africa was orally held and that the Committee's defensive protection work was largely based upon experiences in India/Asia where TK, especially medicinal knowledge, was written down. The Delegation concluded that the recording of oral TK may need particular and adapted forms of assistance.

65. The Delegation of the Islamic Republic of Iran stated that the identification, documentation, recording and classification of TK by expert institutions within concerned organizations was the first step towards its IP protection. Databases needed to be established, with the necessary protection and security measures, to which the public would need access upon obtaining authorization. Some parts of the databases might need to be kept confidential until such time as the required protective standards at national and international levels were in place. Identification, registration and recording of heritage was necessary at the national level and regional levels: for this, international cooperation was needed. In the Islamic Republic of Iran, a database of TK was under development. Forms for extracting TK had been developed, and recorded TK was then transferred to research centers where it was classified, saved in a database and published in special documents or reports. The possibility of making these methods compatible with the Toolkit was being considered. Indigenous knowledge was also

being documented. The focus was on the implementation and application of indigenous knowledge for the revitalisation and constant development of the community from which it originated. The first indigenous research and implementation center in the country was the rural research center named “Khorhe Indigenous Knowledge Research Station.” It had developed two databases, one for identifying local indigenous experts and the other for providing researchers with searchable reports on villages and rural areas.

66. The Delegation of Costa Rica stated that current development of *sui generis* protection underway in Costa Rica would benefit from document WIPO/GRTKF/IC/5/5. It would be necessary to obtain practical experiences with the use of the Toolkit to determine whether it would meet its goals of simplicity and balance. The Toolkit should also highlight the risks associated with TK documentation.

67. The Delegation of France stated that it would be necessary to draw attention to the risks associated with documentation. It was also important to ensure that the definitions used in the Toolkit (such as for biological resources) were consistent with those used in other instruments and fora.

68. The Delegation of Norway stated that a toolkit was important and that it supported these efforts, because of the potential for negative effects of documentation of TK. It stated that it also supported the proposals in document WIPO/GRTKF/IC/5/5 to field-test the toolkit, referred to the statement of the Delegation of Zambia, and added that it was important to conduct field-testing also in other regions.

69. The Delegation of Kenya supported document WIPO/GRTKF/IC/5/5 and stated that it would serve as a defence against third parties accessing TK from TK holders. It added that intended users would also have to obtain prior informed consent before accessing the information from the TK holders, and that this would safeguard against the misuse of TK by third parties. The Delegation concluded by expressing its support for the comments of paragraph 24 of the document.

70. The Delegation of Mexico stated that the new style and form of presentation of the Toolkit in the Annex to document WIPO/GRTKF/IC/5/5, and in particular the use of icons and symbols, was more legible and appreciated. The Delegation agreed with the intervention that had been made by Brazil. There was a need to be clear on the risks of TK documentation. The Toolkit should also deal with some additional elements, such as rights in documentation of the same TK made in parallel by two or more communities and the position of documentation undertaken without the consent of the relevant community. Finally, the Delegation requested that a regional workshop be held to take account of the special character of TK from the Latin American region.

71. The Delegation of Equatorial Guinea stated that it could not make any statements at present as it was awaiting for the conclusions of the African Group and requested that Spanish be made available as a language during the meetings of the African Group.

72. The Delegation of Venezuela reiterated its proposal made in a previous session of the Committee that two versions of the Toolkit could be prepared. The first version would be a full text version and the second version would be a shorter edition in non-legal language. The shorter version would also refer to the specific features of TK in order to help the communities understand and make informed decisions. The Delegation read a contribution of the Venezuelan Indigenous Council relating to the said item. The contribution included that

the indigenous peoples of Venezuela rejected the cataloguing of TK since this would be done for the purposes of research, preservation, or marketing and commercialization of indigenous ancestral TK. The indigenous peoples of Venezuela felt that the cataloguing of their TK ran counter to their culture and felt that it would fragment their vision of the universe where there could be no separation between knowledge of the earth and knowledge of religion. The indigenous peoples of Venezuela also felt that they would lose control over their TK by cataloguing it. It was for this reason that the Delegation requested that such a statement be included in the first part of the Toolkit. The possible risks involved in cataloguing TK could also be included in part two of the Toolkit. The Delegation stated that the participation of the indigenous peoples in the Committee needed to be increased and enhanced and the Delegation stated that it would give its support in this regard. The Delegation said the indigenous peoples 'demanded' their participation in the Committee and looked forward to their participation in the future. The Delegation went into further detail with regard to the proposed icons in the document and proposed that the icons be simple and clear for the better understanding by indigenous peoples. With reference to potential risks, a clear and obvious risk icon should also be elaborated. The Delegation concluded that the further improvement of the Toolkit would certainly be one of the major achievements of the Committee.

73. The representative of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) suggested that the Toolkit advise users first to seek professional advice before using the Toolkit. There was also a need to train the legal profession in these matters in order that they may be able to provide appropriate advice, the representative added.

74. The representative of the Inuit Circumpolar Conference expressed the concerns that the Toolkit did not reflect the self-determination principle.

75. The representative of the Pauktuutit Inuit Women's Association, the Canadian Indigenous Biodiversity Network and the Kaska Dena Council stated the Toolkit would be useful in developing local, national, regional and international regimes for the protection of TK and associated GR of indigenous peoples. It should, as had been proposed, be translated into local languages. The representative noted that the Toolkit was being field tested in a single region and that it should be tested in other parts of the world, including through WIPO's workshops. Providing financial support for indigenous communities to provide inputs into such documents was important, and the representative referred in this respect to document WIPO/GRTKF/IC/5/11. Finally, the Toolkit should contain a basic and lay explanation of the term 'prior informed consent.'

76. The representative of the Saami Council stated that the Toolkit could assist indigenous peoples to better protect their TK and GR. However, the Toolkit must make it clear that IP rights were not the only rights that potentially applied to these kinds of resources and knowledge. It stressed that indigenous knowledge – even though not protected by the IP system - might very well be protected as, for example, a human right, including the right to self-determination, and the Toolkit must thus not serve as a marketing tool for the IP system. If WIPO felt that such assistance fell outside its mandate, the representative suggested that WIPO seek other UN bodies' advice as to how to complement the Toolkit in this regard. The Toolkit should further also clearly stress that the protection systems introduced in it did not constitute a substitute for the relevant indigenous people's customary law regarding TK and GR.



77. The representative of the Tebtebba Foundation suggested that the Toolkit should contain a substantive section on prior informed consent.

78. The representative of GRAIN, speaking on behalf of the indigenous peoples of Colombia, expressed general concern with the discussion on TK and associated GR. Indigenous peoples had conserved GR for thousands of years and rights to them were collective. The type of “protection” that was discussed at the Committee formed part of a capitalist approach and regarded TK and associated GR merely as ex situ inputs to markets. This was not in accordance with the perspectives of indigenous peoples. Indigenous representation at the Committee was not adequate, the representative stated. Finally, the representative expressed opposition to genetic mapping and patents on life forms.

79. The representative of the *FUNA Nuestra Ambiente Fundacion* noted that there are three basic needs for peoples to be met, namely education, health and nutrition. If one is to fight the scourges of the lack of education, bad health and malnutrition faced by developing countries then appropriate structures with an effective content needed to be developed. A better and full understanding was needed. One of the elements the Committee had been working on was the draft Toolkit and this was a positive step forward.

80. The representative of the Indian Movement *Tupaj Amaru*, referring to Committee documents such as WIPO/GRTKF/IC/3/9 and WIPO/GRTKF/IC/5/5, stated that as far as the legal protection of IP in various regions was concerned, a multitude of relevant definitions existed. Different legal systems had different definitions on the subject and material to be protected, and this followed from the economic and political interests of each country. International attempts to harmonize domestic legislation had not been very successful. However there was an increasing need for an international framework that would provide a coherent universal definition acceptable to the international community of TK and mechanisms for application designed to give legal protection especially for the intangible TK that was sacred and secret for peoples. Indigenous communities had to define and harmonize concepts and terms, not only those related to the preservation of cultural and biological diversity, but also where the political, legal and ethical questions arose in certain relevant areas, for example food and agriculture. The representative further provided definitions of many terms related to TK used in other international instruments and said that none had universal acceptance. The representative understood that term used by WIPO were construed for exploratory purposes only. This approach was more akin to a description of characteristics and features and not necessarily that of a definition. The representative stated that TK, collective in nature, was constantly undergoing change and transformation because it was always adapting to the challenges of the modern world. On the other hand IP was a western concept and did not recognize the holders of TK as subjects of law nor was it designed to bring about the protection of the cultural heritage of ancestral civilizations, unless of course, it dealt with it as merchandise and goods. Referring to the objectives of documenting TK, the representative stated that indigenous peoples and holders of TK should try to conserve and preserve their heritage as living memory, and that western States were trying to place TK as goods drawing profit from their TK. The representative said that States must adapt provisions to address the concerns that arose from these objectives. With regard to the Toolkit, the representative supported the positions taken by the Delegations of Brazil and Venezuela in that such knowledge would be exposed to real risks. With regard to prior informed consent of the indigenous peoples it would be impossible to translate the content of the tool kit into the hundreds of languages. To document and place TK in the public domain would signify violating the confidential character of many of the intangible, sacred and secret elements which belong to the living patrimony which was transmitted from generation to

generation, and which constituted the memory of their ancestors. Placing indigenous knowledge in the public domain would accentuate the deterioration of the cultural values and elicit appropriation of their cultural values by trans-national corporations and consequently the destruction of the indigenous identity. In conclusion the representative stated that the Toolkit had been prepared without consultation of indigenous communities, aboriginal peoples and interested organizations, which was a prerequisite for its elaboration.

81. The Committee took note of the document and noted the suggestions and observations made (such as the need to use the Toolkit with prudence because of the differing circumstances in which it could be used, the need always to give special consideration to the needs and concerns of the primary stakeholders, the desirability of giving special consideration to its use when documenting orally held TK, and the overall concern that this Toolkit would be seen only as one element in the overall framework of the protection of TK).

82. The Committee also noted the reservations expressed by a number of Delegations as to the use in practice of the Toolkit because many TK holders were not interested in documenting their knowledge and because the discussions on the issues dealt with in the Toolkit would necessarily be very complex.

83. Subject to noting the observations thus made, the Committee approved the invitation contained in paragraph 24 of document WIPO/GRTKF/IC/5/5.

#### *Defensive protection of Traditional Knowledge and Biological/Genetic Resources*

84. The Secretariat introduced document WIPO/GRTKF/IC/5/6, concerning practical mechanisms for the defensive protection of TK and GR within the patent system.

85. The Delegation of the Philippines, on behalf of the Asian group, presented document WIPO/GRTKF/IC/4/14 on technical proposals on databases and registries of TK and Genetic resources. The Delegation affirmed the importance of the concerns of TK holders and custodians of Genetic resources concerning ownership, nature and type of databases and registries, identification of national databases and benefit-sharing. The proposal of the Asian group was to evolve technical standards for creating databases and registries. One of the general observations made by the Delegation was for communities to lead the compilation, operation and control of databases and registries of TK and associated biological/Genetic resources. National and local actors should facilitate this keeping in mind IP considerations as well as other benefits of documentation, such as conservation of TK and associated biological/Genetic resources. The Delegation suggested that WIPO facilitate capacity building and networking of actors and processes for the protection of IP relating to these databases. The custodians of TK and associated biological/Genetic resources should retain full control of the use of the documentation data once they were compiled in databases and registries. A means of doing so was the Asian Group's recommendation on the use of multi-purpose databases and registries that could serve both defensive and positive legal protection. Given its diversity it was desirable that there be an intermediate level between the level of the database in its entirety and the level of individual database records, namely data domains (such as traditional medicine, traditional agriculture, etc). Thus, the databases could be structured in, or allocated to specific domains, such as traditional medicine, traditional agriculture, and expressions of traditional cultures. The recommendations also set out

standard data fields for records in the domain of traditional medicine, categorized in three groups: content and resource identification standards, technological standards, and security and transmission standards. The set of standards would become useful to communities and countries when it was compiled into a comprehensive Data Specification which reflected the specific characteristics and needs of TK and associated biological/Genetic resources. The Delegation highlighted that the purpose of databases and registries was not to put undisclosed TK and Genetic resources into the public domain; and they should achieve multiple IP objectives in respect of the TK and Genetic resources on which they contain information, including defensive and positive legal protection (the full range of proposed objectives was set out in document WIPO/GRTKF/IC/4/14); the rights of the custodians of TK and Genetic resources to their continuing control and enjoyment of their knowledge and resources were to be recognized throughout the compilation, operation and use of databases and registries; database and registries could be used as a set of tools when documenting TK and associated Genetic resources with appropriate mechanisms to restrict access in accordance with the requirements of the custodians and traditional owners; strategic IP management was critical when documenting TK and associated Genetic resources as a measure for ensuring prior informed consent concerning documentation and subsequent use of TK and associated Genetic resources; and lastly there was a need to address and manage the risks attached to compilation and digitization of TK which may lead to the ready access and unauthorized exploitation of the TK, in the absence of clear international principles.

86. The Delegation of Brazil expressed agreement with respect to document WIPO/GRTKF/IC/5/6 that defensive protection measures could play a useful role in safeguarding interests related to TK and Genetic resources. It recognized that developing countries from some regions found TK databases to be useful tools and acknowledged the efforts aimed at establishing databases at the national level in some countries. The Delegation recognized that in some cases databases could play a key role in facilitating a patent examiner's check against patent request relating to the existing documented knowledge of traditional communities. Nevertheless, in Brazil, there was open scepticism with respect to the usefulness and appropriateness of utilizing databases as a protection measure. There were, for example, concerns about the loss of confidentiality of TK that was not considered to be in the public domain. The delegation recalled, moreover, that even in countries that found databases useful, it was recognized that the use of such databases had inherent limitations, since, given the wide scope of TK, documentation could not be completely comprehensive or exhaustive of the TK available in a country. This would appear to be particularly true when the TK used in a particular invention was undocumented, based on oral traditions or documented in a local language. The Delegation concluded by reaffirming Brazil's position that in order to have an effective system of defensive protection of TK and associated Genetic resources in place, the use of databases would not be enough. It was of the utmost importance to ensure that all patent offices require that an applicant for a patent relating to biological materials or to TK should, as a condition to acquiring patent rights, disclose the source and country of origin of the biological resource and of the TK used in the invention, and provide evidence of prior and informed consent under the relevant national regime and evidence of fair and equitable benefit-sharing. With regard to the suggestions contained in the final part of document WIPO/GRTKF/IC/5/6, namely paragraphs 80 to 84, the Delegation said it had had a preliminary glance at the ideas contained therein and was concerned about the recommendations referring to future work. It felt that the ideas contained therein should be more fully discussed and properly grasped before any decision could be taken. The Delegation drew attention to the suggestion contained in paragraph 80 proposing an exercise to clarify the legal criteria that applied to prior art, as well as the linkage proposed to the efforts at harmonizing substantive patent law in the work of the Standing Committee on the

Law of Patents. The Delegation recalled that the Report of the United Kingdom's Commission on Intellectual Property Rights, which was mentioned in paragraph 80, had not in fact endorsed the negotiations of the SPLT. In reality the Report had been critical of efforts at substantive patent law harmonization in WIPO. The Delegation therefore felt that the implications of the recommendations proposed by the document should be more carefully thought over and discussed. With regard to paragraph 82, the Delegation expressed concern with respect to the proposal put forward in that paragraph to prepare recommendations for national patent offices on search and examination, and, in particular, with respect to the emphasis placed on search and examination in developing and least developed countries. The Delegation warned that careful attention was needed here and encouraged the Committee to fully grasp the ideas alluded to. The Delegation expressed a concern that by placing an emphasis on search and examination in developing countries and LDCs one would be mischaracterizing the source of the problem of biopiracy. The Delegation recalled that there was extensive documentation of cases of biopiracy in the recent past, and that there was nothing in that documentation that would suggest that search and examination in developing countries was the source of the problem. The Delegation, therefore, expressed reservations with respect to the approach of the document on this matter, as well as on its recommendations for future work. Noting the references to the harmonization of substantive patent law and the work of the Standing Committee on Patents (SCP), it recalled that developing countries had proposed amendments to the text of the draft Substantive Patent Law Treaty, proposals which were related to the issues currently being dealt with in the Committee and by the last meeting of the working group on the PCT reform. Hence, given these discussions, the Delegation requested the Secretariat to provide some background information to the plenary on those discussions.

87. The Delegation of New Zealand thanked the Secretariat for its useful summary of work on defensive protection contained in document WIPO/GRTKF/IC/5/6. It agreed that further work in this area should be undertaken, together with work on approaches to positive protection and capacity building programs to ensure that documentation decisions were fully informed. It supported the proposal to investigate the legal criteria that apply to prior art, including the development and circulation of a questionnaire, which could provide a practical tool for defensive protection activities of indigenous and local communities and be of assistance to States interested in making changes to their patent legislation to better accommodate the interests of TK holders. The Delegation continued by noting that some information regarding prior art criteria had already been collected in connection with the work of the Standing Committee on the Law of Patents in relation to the Substantive Patent Law Treaty and referred the Committee to document SCP/6/INF/2. It also noted that the definition of prior art proposed in the draft Substantive Patent Law Treaty could have the effect of excluding some TK which may not be widely publicly available (for example, not on-line, published in small quantities or published in languages not widely used) and suggested that the Standing Committee should be better informed by the work of this Committee in the area of defensive protection. The Delegation finished by supporting the technical proposals put forward in document WIPO/GRTKF/IC/4/14 regarding a data specification for forwarding to the Standards and Documentation Working Group for inclusion in the WIPO Industrial Property Documentation Handbook and by suggesting the development of recommendations or guidelines for national patent offices on both the positive and defensive protection of TK.

88. The Delegation of Norway noted that the Committee should be pleased with the achievements to date, in particular with regard to facilitating improved access to material for prior art searches in order to avoid inappropriate granting of IP rights. It further noted that whilst some of the work of the Committee had already been fed into other parts of the WIPO

system, this mainstreaming of the Committee's outputs into relevant WIPO bodies dealing with issues such as minimum documentation was of the utmost importance and must continue. It concluded by agreeing with all of the work proposals put forward in document WIPO/GRTKF/IC/5/6.

89. The Delegation of Japan stated that it highly appreciated the work of the Committee in this area to date, in particular its development of TK inventories and the consequential work at WIPO on the revision of the PCT minimum documentation list and the revision of patent classification regarding traditional medicine. With regard to document WIPO/GRTKF/IC/5/6, the Delegation noted that the Japanese Patent Office (JPO) database, which contained a variety of information regarding TK and GR, had been fully used by the Japanese Patent Office and was highly beneficial for defensive protection purposes. Therefore it encouraged Member States to respond to WIPO/GRTKF/IC/Q.4 to deepen the Committee's understanding in the area of databases of TK and GR. The Delegation further supported forwarding the technical proposals to the appropriate WIPO working groups, and concluded by stating that prior to developing registration mechanisms for the positive and defensive protection of TK, it might be appropriate to carry out a survey on prior art in many countries taking into account the work already carried out by the SPLT.

90. The Delegation of Zambia thanked the Secretariat for the documentation provided to the Committee. It noted that document WIPO/GRTKF/IC/5/6 rightly stressed that the protection of TK should be undertaken in a comprehensive manner by using both defensive protection and positive protection (although it noted that, in some cases, defensive protection could undermine the rights of TK holders). It continued by stating that it was important to focus on examples of existing systems of protection of TK and that it would also be helpful to highlight active approaches to the revision of existing patent systems (such as the PCT) to further improve defensive protection. The Delegation concluded by noting that since most TK in Africa was oral TK (as opposed to written TK), the Committee may need to consider specific assistance to address the recording of oral TK.

91. The Delegation of the United States of America supported the three tasks proposed in paragraph 89 of document WIPO/GRTKF/IC/5/6, and in particular encouraged additional responses to WIPO/GRTKF/IC/Q.4 and the circulation of a questionnaire on prior art criteria to enable the further sharing of domestic experiences with the Committee. It stated that, once this information gathering exercise had been completed, it may then consider the development of draft recommendations to patent granting authorities concerning registration mechanisms for defensive and positive protection. It then suggested the following modifications to document WIPO/GRTKF/IC/5/6: firstly, that only TK or GR documents that are made reasonably accessible to the public should be included in the WIPO database for prior art patent searches as required for PCT searches; secondly, that the purpose of TK or GR publications was not to prohibit the reasonable patenting of improvements to the disclosed technology; and thirdly, that the term stakeholders should be interpreted broadly to include more than just those that might gain financially from the disclosure or maintenance of this information.

92. The Delegation of Canada stated that significant threshold questions needed to be addressed before defensive strategies could be pursued (for instance, questions of Prior Informed Consent) for the documentation process, and control by the custodians of the TK over decisions on deployment and access). It noted that these issues were dealt with in other documents and supported a continuation of existing initiatives in other WIPO bodies. As to document WIPO/GRTKF/IC/5/6, this provided a useful analysis of the practical issues, once a

TK Community had decided to pursue a defensive protection strategy. In relation to paragraph 89, the Delegation noted the following: it encouraged a greater input from TK holders to WIPO/GRTKF/IC/Q.4 and stated that it would encourage responses from indigenous TK holders in Canada who were contemplating, or in the process of undertaking, documentation of TK. The Delegation supported, in principle, the development of a model data specification that could be used by those who have voluntarily chosen to undertake defensive documentation strategies and noted that, to the extent that such strategies may be more successful when they follow standards that are familiar to patent offices, the development of such standards should be encouraged. Whilst still reviewing the specific data specification proposal in document WIPO/GRTKF/IC/4/14, it noted that, on a preliminary basis, that document reflected a particular approach to creating databases, which may vary according to regions. It therefore encouraged any future process to take into account possible different regional approaches to documentation. The Delegation concluded by stating that it supported any activity that might improve the efficacy of prior art searches in a way that helped to defend TK (for instance, recommendations for patent authorities that would specifically address how to deal with TK registered for defensive purposes, or the development of guidelines that might sensitize patent examiners to certain issues when accessing TK databases as part of their prior art searches), although it reserved its comments on how this work might proceed.

93. The Delegation of the Republic of Korea said it believed it was important to develop a TK database for use in protecting TK. It agreed with the Asian Group's technical proposal on the database and registry for TK and GR, and commented on the recommended standards that comprised of content and resource identification standards, technological standards and security and transmission standards. For the second and third groups the Delegation said that conventional information technology standards could be adopted. However, it would be difficult to prepare the content and resource identification standards as the contents and elements of TK were very different in each country. Although the Asian Group had already recommended a minimum set of data fields on pages 7 and 8 of the Annex of document WIPO/GRTKF/IC/4/14, the Delegation felt that a more thorough investigation and review would be required to prepare the standards of the "specific data on TK or associated resources" as found in the INID Code from (01) to (08), on page 8 of the Annex. The Delegation therefore proposed that the contents and elements of TK be investigated and the standards of TK be based on the results of the investigation. The Delegation further stated that given the wide scope and diversity of TK, priority could be given to the investigation of the TK content of traditional medicines and medicinal plants which had recently attracted considerable attention in many countries.

94. The Delegation of the Russian Federation stated that it fully supported document WIPO/GRTKF/IC/5/6 and said that the recommendations concerning the publication of TK found in paragraph 24 were important for its effective use. The Delegation also supported paragraph 65, considering it to be the next step in the Committee's work, namely to develop and use many databases which would be for both positive and defensive protection. Paragraph 89, concerning information inquiries, paragraph 4 for the subsequent analysis and development of a draft recommendation concerning mechanism for registration were also supported. Referring to the intervention made by the Delegation of Brazil, the Delegation of the Russian Federation believed that they were completely right in saying that the publication could be dangerous as there was a confidential factor that had to be taken into consideration. The document dealt with this concern and the Delegation noted that one had to know what was the purpose of documentation, what kind of information was concerned, what kind of database was one going to build. It seemed that one was essentially facilitating access so that

a third party would not be in a position to get a patent based on the information. Hence the question of confidential information needed to be considered.

95. The Delegation of China said that this document was, in general, quite positive, constructive, and helpful to the harmonization and unification in the construction of a TK database. The Delegation believed that harmonization on different titles and terms used under the same subject matter was needed and therefore proposed to add a unique identifier system to the database standard. The Delegation stated that this proposal was based on their encounter with some difficulties while constructing the database of Chinese Traditional Medicine. A preliminary unique identifier system was adopted after explorations and the Delegation said it was willing to participate in WIPO future efforts in formulating the standards for database of TK. The Delegation, having observed the task in document WIPO/GRTKF/IC/4/14 to further develop and adopt draft specifications for databases and registries of TK and GR, suggested that the Committee consider related legal questions such as the relationship of documented TK and recognition of rights associated with TK, and the possibility of creating a legal presumption of ownership on the part of the TK holder with the TK right system. The Delegation stated that while continuing the discussion on the standard of the database, the Committee should also strengthen the study on the complex legal issues and should organize legal experts to have an in-depth study on these issues, thereafter proposing a solution.

96. The Delegation of Egypt welcomed the content of the document as it affirmed that negative protection was not a substitute to positive protection and that there was to be complementarity between the two forms of protection as clearly highlighted in paragraphs 3, 27 and 79. The Delegation believed that the deliberations of the Committee have concentrated more on defensive protection and therefore suggested additional attention be placed on positive protection. The Delegation said that it concurred with the statement made by the Delegation of Brazil with respect to paragraph 80 concerning the possibility of extending the definition of prior art and the reference to the report of the Commission on IP Rights regarding harmonization of substantive patent law. Regarding paragraph 82 on the search and examination, the Delegation added its voice to the statement of the Delegation of Brazil. The recommendation calling for search and examination to take into account disclosed TK as prior art was of particular relevance for developed countries given that the patent legislation of these countries did not request mandatory disclosure of origin as evidence of prior informed consent, and hence allowed the occurrence of biopiracy. The Delegation added that this was not the case in many developing countries, including Egypt, as patent legislation required full disclosure of origin. The Delegation believed that this part of the document needed further study before any action could be taken on the basis of the analysis it made.

97. The Delegation of Cuba stated that the work of the Committee concerning the protection of GR should not exceed the limits of defensive protection. It added that the clarification of measures and elements that limit acquisition of IP rights for those who do not have any rights in the GR was the proper way of understanding the term “protection of genetic resources.” It stated that positive protection of forms of life and the viewing of GR as a whole as well as its replication was a matter being dealt with by WIPO as a substantive patent issue. The Delegation believed that GR, their replication or derivatives were not the pure domain of individuals and supported any work that would prevent perpetual links with the objectives described. It added that in Cuba there were rural communities, which created TK, and that most of the ancestral knowledge was reserved not only for the communities but also for those institutes that give extra added value to that TK of the rural communities. It

went further to state that in health fields it had enhanced the knowledge in times of critical shortage both in regards to the use as well as the components. It added that this was the reason for their support of the position of developing countries in respect of their TK, which had their individual characteristics in the various contexts and situations. The Delegation indicated that a common scenario was needed for the general protection of TK, which could lead to directives or guidelines which would provide for local legal frameworks to prevent unauthorised access to this knowledge and that if it should be put into the public domain there should be proper compensation. It added that TK concerning GR deserved an analysis of a different nature due to the large amount of knowledge and traditional cultural expressions of folklore in Cuba. With regard to documentation and databases of GR, it stated that it would be useful to have a preliminary toolkit as it was a valuable instrument for further thought both for the informal holder of GR as well as its use. It added that proper training was required for both sectors to ensure its success. The Delegation indicated it would submit recommendations for the toolkit to enhance its use and supported the views expressed by various delegations concerning the non-use of databases that contain TK as it did not have neither a national nor multinational context to protect confidentiality and nonauthorized use.

98. The Delegation of Venezuela stated that since document WIPO/GRTKF/IC/5/6 was not yet available in Spanish, it would, at this stage, only make preliminary comments. It approved and agreed with paragraph 26, but stated that whilst the work mentioned was very important, it did not yet constitute an appropriate *sui generis* mechanism. As to paragraph 54, this should be considered as part of the initial study, since it highlighted the need for a system of special protection. It shared the concerns raised by the Delegation of Brazil regarding paragraphs 80 to 84. Whilst it was not yet in a position to discuss the issues raised there in detail at this stage, (as it was still awaiting instructions), it stated that there was clearly additional work to be undertaken in relation to the study on defensive protection on TK. The Delegation concluded by stating that it could not endorse the recommendations made in paragraph 89; since there had been difficulties in interpreting the replies received so far, it was not appropriate to issue more questionnaires at this stage.

99. The Delegation of Kenya supported the proposal of paragraph 89 of document WIPO/GRTKF/IC/5/6. The Delegation also supported both the positive and defensive protection mechanisms with emphasis on the defensive protection mechanism. It stated that the defensive protection addressed the concerns of TK holders through TK documentation. It added that standardization for databases featuring both patent and non-patent documentation of TK could be used by examiners when assessing the novelty and inventiveness of patent claims. Regarding inventories of periodicals containing TK subject matter and online databases, it proposed a systematic information gathering on databases and registries for TK and GR through means such as questionnaires. The Delegation supported, to be included in future works, a questionnaire on prior art criteria and development of draft recommendations to IP-granting authorities.

100. The Delegation of India agreed with the observation of the Secretariat that, unless well thought out, dissemination strategies had already been considered, documentation for the purposes of defensive protection may actually facilitate the misappropriation and the unauthorized use of TK, TCEs and the components of biodiversity. The Delegation also agreed that in majority of cases, misappropriation or the unauthorized use of TK occurred due to the lack of access to public domain TK to the patent examiner(s) which may be for the reasons of the non-availability and/or format and language barriers. It added that though PCT regulations (Rule 33.1) had provided ample safeguards wherein as per the regulation relevant prior art shall consist of everything which had been made available to the public anywhere in



the world by means of written disclosures, these regulations were difficult to implement in actual practice. It stated that it was for this reason India had to fight for the revocation of patents such as Turmeric and Basmati at USPTO and “Neem” at EPO by incurring considerable efforts and resources. However, it was done only to establish the demonstrative effect on the issue of misappropriation of Indian TK. The Delegation stated that suggestions had also been made that defensive protection to some extent could be achieved by monitoring patent activities or by following defensive publication strategies as were followed by the Xerox Disclosure Journal, International Business Machines (IBM) Technical Disclosure Bulletin, and Bell laboratory records. It added that for utilizing publications as an effective tool for defensive strategies, it was necessary that: (i) a clear date of publication was given; (ii) publication was readily accessible; and (iii) disclosure enabled the reader to put the technology into effect. The Delegation went further to share the details of a study carried out by Indian experts in March 2000 and April 2003, and referring to the March 2000 study, it concluded the following possibilities: (i) within a period of 3 years, grant of patents on medicinal plants had increased by threefold; (ii) unauthorized use of TK or misappropriation in the area of medicinal plants may be to the extent of more than seven thousand patents, granted for unpatentable TK innovation, in three patent office alone; and, (iii) despite information clearly being available in public domain which fully satisfies the need of clear date of publication and details such as disclosures enabling the reader to put the technology into effect, patents for unpatentable TK innovations are being granted. The Delegation stated that reasons for misappropriation were beyond the reasons explained at paragraph 7 of the document WIPO/GRTKF/IC/5/6. Hence, the Delegation was of the the opinion that defensive strategies which may yield definitive benefits in the areas of modern scientific research may not be applicable to TK, GR and TCEs due to the difference in their character. It added that monitoring patent activities may be adequate and appropriate in the area of modern scientific research and it was theoretically possible to get even wrong TK patents revoked through monitoring mechanism as had been successfully demonstrated by India. It stated that it may not prove to be an effective strategy for the developing countries that may not have resources to get thousands of wrong patents revoked through monitoring of patent activities and that a proactive solution rather than the reactive strategies was needed. The Delegation complimented the Secretariat for creating linkages between Committee and international searching authorities and that such efforts in compilation of the inventories on TK in general and on databases need to be fully supported and appreciated. The Delegation expressed further its appreciation of the decision of the Meeting of International Authorities under the Patent Cooperation Treaty (PCT/MIA) (paragraph 42) that the inventories produced by the Committee would be considered for appropriate selection of periodicals from the inventory by all international Searching Authorities (ISA) and Preliminary Examination Authorities of the PCT for carrying out appropriate selection of periodicals from the inventory containing articles with descriptions of disclosed TK to a sufficiently practical or technical level that they would be of relevance to patent examiner carrying out prior art searches. In this context, the Delegation submitted that adoption of different and softer standards be made in the area of TK, TCE and the component of biodiversity compared to the standards applicable to modern scientific and technical literature. The Delegation went to further illustrate the point and stated that there was a need for adopting a balanced outlook and approach towards non-patent literature in PCT and also to include larger number of TK related databases and journals by agreeing to adopt relatively softer standards for inclusion of these non-patent literature in PCT and appreciated the Secretariat’s initiatives in this direction. However, it added, there was a need to significantly enhance these efforts. The Delegation fully supported the attempts of International Patent Classification Union for the development of classification tool for TK and was totally in agreement with paragraph 46 to 50 of the document WIPO/GRTKF/IC/5/6. Since this activity was the outcome of the presentation made by delegation of India in

February 2001 at a Committee of Experts for the IPC Union, it wished to put on record its appreciation of IPC Union and, in particular, of the other members of Task Force, i.e. (i) JPO; (ii) EPO; (iii) China; and (iv) USPTO. Also, it was of the opinion that it was necessary that initiatives taken by IPC Union in creating a classification tool for TK, TCE, and GR as well as development of Traditional Knowledge Resources Classification (TKRC) be fully supported and extended to several countries based on their needs and requirements. It stated that they had already given their suggestions on the toolkit for IP Management and fully supported this activity and would like the Secretariat to initiate the efforts on the integration of several initiatives resulting in bringing out a practical guide for establishment of database/registries at national, regional and international levels. It was also in agreement with the Secretariat's initiatives of establishing WIPO portal to which India has already contributed its Health Heritage Test Database. It recalled that a proposal was submitted by Asian Group on Technical Specifications for setting up of registries and databases (paragraph 74). The Delegation expressed its wish to get the recommendations made at paragraph 77 and as mentioned in conclusion at paragraph 89 adopted in respect of document WIPO/GRTKF/IC/4/14. It added that a need was also felt for creating a mechanism and detailed guidelines for setting up of regional and international registries in the area of TK, TCE and the component of biodiversity. The Delegation reiterated that solutions to these issues needed a comprehensive approach on all aspects, i.e. technical aspects as has been well considered in this document, implementation of Doha-Declaration Commitment on CBD and TRIPS relationship, *sui generis* legal framework and setting up of appropriate IP standards on TK, TCE and the component of biodiversity due to their special character in particular providing positive rights to these knowledge systems despite open domain limitation, which certainly call for a new approach.

101. The representative of the FAO commented on paragraphs 14 to 21 of document WIPO/GRTKF/IC/5/6. The representative stated that it was important to understand the matter being referred to relates not to GR which are held by individuals but to GR which are being held in trust through the international community. The representative went on to state that defensive protection was an important factor when there were materials that were being held under a multilateral regime. He added that it would be a very costly investment to put under an IP protection system, involving the FAO, all the major crops and accessions that were currently under the international regime. The representative commented that it was necessary to think separately of genetic resource policy and IP policy and ask where the interface was. It stated that when materials had been placed in trust for the international community and the material was the basis of food security, the immediate intentions of the governments, who negotiated the treaty, was not IP but the conservation of sustainable use of the material, and food security. The representative stated that there were implications for IP, but it seemed that the mandate for genetic resource policy when dealing with food and agriculture laid within the bodies that were negotiating these policies. The representative concluded that it was clear that the international community needed to work towards mutual respect between the different sectors and their mandates.

102. The representative of the United Nations Conference on Trade and Development (UNCTAD) referred to the statement made by the Delegation of Brazil and commented on the cost implications involved in defensive protection. The representative referred to the two categories of defensive protection being discussed, namely the database approach in document WIPO/GRTKF/IC/5/6 and the disclosure mechanism in document WIPO/GRTKF/IC/5/10 and stated that the costs involved in both situations would be placed respectively on the TK holders and the patent applicants. With regards to document

WIPO/GRTKF/IC/5/10, the representative referred to the recent Decisions of the Conference of Parties of the CBD on disclosure which encouraged member states and their patent legislations to disclose the source of origin on GR and relevant TK and thought that this would be of interest to the Committee. The representative concluded that with regards to future work, the Secretariat should consider the possibility of managing the documentation for the Committee in size and focus on reflecting the discussions of future work.

103. The representative of the United Nations University (UNU) referred to a comparative study that the UNU Institute of Advanced Studies (IAS) had prepared on the use of databases and registries for TK protection. The representative suggested that the Committee may wish to decide how best to associate itself with the negotiation of an international benefit-sharing regime relating to GR as called for at the World Summit on Sustainable Development (WSSD). Such a regime would require measures to ensure the recognition and protection of TK. The representative provided information on the study and its findings in so far as defensive and positive protection of TK went, with particular reference to the experiences in this regard of Panama and Peru. The representative drew attention to the tendency in the development of national *sui generis* regimes to provide a substantive role for customary law and practice in the definition of the ambit and scope of TK protection. One of the many issues dealt with in the study was the establishment of standardized specification data for the purposes of positive and defensive TK protection. Developing standards based upon criteria developed by IP regimes would define the modalities for protection of TK based upon IP practices. Further analysis was necessary therefore and the study suggested that the time was not yet ripe nor the technical basis sufficiently clear for establishing standards at this time. The study included consideration of a potential role for trusts as a means for securing more equitable management of TK databases. On the participation of indigenous peoples, the representative expressed the need for the appropriate processes to ensure the full involvement of indigenous peoples in the Committee's work. This was one of the greatest challenges for the Committee as it considered its future work. Finally, the representative suggested that the Committee address four specific areas of work, namely: analysis of prior art regulations, to expand their scope to include a wider range of sources of TK including, local community registers, indigenous peoples confidential registers and oral registers; the role of disclosure of origin of the source of TK in patent applications; analysis of the application of the principle of the public domain to TK; and, analysis of mechanisms to enhance the utility of databases and registries in TK protection, including through *sui generis* database protection and database trusts. The representative invited delegates to provide comment on the study.

104. The representative of the International Plant Genetic Resources Institute (IPGRI), who was observing the Committee for the sixteen International Agricultural Research Centers (IARCs) of the Consultative Group on International Agricultural Research (CGIAR), announced that the System-wide Information Network on Genetic Resources (SINGER) had recently been linked to the WIPO Online Portal of Database and Registries of TK and Genetic Resources in order for it to be potentially included in patent offices' prior art searches. The linking was described in document WIPO/GRTKF/IC/5/6. The representative explained that the linking was important for two reasons: first, the size and quality of SINGER, which contained passport, characterisation, and evaluation data on over 600,000 accessions of crop, forage and agroforestry plants that were currently held in the *ex situ* collections of the CGIAR Centers. The representative recalled that together the Centers constituted the largest collections in the world of plant GR for food and agriculture (PGRFA). The second reason which made this linking important was that it permitted the CGIAR to fulfil its mandate to protect the global public interest in those *ex situ* collections of PGRFA. The representative

then went on to explain what was meant by the global public interest in PGRFA within those collections: in 1994 the CGIAR Centers entered into an agreement with the FAO to place what was now more than 600,000 designated accessions from the collections “in trust” for the international community. Pursuant to these agreements, the CGIAR Centers undertook: to provide unrestricted access to those designated materials; not to take out any IP rights over those materials; and not to provide those materials to third parties unless they also agreed not to take IP rights out over the materials they would receive. The representative stated that encouraging patent offices to include SINGER in their prior art searches was one very useful strategy to ensure that none did take out IP rights on the genetic materials held in trust by the CGIAR Centers. The representative considered the inclusion of the SINGER database on the WIPO Portal to be an excellent example of the marriage between the IP mandate of WIPO and the GR mandate of the FAO and the activities of the CGIAR Centers. The representative foreshadowed that once the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR or “the International Treaty”) would enter into force, the CGIAR Centers would enter into agreements with the Governing Body of the ITPGR to include their collections in the Multilateral System of Access and Benefit-sharing which the International Treaty will create. The representative foreshadowed that, once the International Treaty entered into force, including the CGIAR Centers and any other material contained in the Multilateral System of the Treaty in the prior art searches of the Patent Offices through the WIPO Portal would help to ensure that this collection would be respected in the manner that was described by the International Treaty. The representative noted that SINGER and other genetic resource databases had not been assembled with other prior art searches in mind, but rather to assist plant breeders, scientists and others to gain access to information they needed for their research. Consequently, he added, that a certain amount of reorganization of data and search strategies would be no doubt necessary to move ahead with this enterprise. The representative pointed that most managers of genetic resource databases were not familiar with IP laws and the technicalities of prior art searches or what constituted prior art in different jurisdictions where their web-based data were being accessed. The Committee had already begun work on these issues and he considered this work to be an excellent match between the IP mandate of the Committee and the GR mandate of the CBD and FAO.

105. The representative of GRAIN introduced a spokesperson for the indigenous communities of Colombia who commented that the Secretariat’s interpretation of protection was to capture resources from the sites of origins, referred to as *in situ* and *ex situ* in document WIPO/GRTKF/IC/5/6. There were two different schools of thoughts present: indigenous peoples have different views on the world and saw the protection of GR as part of biological diversity and saw themselves as part of these resources. Their cultures, laws and policies instructed them not to be owners but rather administrators. The laws of nature along with their traditional culture should be respected. He went further to state that resources should not be captured in lists and databases. With regard to IP and TK, he stated that the very term of “traditional knowledge” was underpinned by the idea of ownership of property. The issue was a matter of politics and identity as well as an economic issue. He called on Delegates to support the conservation of the land and culture of indigenous communities, and on governments to support indigenous peoples to enable them to continue to develop.

106. The representative of the Tebtebba Foundation explained that the patenting of life is the biggest issue for indigenous peoples. The standards and criteria of patentability and prior art seemed to be so low that patents could issue on things known for centuries. Databases did not solve these problems. The representative indicated it would be important to know what was happening in the SCP.

107. The Secretariat responded to a request by Brazil for information on discussions that had taken place in the SCP concerning a draft substantive patent law treaty, referring to document SCP/9/2 which contained the current draft treaty. The treaty had been directed to issues that occur up to the grant of a patent although it did contain provisions on interpretation of claims after grant. Several issues discussed in the SCP were connected with issues discussed by this Committee. One was the provision in Article 8, which sought to define prior art in a uniform way. It sought to define prior art as including all prior disclosures, as prior art, including those that were oral for purposes of assessing novelty of claims in a patent applications. It would thus improve the situation involving use of TK as prior art. Other relevant provisions included Article 2.3 which said that nothing in the Treaty and the regulations should limit the freedom of a contracting party to protect public health, nutrition and the environment or to take any action it deemed necessary to promote the public interest in sectors of vital importance to its social, economic and scientific development; Article 14.2 was of similar interest. This and similar provisions were placed in square brackets on the understanding of the SCP that substantive discussions on the issues would be postponed. The next meeting of the SCP was scheduled for May 2004.

108. The Committee took note of the concerns expressed and the requests made for clarification and further discussion, especially as regards paragraphs 80 to 84 in document WIPO/GRTKF/IC/5/6.

109. A number of delegations expressed support, in whole or in part, for the invitation contained in paragraph 89. The Committee thus called for further responses on the questionnaire in accordance with the proposal under (i) of the paragraph. Furthermore, the Committee noted the various observations made on the technical proposals contained in document WIPO/GRTKF/4/14 and supported the proposal in (ii), including the transmission of it to the appropriate body within the Standing Committee on Information Technology (SCIT).

### *Existing Intellectual Property Protection of Traditional Knowledge*

#### *Elements of a sui generis system for the protection of TK*

110. The Committee noted documents WIPO/GRTKF/IC/5/7 and WIPO/GRTKF/IC/5/8 and postponed discussion of them to a later date.

## ITEM 6: GENETIC RESOURCES

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

111. At the request of the Chair, the Secretariat introduced document WIPO/GRTKF/IC/5/10, with reference also to the earlier documents WIPO/GRTKF/IC/4/11 and WIPO/GRTKF/Q.3. The Secretariat noted that the document incorporated extensive portions of these earlier documents which had already been considered by Member States. Sections V to VIII of the current document were new material, which amounted to a further

elaboration of the questions that had been set out in document WIPO/GRTKF/IC/4/11 which had been considered by the Committee at its fourth session.

112. The representative of the Secretariat of the CBD recalled the background to the invitation to the Committee to prepare the study contained in the annex to document WIPO/GRTKF/IC/5/10. That study would be submitted, if approved by the WIPO General Assembly, to the COP VII taking place in 2004. The representative stated that the study would provide a good basis for discussion and emphasized it would be helpful if the study were also made available to a meeting of the CBD's Working Group on Access and Benefit-Sharing in December 2003.

113. The Delegation of Peru introduced and summarized the main points of document WIPO/GRTKF/IC/5/13 ("Patents referring to *Lepidium Meyenii* (Maca): Responses of Peru") which was closely related to issues discussed in document WIPO/GRTKF/IC/5/10. Document WIPO/GRTKF/IC/5/13 was, the Delegation stated, an illustration and technical study of how biopiracy occurred in practice. The Delegation drew certain conclusions that might have wider validity and usefulness. In particular, it was enormously difficult for a country to challenge patents of this nature in the United States of America or Europe. Peru intended to establish a monitoring or early-warning mechanism to identify similar cases in which the unauthorized use of materials or components of national biological diversity or the TK of communities were being used. The possibility of establishing a journal of communication with other patent offices to obtain information on patent applications involving GR of Peruvian origin was being evaluated. The difficulty of access to information showed the problems patent offices faced when assessing this type of documentation, which affects the ability to carry out strict and comprehensive examinations of patent applications, which gave rise to rights of dubious legitimacy. It was necessary to organize this type of documentation, to make its use more systematic and for it to be included within search and examination procedures carried out by patent offices in order to avoid patents being granted on the basis of partial and limited examinations of novelty and inventive step. Including the requirement to disclose the source of GR, TK and folklore in international and national legislation would avoid cases of biopiracy. Finally, in regard to the Maca case, the Delegation urged WIPO to complement the international search that had already been taken into account, and for this additional information to be provided to the States cited in the international application. The Delegation stated that the patent system had weaknesses and limitations affecting the rights and interests of many countries having GR and where indigenous peoples lived. This was one of the reasons why, the Delegation concluded, it was necessary to extend and expand the mandate of the Committee which still had a lot of work before it.

114. The Delegation of Italy, on behalf of the European Community and its Member States referred to the draft technical study on disclosure requirements related to GR and TK and stated that this issue was very important in the current discussions on the relationship between GR and TK on one hand, and intellectual property on the other hand, therefore the European Commission and many European Union Member States had responded to the questionnaire circulated by the Secretariat. The Delegation recalled that the European Community and its Member States submitted a communication to the Council on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the relationship between the Agreement on TRIPS and the CBD in September 2002. The Delegation noted that in this communication the European Communities agreed to discuss the possible introduction of a system, such as a self-standing disclosure requirement, that would allow Members to track, at a global level, of

all patent applications with regards to GR or related TK for which they have granted access. The Delegation stated that the European Community and its Member States saw merit in a system that would ensure transparency and allow authorities of countries granting access to their resources or related knowledge to keep track of patent applications linked to the use of these resources or related knowledge. The Delegation stated that under such a system, the information to be provided by patent applicants should be limited to information on the geographic origin of GR or related TK used in the invention. The Delegation stated further that in order to achieve the necessary legal certainty, a further in-depth discussion of the concept of TK was necessary. The Delegation added however, that such a disclosure requirement should not act, *de facto* or *de jure*, as an additional formal or substantive patentability criterion. The Delegation stated that the legal consequences to the non-respect of the requirement should lie outside the ambit of patent law, such as for example in civil law (claim for compensation) or administrative law (fee for refusal to submit information to the authorities or submitting wrong information). The Delegation confirmed that the European Community and its Member States' readiness to discuss this issue in a constructive manner and reiterated their commitment to achieve tangible results to the satisfaction of all parties. The Delegation expressed the European Community and its Member States' support of the transmission of the technical study to the COP of the CBD and to the Secretariat of the WTO as well as further future work on this issue, including development of guidelines and recommendations as proposed in paragraph 12 of document WIPO/GRTKF/IC/5/10.

115. The Delegations of Peru and Costa Rica suggested that the study be provided as soon as possible to the Secretariat of the CBD so that it could be made available to working groups established under the CBD that will be meeting later this year.

116. The Delegation of South Africa stated that it was necessary to address the biopiracy issue. If there was a causal link between an invention and GR, TK or folklore, the patent or other IP should be void *ab initio*; if there was no disclosure, the patent or IP should be null and void if there is non-disclosure or misrepresentations. If there was a causal link between the invention and GR, TK and folklore, there should be co-ownership which results in co-commercialization, and those who contributed less should also be compensated, the Delegation stated. Biopiracy should be equated with counterfeiting of IP under the TRIPS Agreement. In the absence of this, WIPO and the World Trade Organization (WTO) should reconsider their work on the enforcement of IP. The Delegation encouraged developing countries in particular to regard the Bonn Guidelines as mandatory and to legislate accordingly. Developing countries should not renege from this position during bilateral negotiations with powerful nations. Nullifying a patent or IP by one country of a patent or IP on the ground of non-disclosure should also warrant nullification of such a patent or IP in other Member States, because of the costs involved in nullifying or expunging patents or IP. Criminal sanctions against the applicant should also be considered. The rules of fairness, equity and unfair competition should apply in relation to GR, TK and folklore.

117. The Delegation of Switzerland considered the document to provide an excellent basis for further discussions on these issues in this and other international fora, in particular the CBD, and supported the forwarding of the finalized technical study to the WIPO General Assembly with the recommendation that it be transmitted as a technical reference document to the seventh Conference of the Parties of the CBD. Switzerland, however, regretted that so few replies had been received to the relevant WIPO questionnaire. The Delegation drew the Committee's attention to proposals Switzerland had submitted the WIPO's Working Group on the Reform of the Patent Cooperation Treaty in May 2003, in document PCT/R/WG/4/13,

which had also been made available to the present Committee. These concerned the declaration of the source of GR and TK in patent applications. In summary, Switzerland proposed to amend the Regulations under the PCT of WIPO. These amendments would explicitly enable the Contracting Parties of the PCT to require patent applicants to declare the source of GR and/or TK in international patent applications. This requirement would apply if the claimed invention was directly based on such resources or knowledge. To further simplify procedures, Switzerland proposed to afford applicants the possibility of satisfying this requirement at the time of filing an international patent application or later during the international phase. In case an international patent application did not contain the required declaration, national law might foresee that in the national phase the application was not processed any further until the patent applicant had furnished the required declaration. By reference, the proposed amendment to the PCT would also apply to the Patent Law Treaty (PLT) of WIPO. Accordingly, the Contracting Parties of the PLT would be able to require in their national patent laws that patent applicants declare the source of GR and/or TK in national patent applications. Based on the PLT, the national patent law might foresee that the validity of a granted patent was affected by a lacking or incorrect declaration of the source, if this was due to “fraudulent intention.”

118. The Delegation of the United States of America stated that while benefit-sharing and prior informed consent were worthy goals, they would not necessarily be achieved by a disclosure requirement in patent law, but rather by a successful access and benefit-sharing regime that lay outside patent law. Such a regime should be based on contracts or permits that mandate regular reporting, notice given if an invention is made and that the contract be identified in any patent application claiming an invention developed using materials received under the access agreement. As for the draft study itself annexed to document WIPO/GRTKF/IC/5/10, the Delegation suggested that the disclaimer in paragraph 10 of the document be moved to a more prominent position, such as on the cover or in the first paragraphs of the document.

119. The Delegation of the Islamic Republic of Iran stated that GR were a form of life and principally they may not be considered as an innovation or invention nor could they be limited to the IP set of laws within the framework of the existing legal regimes. It stated that since their illegitimate use violated the constitutional rights of their owners and custodians, the dangers and effects of offensive and degrading use of these resources would be detrimental and harmful for the human and the environment and would threaten and endanger local communities ultimately resulting in the impossibility of the permanent and constant use of the benefits of these resources. The Delegation stated that the preparation of a special *sui generis* legal system for establishing consensus among interested parties in respect of GR and the distribution of benefits raised was a crucial issue. It stated that this legal mechanism must be in line with the CBD and must duly observe the rights of the country of origin and ensure the rights of national sovereignty for countries to control their own GR. It stated that the lack of such mechanism could not justify bio-piracy of GR within developing countries which were unable to protect and manage their own GR due to lack of financial and technical resources. The Delegation stated that taking into consideration the commitments and obligations prescribed in the CBD and the necessity of exploitation of GR, it had recently ratified a new act entitled “Plant Cultivar Registration and Control and Certificate of Seeds and Seedlings,” which provided a protection and exploitation system for internal uses, and based its activities on the following principles: (i) prescribing special criteria and standards for different varieties of GR depending on each case; (ii) ensuring certain requirements and conditions for the protection of the genetic resource of the country; (iii) designing and preparing a contractual model for transfer of genetic materials, such as exploitation of races of



the original Iranian horses and also contracts on the use of plant GR for uses intended merely for research purposes; (iv) determining the actual right holders and interested parties with the approach of establishment of organizations in local areas in order to create the required capacity for protection and exact designation of the Iranian party; (v) appointing national authorities in various fields in order to implement and control the said standards and criteria and also recording the data relating to the transfer of genetic materials; (vi) stipulating the registration of the contract for transfer of genetic materials in the registers of a national authority as the fundamental condition for transfer; (vii) stipulating that the national laws of Iran govern the preparation, conclusion and implementation of the contracts for transfer of genetic materials and resolution of the disputes arising therefrom; and, (viii) indicating the national property rights on the manner of distribution of the benefits arising from the exploitation of the hereditary reservoirs and stipulating that it shall be controlled by the said national authority as a term and condition of the contract. The Delegation stated that on the basis of the abovementioned principles, and with due consideration to the observation of the prior informed consent, it recognized the contractual method as the most efficient method within the framework of a *sui generis* system and a successful experience for protection of interests of owners and custodians of the environments of the countries.

120. The Chairman concluded, and the Committee agreed, that the study annexed to document WIPO/GRTKF/IC/5/10 would, taking into account the comments made, be transmitted to the WIPO General Assembly in September 2003, as proposed in paragraph 12 of the document.

#### *Contractual Practices*

121. The Committee noted document WIPO/GRTKF/IC/5/9 and postponed discussion of it to a later date.

### ITEM 7: FUTURE WORK

#### *Future mandate*

122. The Secretariat introduced document WIPO/GRTKF/IC/5/12, noting that the document provided a general overview of the work of the Committee to date, and introduced each of the current documents and described their interaction. The document also provided an overview of key themes of the Committee's discussions, and sought to clarify key distinctions and key terms used in the work of the Committee. While it did not make any specific suggestions as to the future work of the Committee, it was a guide to past documents of the Committee and the work of the Secretariat in this area. The Secretariat added that the document made a distinction between policy discussions and capacity building, as well as the relationship between IP approaches to GR, TK and folklore, and non-IP approaches and mechanisms.

123. The Delegation of Zambia on behalf of the African Group reiterated its support for the work of the Committee. The African Group appreciated all discussions and documents of the Committee, considering them a valuable source of information for many countries. The Delegation stated that the Committee had had ample time to discuss many issues on TK, GR and folklore, and that it was time to make firm decisions and precise recommendations to the General Assembly for the need to create a legal instrument. The Delegation added that the General Assembly should then establish a mandate for creation of an international instrument.

The Delegation further stated that at the time that the Committee had been established, the African Group had expressed its satisfaction at a historic opportunity to correct the imbalance inherent in the current international intellectual property system and the gaps in conventional intellectual property rights presently rendered them incapable of providing effective protection to the interests of countries home to a majority of the world's biological resources and a great heritage of TK and folklore. The Delegation stated that though the Committee had undertaken important information gathering and policy discussion, it had not emphasized the need to negotiate a legally-binding international instrument to protect GR, TK, and folklore. It added that discussions had thus not been sufficiently focused and expeditious with regards to a legally-binding international instrument and had continually been used as an excuse to exclude or delay work in other fora. It stated as a result, while these issues remained essential to developing countries, particularly in Africa, continuing work would only be valuable with crucial adjustments both in substantive direction and form. In that sense, it stated that a clear mandate for negotiating a legally-binding international instrument that recognizes and facilitates the protection and enforcement of the rights of countries and communities over their GR, TK, and folklore was fundamental. The Delegation stated that despite its considerable body of substantial and practical materials, a Committee with no negotiating mandate had not moved towards an effective protection system, moreover, the mandate needed to unmistakably establish the timeline in which such a framework would be negotiated. It stated that concrete and effective results would only be possible by precisely limiting the extension in time of negotiations. The Delegation added that the development of a legally-binding international instrument to recognize and facilitate the protection of developing countries' rights in these subjects would require a wide variety of activities, from strengthening capacity building and guidance to national policy makers to developing specific legal instruments. Through these different endeavors, it added however, the Committee or any new body created must remain manifestly focused on setting international norms for the effective protection of GR, TK, and folklore. The Delegation stated that at the same time, work on each specific issue should be based on the basic principles already expressed by the African Group and other developing countries. The Delegation stated further that norm-setting undertaken by the Committee or a new body should at all times be complementary and compatible with the work at the Food and Agriculture Organization, the Convention of Biological Diversity, the World Trade Organization, UNESCO and others. The Delegation stated that the mandate to negotiate a legally-binding international instruments for protecting GR, TK, and folklore, may be carried forth in different types of bodies. It added that the specific denomination of the body was not in itself as essential as ensuring that the same was substantively directed towards the international protection of GR, TK, and folklore. Consequently, it stated, any body dealing with these issues should include the following rules: (i) limiting the timeframe for negotiations and ensuring rapid solutions to the challenges presented by the intellectual property protection of GR, TK and folklore; (ii) guaranteeing the constructive contribution of non-governmental organizations, local communities and indigenous peoples in the deliberations; (iii) establishing sessions to operate on a stand-alone basis, dealing with one issue at the time, to enable the participation of all parties interested in a specific issues and more time for preparation for developing countries facing resource challenges. If such sessions were not possible, it might be useful to create subsidiary expert working groups and task forces to deal in a more focused way with particular technical issues; and (iv) complementing the policy setting and normative work with developing practical tools such as toolkits, guides, and databases and the carrying out of capacity-strengthening and cooperation activities. The Delegation stated that the allocation of adequate resources to support all these aspects of the work would be necessary. It concluded that first and foremost, the mandate of the Committee or new body must be clearly geared towards negotiating international instruments within a reasonable period of time and without

obstructing protection mechanisms being developed in other fora, followed by a form of work that corresponds with the need to establish comprehensive global protection in conjunction with other WIPO bodies and other international organizations. It added that only with such changes could gaps in the international intellectual property system be overcome and become the tool that countries need to obtain economic, social and cultural development.

124. The Delegation of the Philippines, on behalf of the Asian Group, stated that the Asian Group viewed the work of the Committee as a vital component of the WIPO's overall mandate of addressing issues of great importance to its membership, particularly developing countries. The Asian Group had actively lent its support for the work of the Committee since its inception. The Delegation stated that the past sessions of the Committee demonstrated the importance of GR, TK and folklore in the international agenda, confirming that these issues raised legitimate IP concerns that needed to be dealt with at the international level. The Delegation stated that the work in the Committee had further contributed to mainstreaming these issues in WIPO's activities and enhanced their understanding of the different dimensions and implications of the issues under consideration in particular through an enriching exchange of information on relevant national and regional experiences. It expressed that the Asian Group was concerned that the Committee had proceeded slowly and had not delivered concrete tangible results or measure that would enable developing countries to effectively protect their GR, TK and folklore. Meanwhile, it added, bio-piracy and the misappropriation of TK and folklore continued unabated. The Delegation stated that these were urgent challenges that required prompt action by the international community, including WIPO. It added that toolkits while valuable for TK holders were not the main answer to these challenges. The Delegation stated that it was time to move beyond mere discussions and exchanges of information. It added that future works within WIPO on these issues should be clearly focussed and results orientated. The Delegation stated that the Asian Group called for an entirely new mandate to work on these issues, and that this mandate should include norm-setting, with a view to the negotiation of relevant international instruments on the protection of intellectual property and GR, TK and folklore as appropriate. It added that this should be achieved with a reasonable time framework, and should be subject to periodic review by the membership of WIPO. The Delegation added that the Asian Group held the view that it was important that the mandate also ensure that the future work in WIPO will be mutually supportive of the work undertaken by other relevant international organizations that also have a mandate to address these issues. It added that a synergy was needed amongst the different international organizations. It added further that it was important to address these, both in the future body and in other bodies of WIPO that dealt with branches of intellectual property relevant to the protection of GR, TK and folklore. The Delegation concluded that the Asian Group did not see continuing work in WIPO on these issues as a goal in and of itself. The Delegation added that their goal was to effectively protect and preserve their GR, TK and folklore at the national and international level. The Delegation concluded that any decision on future work in WIPO on these issues must be made in this light.

125. The Delegation of Portugal, speaking on behalf of Group B, indicated that the key outcome of the present meeting should be recommendations on future work; the format of the Committee; and the mandate. The work begun by the Committee should be continued. The Delegation stated that Group B considered that the Committee should conduct its activities with a view to develop appropriate future steps to adequately address the intellectual property issues raised in the Committee. With respect to the the specific work to be undertaken by the Committee, it was of the view that the Committee itself, at its next meeting, should consolidate the items in its work programme based upon the continuation of previous and

ongoing practical initiatives, and take into account the lessons learnt from the analysis conducted under the first mandate. The format for continued work should be as an Intergovernmental Committee for a limited term of two years with the possibility of renewal. The mandate should be to examine and discuss IP issues involving benefit-sharing and the protection of folklore/cultural expressions. The Committee's deliberations should be shared with other bodies. In addition the Committee should consolidate programs taking into account the lessons learned up to now.

126. The Delegation of China expressed support in principle for the statement of the Asian Group. The Delegation stated that the discussion on IP and GR, TK and folklore was an important agenda in the development of the current international IP system. The Delegation stated that since the establishment of the Committee, various activities had been carried out by WIPO and certain progress had been achieved in some areas, but the Committee should deepen the discussions, make more comprehensive studies on the relevant subjects, and further harmonize relevant issues. The Delegation supported extending the mandate of the Committee and of the further strengthening its activities. It agreed, in principle, with the inclusion of norm-setting activities into the general objective of the future work of the Committee. The Delegation believed that the future work of the Committee should mainly include the following two aspects: continued discussion and study on the full use of the current IP systems for the protection of the GR, TK and folklore, including the discussion on a database of GR and TK; and an in-depth, comprehensive and extensive analysis and study on a *sui generis* system based on the current progress. As for the norm-setting activities, the Delegation stated the Committee should, in particular, pay attention to the summarization and derivation of the practical experience of various member States, and should collect opinions of Member States. The Delegation believed that broader investigations, studies and analysis should be conducted to achieve a more comprehensive and clear understanding by the Member States on the relevant issues, in order to expand their common understandings. It added that in this way the Committee could create a good base, after a period of work, for the adoption of an appropriate treaty when the conditions were ready. The Delegation concluded that the Committee had a long way ahead with heavy responsibility, and hoped that the Committee would conduct a closer cooperation with the Member States during its new mandate, and operate more effectively, so as to fulfill its arduous and important mission.

127. The Delegation of Egypt stated that there had been a flood of a complex and varied information concerning defensive protection. With regards to positive protection relatively little effort seemed to have been made. This paradoxical situation had been brought about by several factors. Developed nations may feel it would be judicious for the work of the Committee to be limited to drawing up a guideline or at the very most to preparing a model law therefore excluding the possibility of any binding international instrument for protection of folklore, TK and GR. The Delegation added that developed nations may feel that a binding instrument might put restrictions on cooperation trying to use human knowledge for technical purposes and for profit making. The Delegation commented that without a binding international system, it would be the responsibility of national legislators to adopt laws in respect of protection, and there would be no international point of reference setting limits. Hence a binding international system would be in the interest of all parties concerned. The second factor, the Delegation stated, was that certain people may feel that defensive protection would be sufficient to preserve and protect TK, GR, and folklore. Protection has two aspects, defensive and positive, and with these two aspects protection was total and

indivisible. Regarding the compilation and cataloguing of TK into databases, developing countries might be skeptical as some parts of the knowledge might not be catalogued which implied these resources would not be subject to protection. It added that the inclusion of TK and expressions of folklore in databases would not in itself guarantee their protection, as inclusion in databases would not be a right according to the specific legal term but a measure to prove the existence of a right. With respect to positive protection, the Delegation was of the opinion that a *sui generis* system would once adopted, be a mechanism equivalent to the patent system under Article 27.3 (b) of the TRIPS Agreement, therefore normal to use as a protection mechanism for the various areas of IP. The Delegation stated that the components for a *sui generis* system should be laid down on a very specific basis: there should be prior informed consent keeping in mind the advantages or benefits have to be shared, as these shared benefits would not only mean income but also mean the advantages conferred by the holding of technical knowledge in this area. The Delegation referred to a model law in Egypt on *sui generis* protection of plant varieties. The Delegation stated that with regards to a traditional systems of protection of IP, in particularly the patent system, the use of this system for the protection of TK and GR could be efficient and effective only if there was full and complete disclosure and benefit-sharing, otherwise there would be the continuation of biopiracy. In conclusion, the Delegation stated that if the mandate of the Committee was ensure real progress in improving the protection for the three issues under discussion by using audacious and imaginative methods. The Delegation urged that the Committee try and find better means to move towards the preparation of an international instrument which would preferably have treaty status with full and effective protection for TK, GR and folklore. The Delegation stated that there was a need to prepare recommendations on these issues for the benefit of the General Assemblies.

128. The Delegation of Italy, on behalf of the European Community and its Member States, expressed support for renewal of the mandate of the Committee. It added that the European Community and its Member States considered that the Committee should continue studying and discussing the IP issues concerning TK, GR and folklore. The European Community and its Member States confirmed their commitment to find appropriate, effective and balanced solutions for the protection of TK, GR and folklore, agreeable to all parties. The Delegation concluded that they remained open to the examination of any appropriate courses of action resulting from discussion without prejudging any possible outcome.

129. The Delegation of South Africa endorsed the statement of the Delegation of Zambia on behalf of the African Group. The Delegation proposed that WIPO establish mechanisms to develop a treaty for Member States to ratify voluntarily and that WIPO develop model legislation for interested Member States to apply within their national jurisdictions. The Delegation proposed further that WIPO encourage Member States, who were Members of the CBD to change their IP regime in accordance with the CBD. The Delegation stated that IP regimes should recognize customary laws in this regard and that it would be wrong to state that the philosophical approach of the IP regime and TK, GR and folklore were compatible. It added that such differences should be taken into account when the legal international instrument was clarified. The Delegation stated that South Africa requested WIPO to formulate a treaty or convention or model legislation for South Africa, Africa and other developing countries. The Delegation proposed that WIPO assist South Africa and other interested Member States to draft model bilateral and regional agreements in this regard. The

Delegation proposed further that WIPO assist South Africa in establishing the database of folklore and that model legislation on folklore contain elements of IP and repression of unfair competition be used to protect folkloric issues. The Delegation proposed that the treaty or model legislation be developed for GR and biodiversity contain provisions outlawing biopiracy. The Delegation proposed further that the treaty or model legislation be developed contain provisions dealing with the principles of equity, fairness, and breach of confidentiality. The Delegation stated that Member States of WIPO who would adopt the treaty and model provisions should legislate for a minimum threshold for benefit-sharing as contained in CBD extension. The Delegation proposed that the instrument or model legislation contained penalty provisions for countries not following the rules. The Delegation concluded that it was not asking a treaty or model legislation, which contained everything at an international level, but requested a treaty or model legislation, which would contain minimum standards which could be appreciated by all nations. The Delegation concluded further that certain issues may be covered at the regional level whilst others could be obtained at the national level. The Delegation concluded that WIPO should assist in all three counts and that failure of one should not lead to failure of all. The Delegation added that South Africa was intending to change its laws in line with the above-mentioned recommendations.

130. The Delegation of Venezuela stated that the Committee had been established to address a very particular situation which had yet to be resolved; nonetheless, the work of the Committee, to date, had been very important and had enabled progress to be made both in theory and, to a certain extent, in practice. However, the Committee needed to focus more closely on its future work program. From the work carried out so far, the Delegation drew the following conclusions: First, existing legislation on IP was not sufficient to deal with the issues under discussion in the Committee and to offer full protection to TK holders. New alternatives were needed. Second, the documentation and work of the Committee to date showed that the use of GR and TK in the development of inventions helped pre-empt unfounded claims being made by unauthorized third parties. Third, in the course of the life of the Committee, while the limits of the traditional IP system, when it comes to providing positive and defensive protection, had been identified by very constructive exploratory work, it was now time to focus in on the most appropriate aspects of a *sui generis* system and to take specific steps forward. In particular, the Committee should give some body to the ideas set out in document WIPO/GRTKF/IC/5/8 and use this document as the basis for future work of the Committee. The *sui generis* system should not be limited to the toolkit or to databases, but must go beyond these things. The Delegation continued by stating that it was in a position to recommend, as recommended by both the African and the Asian Groups, that the Committee's mandate, from now on, should include establishment of norms and preparation of a binding international instrument on TK, GR and Folklore. The Delegation stated that there should be a clearly defined and reasonable period of time within which this work should be done and that this should not exceed 18 months of discussion. Further, the formal mechanism for discussion should not be a permanent or standing body, since such a body may extend rather arid discussions for years to the detriment of indigenous and local communities. A Committee with clearly defined deadlines for completion of its work and a clearly defined mandate would be the best way to proceed. Finally, this work should be done in coordination with other bodies that have competence in these areas, and should not be used in other fora as a reason for not discussing the issues in those fora.

131. The Delegation of Australia emphasized its commitment to the work of the Committee and to developing practicable and workable solutions to the issues before it. The Delegation drew to the attention of the Committee some recent developments in Australia. The first concerned the implementation of Australian obligations under the CBD. Under its federated

government system, the Federal Government had developed legislation to govern access to GR on central government-owned land and was drafting regulations following extensive public consultation. Australian State or provincial governments were also implementing legislation to cover access to GR on state controlled land within their jurisdiction. The Queensland Government had recently released draft legislation to manage and control access to GR in that state. Almost 4 percent of the world's biodiversity was unique to Queensland and the draft legislation was intended to ensure a system of streamlined, sustainable and ethical access to that biodiversity. This would recognize TK holders and ensure that PIC and benefit sharing was part of any access agreement. In another development, Indigenous (Communal Moral Rights) legislation was proposed to enable Indigenous communities to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material. Amendments to the Copyright Act would be introduced into Parliament later in 2003 and would give Indigenous communities legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom. The existing moral rights provisions of the Copyright Act gave individual authors the right to be identified as the author or artist of their work and to take action to prevent false identification of the author or derogatory treatment of these copyright works and films. However, Indigenous communities did not currently have legal standing to bring moral rights court actions regarding the treatment of Indigenous material. The legislation would therefore introduce Indigenous communal moral rights in relation to a work (including an artistic work) or film based on an agreement between the author/artist and the Indigenous community. These rights could be independently exercised by the community and would mirror the nature and scope of authors' moral rights, as far as possible. These proposals would provide certainty and assist users and purchasers of items to identify those works and films to which the rights attach, and would facilitate cooperation and respect between artists, authors, film-makers and Indigenous communities. However, difficult threshold questions remain in the drafting of these proposals, including how to define the community and its relationship to the protected work, how to establish who can represent the community and take action on its behalf and how to establish the necessary relationship between the community and the author or artist. Nevertheless it was the Australian Government's intention that this legislation would provide a simple, workable and practical scheme for Indigenous communities, artists, galleries and the public, and the Government would continue to consult in fine-tuning the new provisions. As to the future of the Committee, the Delegation stated that it recognized that there were issues which required further development through the work of the Committee and that it therefore strongly supported the renewal of the Committee's mandate, as set out in the papers before the Committee, for a further two years. Australia was, however, concerned about calls to commence work now on negotiating binding language and instruments and believed that such calls were premature. The issues were not fully mature and the goals of such work remained unclear. To enter into such negotiations now, when the Committee was far from consensus on the meaning of terms such as TCEs, would be counter productive and could undermine further progress on these issues. The Delegation concluded by stating that the renewal of the mandate for the Committee would be an important contribution to achieving international consensus on the way forward.

132. The Delegation of Mexico stated that the work of the Committee over the last five sessions had been of enormous value and had provided a much clearer picture of the complex issues under consideration. However, many matters were still outstanding. Some of these could not be tackled within the current terms of reference of the Committee and remained to be addressed within WIPO, or to be forwarded to the appropriate fora. The Delegation concluded by stating that it believed that the Committee should continue with its work, but

that its terms of reference should be revised to take it further than mere discussion. In this regard, it agreed with the statement of the Asian Group.

133. The Delegation of the Islamic Republic of Iran stated that in addition to identification, reinforcement and documentation of TK and expressions of folklore, the Committee should also consider the development of strong and comprehensive laws and regulations to protect intangible cultural heritage. Such legislation should be developed with great care, taking into account the cultural and environmental sensitivities of the peoples affected, including local and tribal values and customs, religious beliefs and cultural diversities. Otherwise, such legislation may weaken that which it sought to protect.

134. The Delegation of India stated that it had always viewed WIPO and the Committee as the most qualified and neutral forum to find, and conclude, a consensus on the sensitive issues under discussion, and that this view had been vindicated by the progress made to date. Accordingly, any substantive and focussed action plan for the future deserved its full support, subject to the need to address, and to resolve by consensus, these issues sooner rather than later. This would avoid the accusation that the Committee was a talk-shop where the fact-finding exercise was an end in itself. Further, the Delegation stressed that norm-setting efforts should be at the core of the future work of the Committee. The Delegation concluded by associating itself with the statement of the Asian Group.

135. The Delegation of Nigeria stated that it was especially pleased with the various consultations and seminars that taken place and that, together with the work of the Committee, these had given experts the opportunity to make informed decisions and inputs at both a national and regional level on the various issues before the Committee. It continued by stating that it endorsed the statement of the African Group. However, whilst it was confident that there was light at the end of the tunnel, nonetheless, many developing countries and communities remained frustrated at the lack of practical progress. It hoped that the Committee would continue to make progress to address these concerns, and in particular that progress would be made on the development of an internationally binding instrument on TK, GR and folklore.

136. The Delegation of Brazil stated that there was clear convergence of views among developing countries, and that it supported the statements made by the African Group, by the Asian Group, Egypt and Venezuela, amongst others. It noted that, even while the IGC held its discussions, bio-piracy and the misappropriation of TK continued unabated, regardless of continuing losses suffered by developing countries; this was a serious issue that required prompt action by the international community, including WIPO. It stated that the Committee had gone beyond the stage of mere deliberations and exchanges of national experiences and noted, that if the Committee were to continue its work, it should have an entirely new mandate, with specific, concrete objectives. This mandate should include norm setting and should prepare the grounds for the negotiation of an international, legally binding treaty of *sui generis* protection. These negotiations should be carried out within a reasonable time frame. The Committee should also consider the relationship of its work with the work being carried out in other international organizations. The Delegation stated that the Committee must deliver. It should never be used to detract from important initiatives that were currently being undertaken elsewhere, or to defer consideration of proposals tabled by developing countries in other organizations, such as the WTO. The Delegation concluded by stating that it was concerned lest the Committee become swamped by an enormous quantity of documents on issues that were not necessarily relevant to its mandate. Therefore it strongly supported



the comments made regarding the length of the written materials being prepared for the Committee.

137. The Delegation of Kenya associated itself with the statement of the African Group and noted that, in Kenya, some areas of TK, GR and Folklore could not be protected by the current IP regime. Due to this, there was continued bio-piracy and misappropriation of these resources. Accordingly, the Delegation wished the Committee to develop an international instrument to protect such resources.

138. The Delegation of the United States of America stated that all of the studies carried out by the Secretariat had provided the Committee with valuable information and mechanisms with which to analyse the issues. However it was still unclear in many areas where practical problems remained and the Committee was still seeking input from many of the delegations that most sought changes. The Delegation stated that it remained open to listening to actual problems and to finding appropriate solutions. The issues under discussion were also of great importance to Native American communities within the United States of America. The Delegation had worked, and would continue to work, with these tribes to develop a further understanding of the needs of their communities. It was because of this working relationship that the Delegation supported participation of indigenous representatives in the work of the Committee. The Delegation continued by stating that the work of the Committee had yielded many useful and practical results, including the contracts database, a draft TK Toolkit and examples of various methods to protect TCEs. It had also found it especially useful to exchange national experiences on *sui generis* legal solutions outside of existing IP laws. In particular, this type of exchange had helped the United States of America to implement a toolkit for the benefit of Native Americans. Nonetheless, the Delegation recognised that not all questions had been answered by the Committee and that many of the action items presented at this session provide for the continuation of work, including the preparation of further questionnaires. The Delegation concluded that it would therefore support renewal of the mandate of Committee in the current form for the next biennium or two, as necessary, and that it would like to see the Committee using its experiences to date to help member states to develop national and/or regional mechanisms to address their particular concerns.

139. The Delegation of Costa Rica stated that work of the Committee was very important to finding legal and political solutions at all levels to protect of GR, TK and TCEs. However, it also recognized that the work of the Committee should be greater and should be extended to a norm setting function. This function should pay especial regard to TK and TCEs, and should also include reference to the work of the CBD and the decision of the Johannesburg summit with regard to an international regime for benefit-sharing. The Committee should also continue its work on the analysis and development of elements of *sui generis* systems to protect TK at a national level.

140. The Delegation of the Russian Federation stated that work of the Committee could not be compared with other work of WIPO, such as the PCT, because in such other work, member states were dealing with laws, whereas, in this Committee, the issues under discussion related to the creative soul of individuals, communities and societies. Accordingly, the Committee should not rush into such sensitive issues, but should consider them carefully and properly. When the work was concluded, it believed that there would certainly be an international binding instrument. In the meantime, the work should be a permanent feature of WIPO, and the future Committee should have a permanent, or standing, status. The Delegation concluded by agreeing with the proposal made by the Delegation of the United States of

America and many other States; namely, the terms of reference of any future Committee should be carefully drafted.

141. The Delegation of Nicaragua expressed conviction that norms for the protection of TK, GR and folklore should be developed by the Committee. The terms of reference for the Committee should be altered to ensure more concrete steps. The Delegation also supported the statements in this respect of the Philippines, Mexico and others. Support for funding participation of indigenous peoples was also expressed.

142. The Delegation of Namibia expressed support for the African Group position articulated by Zambia and for treating the issues addressed by this Committee as urgent. The Delegation urged that the Committee make progress on developing international norms for protecting TK, GR and folklore. The Delegation expressed support for continuing the Committee for a limited time.

143. The Delegation of Switzerland expressed support for the statement of Group B. Document WIPO/GRTKF/IC/5/12 showed that the Committee was well suited to address the various issues and had developed useful tools and information needed to advance discussions. Not all issues had been resolved. Thus, the mandate should be extended with the Committee acting under the same structure, and its term should be extended for at least two years. Future work should focus on certain issues of particular priority such as: disclosure of source of genetic material; terminology; in the context of folklore, clarity was particularly needed and perhaps a group of experts should be convened; advances on databases of TK should be made and attempts made to standardize the format of such databases; analytical work on national experiences should be engaged in; and an annotated menu of policy options for the protection of folklore/TCEs.

144. The Delegation of Panama said that the activities engaged in had been relevant but the work was missing action on norms for protection. These issues were very important to Panama and its large indigenous population, and more specific and creative programs were needed.

145. The Delegation of Norway supported extension of the Committee's work period. Its mandate should be structured to maximize input into these complex issues. The Delegation believed that the Committee was not ready for a negotiation phase. The need for a negotiated international instrument was not clear. Further consideration was needed on whether there was a one size fits all approach for TK or if sectoral solutions were more useful. Further consideration should be given to how any instrument developed in this Committee would relate to other instruments. The Delegation also supported development of annotated menus of policy options on TK and folklore and noted that norm setting might in the future become the aim of the Committee.

146. The Delegation of Senegal noted that the wealth of information based on national experiences for the protection of TK and associated GR, and folklore, transmitted to the Committee by Member States through the various seminars held and studies by the Secretariat. This information permitted members to discern the complex elements in the development of a toolkit. However, the Delegation expressed concern that the elements contained in the toolkit remained insufficient in providing effective protection in a general

manner as well as *vis a vis* the sharing of generated benefits. In addition, the Delegation stated that the legal instrument desired by the African Group was an indispensable and valuable supplement, complementary to the varied components of the toolkit. Hence, future work, based on another mandate, would enable the attainment of still more interesting results to those already adequately obtained by the present Committee. At the same time, these last results, once obtained, would finalize the work already engaged in by other institutions such as UNESCO.

147. The Delegation of New Zealand supported the statement made on behalf of Group B and added that the mandate of the Committee should be to develop a range of policy, legal and practical initiatives (including the completion of tasks already mandated, and those suggested in papers prepared for the fifth session). These initiatives should provide options and mechanisms for adoption by States as appropriate to national circumstances, and to meet the needs of indigenous and local communities in their jurisdictions. The delegation considered that the mandate should provide sufficient flexibility so that recommendations could be made to other bodies. It did not support negotiation of an international instrument on TK at this time, but did not foreclose this possibility should consensus be reached on the conceptual basis for such an approach.

148. The Delegation of Burkina Faso stated that the concept of “folklore” remained unclear. Effective protection on TK, GR and folklore was still needed nationally. International norms and an international instrument would be helpful. The Delegation supported the statement made on behalf of the African Group and urged development of an international instrument. Use of GR, TK and folklore outside national boundaries was the issue.

149. The Delegation of Lesotho expressed support for the statement made on behalf of the African Group. The Delegation stated that a lot of work had been done on the subject matter: surveys, fact-finding mission, exchange of experiences, seminars, consultations and meetings; therefore, it was now time to move a step further towards developing a legally binding international instrument to stop misappropriation. The Delegation further stated that the mandate of WIPO was to recognize, protect and promote works of the human mind, that even though the subject matter did not fall squarely within the traditional intellectual property system, this should not stop WIPO Member States from being creative enough to protect people who have contributed so much to the fabric of human kind. The Delegation concluded by indicating that “where there was a will there was a way.”

150. The Delegation of Colombia expressed concern that the documents produced for the session were still not made available in a timely manner to allow full consideration and participation by the large Spanish-speaking region and other communities, notably those indigenous communities not having Spanish as their native language. Spanish was the only international language these communities have access to, in large part, throughout Latin America. Timely distribution of the documents would allow for the debates and consultations, held at national levels prior to the sessions, to consolidate positions on the distinct proposals without excluding anyone. With regard to document WIPO/GRTKF/IC/5/12, the Delegation believed that given their country’s level of development and interest in collaborating to identify elements that would permit an analysis of possible systems for the defensive and positive protection of a *sui generis* character on all three themes, they were mindful that the IGC sessions resulted in a wealth of important and valuable documents allowing for continued work on the tasks set out by the Committee. These documents should not, however, be considered definitive and their process of

elaboration should continue. The Delegation emphasized as it had in previous sessions their interest in recognition at the international level of a system for the protection of TK. For this reason it supported the initiative to recommend to the WIPO General Assembly the renewal of the IGC's mandate in its current format keeping in mind efforts to strengthen capacity building so that each country may, based on experience, have the possibility to study and analyze the best option of protection. Equally, the Delegation supported the proposal to consolidate a joint recommendation based on the results of the Committee. In conclusion, the Delegation repeated its recommendation for the renewal of the Committee's mandate but that such a renewal should in no way prejudice international negotiations on the themes.

151. The Delegation of Malawi endorsed the statement made on behalf of the African Group. The Delegation indicated that the Committee had spent sufficient time on the issues within its charge and needed to forge ahead. The Delegation urged work on a binding international instrument and additional assistance in capacity building and in preparation of legislation.

152. The Delegation of Japan expressed support for the statement made on behalf of Group B and indicated that protection of TK, GR and folklore was important to many governments. The Delegation supported further discussions on these issues from an IP perspective. There were divergent views on many issues which require further discussion. The Delegation supported retaining the current framework for the Committee for an additional two years.

153. The Delegation of Mali expressed support for the African Group Statement and for developing a legally binding instrument on the three main issues of this Committee.

154. The Delegation of Tunisia expressed support for the African Group Statement. There was a need to protect folklore and cultural heritage from exploitation by third parties. The Delegation indicated the problem was international in scope and that a binding international instrument was needed.

155. The Delegation of Canada expressed support for the statement made on behalf of the Group B countries, and indicated that a binding negotiation process is not appropriate at present, as there are many open issues. Premature consideration of these issues would be harmful to the very beneficiaries we are most concerned with, TK holders. Those stakeholders need to be included in norm-setting discussions. In addition, premature norm setting would divert from useful capacity building efforts. Practical and policy issues are numerous and need to be identified first with outcomes identified subsequently; not the reverse. The Delegation explained that we are involved in a norm-building exercise. This is thus not the time for a norm setting process. As to future work, the Delegation urged continued norm building efforts. The Committee should be authorized to continue for an additional two years with the same structure and status. The Committee should engage in additional analysis and policy issue exploration. Concrete policy advice should be developed. The subjects of the Committee's attention should evolve from the substantive discussions of the documents provided or at the first meeting of the Committee.

156. The Delegation of the Holy See adhered to the declaration of the Group B countries, and underlined its awareness that an instrument setting an international standard, without any prejudice to its modalities, would respond better to the efforts to protect and preserve the traditional and cultural patrimonies, and the GR which constitute, at all times, the riches of humanity, which we have the responsibility to know better, to share and to transmit. Such an international benchmark would contribute to strengthening the capacities of the persons,

communities and peoples in possession of these knowledge and resources, especially in favour of developing countries and indigenous populations, and would also help to curb interference and to fight against dispossessions and acts of piracy.

157. The Delegation of Ecuador stated that it appreciated the work undertaken by the Committee so far. However, the relevant issues were not being accorded the appropriate importance by the Committee. It should not be forgotten why the Committee had been established in the first place, the Delegation stated. Recalling the establishment of the Committee at the time of the Diplomatic Conference to adopt the PLT in 2000, the Delegation stated that the Committee had been established *inter alia* to avoid the failure of that Conference and, based upon a commitment by WIPO's Director General, to discuss mainly issues related to GR. One should analyze the progress made by the Committee so far in relation to this background and commitment. The Delegation stated it was necessary to decide whether it was appropriate to continue to consider the three themes of the Committee within one forum. The Committee should not consider GR issues any further as these had been under discussion for more than 5 years. As several other Delegations had stated, such as Venezuela, Brazil and Nicaragua from Latin America and others from other regions, there was a need now to achieve tangible results. The time was ripe for concrete action. The Delegation's specific proposal was that GR issues (specifically the misappropriation of GR and benefit-sharing) should be referred to the committees dealing with patents, such as Standing Committee on Patents, from where the issue first arose, and the present Committee's only focus should remain the positive *sui generis* protection of TK. Since it was a completely separate issue, folklore should be dealt with in a separate committee so it could come up with a *sui generis* form of protection for folklore.

158. The Delegation of Germany took the floor to underscore its appreciation of the importance of the matters being discussed by the Committee and express its support for the statements made on behalf of Group B and the European Union.

159. The Delegation of France, in line with the statements made on behalf of Group B and the European Union, noted with satisfaction the progress made so far by the Committee. The Delegation appreciated in particular the presentation on national experiences that had been presented to the Committee. The Delegation supported the renewal of the mandate and stated it was open to various proposals for future work, in respect of which it was prepared to be flexible and dynamic.

160. The Delegation of Italy stated that the Committee's work so far had shed light on several issues and it appreciated the amount of work undertaken, yet further study was needed. The Delegation questioned whether examining all three of the Committee's themes together was appropriate as this posed difficulties. For example, the Delegation stated, there were remarkable differences between genetic resource and folklore and, for example, between GR and TK. It was necessary to consider the similarities but also the differences between the three themes.

161. The Delegation of the United Kingdom stated that it believed that the Committee had achieved much during its existence and that it had been an effective way of sharing information, increasing understanding and taking practical measures forward. The Delegation therefore believed that the Committee's current format should be continued and it supported the renewal of its mandate.

162. The Delegation of Morocco stated that the Committee had made much progress which had led to a better understanding of the technical and legal issues associated with the protection of GR, TK and folklore and to deeper reflection on a possible solution or solutions to the various issues. It was necessary, however, as several delegations had stated, to reach an appropriate solution or solutions. At this and previous sessions, several delegations had presented their national experiences. *Sui generis* models and customary law had been referred to. These all demonstrated the complexity of the matter and, therefore, the need for an international instrument. However, development of such an instrument would require the reformulation of the Committee's mandate, the Delegation stated.

163. The Delegation of Cuba emphasised the value and importance of the documents that clarify and allow for a clear analysis and clarifications of the issues. Given the on-going discussions, documents and studies on positive and negative protection in developing and development countries, the Delegation felt that there was a need for the Committee to take its work further and that the mandate be extended for at least a two year period. The Committee should then look at the various alternatives, keeping in mind the progress made in other fora and organisations, including other WIPO Committees. In seeking to harmonise and co-ordinate the issues being dealt with, the Committee should ensure that they were done so in a manner similar or identical to all other fora so as to avoid confusion. Clear and comprehensive conclusions would therefore follow. The Delegation stated that several proposals were put forward by developing countries and while they still needed negotiating the Committee must still ensure that the future work be done in order to secure optimal solutions of all the interests in question.

164. The Delegation of Argentina stated that had the documents been translated and circulated in a timely manner, the exchange of opinions at the national level would have been facilitated. For this reason they endorsed the declaration made by the delegation of Brazil in the name of GRULAC regarding the issue of translation. The Delegation considered the debates so far encountered in the sessions of the Committee enriching, especially those panels that provided distinct national and regional experiences on the protection of GR, TK and Folklore. In this regard, the Delegation fully endorsed and supported the continuation of the Committee in its current format, namely that of an Intergovernmental Committee. With a view to obtaining greater protection for GR, TK, and folklore, the delegation opined that the mandate should include several options, among them the possibility to examine the convenience to negotiate an international instrument. The Delegation also favoured the synergies at the international levels and considered that the future work of the Committee be mutually supportive of the work of other international organizations given their respective mandates and related issues.

165. The Delegation of Egypt expressed its support for the adoption of an international binding instrument which was just and equitable, for which it was necessary to establish a precise schedule in the near future. There was no objection that the Committee continue with its work to come up with such an instrument.

166. The Delegation of India stated that the continuation of the exploratory work of the Committee in its present form would give rise to apprehension that the resolution of the issues was being deflected and that the work of the Committee was being used to inhibit the realization of the objectives and mandates of other fora, which would be unfortunate. The Delegation reaffirmed therefore that it was necessary for the Committee to move on to a discussion of the international dimensions of GR, TK and folklore with a view to establishing norms and a legally binding international instrument which should be done in the next

mandate of the Committee. The work of the Committee or its successor body should be without prejudice to progress in other fora, in particular the WTO. These were mutually reinforcing and independent processes, the Delegation concluded.

167. The representative of ARIPO recalled that at its Council of Ministers session that had taken place in 2000, the Council of Ministers had resolved that ARIPO should take initiatives on the protection of TK and link its objectives with the initiatives of WIPO. At the 2002 session of the Council of Ministers, it had extended ARIPO's mandate to include GR and folklore. The Council also requested ARIPO's secretariat to undertake a study on the feasibility of establishing an inventory and database on TK. In this regard, the representative stated that the Toolkit would be useful. Regarding future work of the Committee, the representative stated that the Committee had made considerable progress and had gathered a wealth of information on the three topics under discussion. However, it was now time to concentrate on more concrete forms of progress such as norm-setting. ARIPO associated itself with the position of the African Group on this matter.

168. The representative of OAPI agreed with all other delegations on the quality of the documents prepared for the session, noting that there was not agreement on all points but there was agreement on the need for continuing work leading to the protection of GR, TK and expressions of the folklore. Even without agreement or consensus on all points, the representative considered that the basis was enough to create a body with a precise mandate to prepare draft international standards for protection. The Committee was set up to discuss these points and to consider the prospects for protection. It was almost unanimously acknowledged that protection confined within national borders would be inefficient and ineffective. For OAPI, and still more for governmental delegates, there was a moral and ethical duty to work towards an international instrument. Responding to the question of the Delegation of the United States of America, the representative indicated that the Bangui Agreement did not protect national cultures in themselves and expressions of the folklore are covered in section VII, covering royalty and the related rights, and cultural heritage. In the section on copyright, two articles referred to expressions of the folklore: Article 5 (on the object of protection) and article 9 (which deals with *domaine public payant* and the exploitation of expressions of folklore). This does not itself protect national cultures or those of Indigenous communities, but regulates the authorization of exploitation of expressions of folklore. It added that folklore denoted the totality of traditions and literary productions, artistic, religious, scientific, technological and different productions of the communities transmitted from generation to generation; this is defined in a non-restrictive way. The representative stressed that Article 68 required transmission from generation to generation. Concerning works derived from or inspired by folklore, the representative confirmed they were protected as well as any literary or artistic work. Other aspects raised were not covered in the Bangui Agreement, but rather in the practices of several Member States. In general, there were no written customary rules which regulate the use of expressions of folklore, but community rules did govern this matter. Returning to document [WIPO/GRTKF/IC/5/3](#), the representative reaffirmed concern regarding the public domain. No comparison should be made with the works of Shakespeare or Mozart. These were exploited in a different way, and were not community works in their creation or transmission. Even if the starting point of an expression of the folklore was an individual author, it was necessary to keep in mind that the essential characteristic is their collective and continuous creation and their customary context. Justice required effective protection, so the representative opposed the public domain as presented in the document. Even so, expressions of folklore must be accessible and protection should not obstruct access.

169. The representative for the SCBD highlighted the recent outcomes of the WSSD which called for action to negotiate, within the framework of the CBD, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of GR. It added that the issue of an international regime on ABS and the potential nature, scope, elements and modalities of such an international regime would be discussed by the Convention's Working Group on Access and Benefit Sharing. The representative stated that delegates may wish to keep this in mind in view of ensuring mutual supportiveness and complementarity of the future work of WIPO and the CBD.

170. The representative of the FAO stated that the Committee should look carefully at the already existing situation and that there were already two binding agreements to access and benefit sharing to GR. It added that it was important to determine where the interface was with IPRs. It added that the FAO's treaty was neutral concerning IPRs but had certain provisions which referred to IPRs. It stated that there needed to be a harmonious framework where matters that dealt with the policy provisions regarding conservation and preservation of sustainable use of GR be addressed in the relevant forums, and IP matters be left to those with the necessary mandate. It concluded that the work should be carried out in a harmonious manner so that the mutual mandates of each forum be respected.

171. In the course of the discussion, the Chairman stated that he intended to give the floor to non-governmental organizations before the list of government speakers had been exhausted, and asked whether this would be acceptable. The Delegation of Brazil supported the proposal. The Chairman stated that this exception to the normal rule of precedence of speakers was entirely due to the special character of the issues under discussion. The procedural step was due to the fact that the issue was of particular concern for many non-governmental organizations and that this deviation from the normal rules of precedence of speakers was due to the special nature of the subject matter under discussion and neither could nor would in any way be seen as a precedent.

172. The representative of the Pauktuutit Inuit Women's Association stated that it was speaking on behalf of a number of Indigenous ad-hoc observers including the Arctic Athabaskan Council, the Assembly of First Nations, the Call of the Earth Circle, the Canadian Indigenous Biodiversity Network, the Indigenous Peoples Biodiversity Network, the Kaska Dena Council, the Pauktuutit Inuit Women's Association, and the Tulalip Tribes of Washington. It requested recognition by the Committee that, just as Member States' opinions were rich and diverse, so too were the views of Indigenous Peoples. It hoped that its intervention would compliment those of its Indigenous brothers and sisters, but stated that it did not presume to speak on their behalf, since their views were as diverse as their traditional territories of origin. The representative continued by stressing that Indigenous Peoples must be integrally involved in the development of the future work and mandate of the Committee. It asserted that Indigenous Peoples' contributions to the Committee's work were absolutely necessary to the development of valid, accepted and credible instruments that may protect Indigenous TK and TCEs. Practical implementation of any models, guidelines and recommendations developed by the Committee, norm setting or otherwise, would require a process in which Indigenous Peoples were all mutually invested. In relation to the issue of an internationally binding regime, the representative stated that many Committee participants clearly considered it premature to move forward to negotiations without the development of an informed understanding of what that regime might entail. He agreed with such views, but stated that such reluctance should not prevent further analysis and discussions, and that he supported the negotiation of norm setting instruments for the protection of TK and TCEs in the appropriate UN fora and at the appropriate time. This position was based on the



fundamental principle of prior informed consent: ‘prior’ in that analysis must be done before proceeding forwards; ‘informed’ in that a knowledgeable understanding of the framework of a binding instrument was necessary (since, in practical terms, this meant that the high quality work being conducted by the Secretariat should continue forwards, the representative confirmed that it strongly supported the extension of the mandate of the Committee); and ‘consent’ meant that once the Committee had an informed perspective, and only at that point, the representative would be in a position to exercise its discretion whether to participate in substantive negotiations. The representative concluded by stating that an internationally binding regime must be approached in an informed and thoughtful manner. An accelerated process would not necessarily produce the strongest instrument for the protection of TK. The representative stressed that meaningful and effective participation of Indigenous Peoples was absolutely imperative to the Committee’s further work and, in particular, involvement by Indigenous women knowledge holders. Parallel processes relevant to TK were being carried out in a number of other fora, including the CBD, FAO, WTO, UNCTAD, WHO, UNESCO and the Sub-Commission on Human Rights. In some of these fora, negotiations were proceeding without any participation by indigenous peoples. The representative therefore called upon WIPO, in coordination with the Permanent Forum, to take an inter-agency focus when addressing the protection of TK and suggested that at the next meeting of the inter-agency support group this matter be debated as a matter of urgency. Further, whilst it seemed that the majority of participants supported, in principle, the participation of Indigenous Peoples in this Committee, it remained essential to move beyond mere principle and forward to practice. Even with supportive statements and opportunities to speak in these meetings, the representative stated that in his experience, Indigenous Peoples remain disempowered and marginalized in the work of the Committee. In particular, few Indigenous observers have the funding to attend meetings and the capacity to participate and, despite its best efforts, the Secretariat has limited opportunities to include Indigenous perspectives into the documents. Accordingly, the representative made the following suggestions to improve Indigenous participation: integral involvement of indigenous peoples in the development of the documents; development of concrete capacity building measures; and funding for participation in future Committee meetings, WIPO workshops, fact-finding missions and other related meetings. In relation to future substantive work, the representative proposed that the Committee should invite the Secretariat to conduct a comprehensive analysis of the role, scope and application of Indigenous laws, customs and traditions that protect TK and TCEs. The Representative stated that, in its view, customary laws were part of a larger indigenous legal framework. Indigenous law was a more appropriate term. In order to examine and implement effective mechanisms for protecting TK, the Committee needed to develop an informed understanding on the application of Indigenous laws and localized protections. These laws should be incorporated or woven into the broad scope of protections of IP relating to GR, TK and TCEs. Not only must there be a better understanding of the traditional legal models that have been used by indigenous communities, but further analysis should also be carried out of contemporary indigenous governance models that may be used or incorporated into regimes for the protection of our IP. Such a marriage of Indigenous laws and existing IP laws would enrich and inform the work of this Committee; the Committee should invite the Secretariat to conduct a comprehensive analysis of the scope, application and use of Prior Informed Consent, placing particular emphasis on inclusion of the perspectives and experiences of Indigenous Peoples. The Committee should coordinate with other UN bodies working in the field of non-IP related TK, such as human rights, cultural diversity and biodiversity. In addition, the Committee should consider on-going funding to the Permanent Forum, so as to ensure their on going participation in this forum and in other UN bodies that deal with matters relating to TK. The Committee should invite the Secretariat to conduct further detailed analysis on the scope and limits of the “public domain” and its inappropriate

application to indigenous Peoples' TK and TCEs. The Committee should investigate further the issue of limitation periods for which a proprietary right can be held, and to whom the right can be granted. Many of the principles of protection that are incorporated into current IP protection mechanisms contemplate limited time frames for this information. The nature of TK is that it is held by communities and is a culmination of generations of knowledge. It is a timeless knowledge. As such the time limited protections currently provided within many existing IP regimes do not meet the needs of TK holders. The representative therefore invited the Committee to explore other options and approaches for TK which is communally held by indigenous communities. The representative urged the expansion of guidelines and mechanisms to protect TK symbols, designs, dress, traditional names and other TCEs from unauthorized use by third parties, as defined by indigenous peoples themselves. Such harmonized guidelines could be used by IP organizations and patent and trade officers to apply consistent standards that provide both defensive protection from misappropriation of indigenous knowledge and positive protection from unauthorized access and use by third parties. The Committee should consider continuing the exploration of options to protect indigenous IP relating to the following matters: culturally offensive trademarks; protection for clothing and textiles of indigenous communities; indigenous, tribal and clan names; traditional utilization of medicinal plants and therapies; sacred objects; symbols of cultural and spiritual significance; and TK provided or incorporated in the national legislative and regulatory processes. Further analysis should be carried out of existing *sui generis* regimes in an effort to provide examples of best practices in relation to the abovementioned matters.

173. The representative of the Inuit Circumpolar Conference noted that the misappropriation of Inuit culture and IP was an urgent matter. The Inookshook rock formations that mark places on Inuit land have been used by large pharmaceutical companies as a symbol to sell their products. Such use interfered with who the Inuit were and what they stood for. There may come a time when the general public would relate to the Inookshook to the company behind it, and not to the Inuit culture. The representative said that current IP systems were inadequate to protect TK and TCEs, yet that customary laws were not applied. The representative said ownership was a distinct concept under Inuit culture and IP and explained that, in relation to Inuit songs, there was a sense of sacredness and that the lyrics or tune of the song would be shared according to the originator's role in the family or community structure. This was respected by the Inuit community. These types of customary practices and laws must be acknowledged in some type of appropriate mechanism. As to future work, the Committee should, with the guidance of indigenous peoples, examine ways to revitalize customary laws as an appropriate mechanism to prevent further misuse. The work should be carried out at a regional level. Further, a memorandum of understanding should be established between WIPO and UNCTAD to work with indigenous communities on the following issues: to determine the potential benefits of TK protection in meeting the trade and development goals of those indigenous communities that pursue goals of economic development; and to examine the effects of misappropriation on indigenous communities. Their work should be guided by Article 8(j) of the CBD and should be in collaboration with the CBD. Finally, indigenous participation should be increased at every level and the Inuit should be recognized as a special group within the proposed eleven indigenous representatives. In concluding, the representative stated that she supported paragraph 52 of WIPO/GRTKF/IC/5/11 and that indigenous representatives to the Committee should be taken from a broad geographical distribution, with respect to gender equity.

174. The Committee noted that the issue of a possible recommendation to the Assembly on the mandate for the Committee for the 2004-2005 biennium was the subject of extensive informal consultations.

175. The Committee further noted that when the meeting resumed after those consultations, the Delegation of Zambia had stated that, in the view of the African Group, during that budget biennium the Intergovernmental Committee should draft and present to the General Assembly a legally-binding international instrument to protect genetic resources, traditional knowledge and folklore.

176. The Chair noted that, despite extensive informal consultations, the Committee had not reached agreement on a recommendation for its mandate for the 2004-2005 biennium.

#### *Participation of local and Indigenous communities*

177. The Secretariat introduced document WIPO/GRTKF/IC/5/11, drawing attention to various proposals for enhancing the participation of local and Indigenous communities in the work of the Committee.

178. The Delegation of Zambia, on behalf of the African Group, underscored that the Group had favored financial support for participation of local and Indigenous communities, and agreed with the proposed scale of support and the proposed selection criteria. The Delegation states that the African Group reiterated its position in the past session and stated that with regard to issue of financing NGOs representing indigenous peoples, it agreed to the proposal in accordance with the parameters to be decided on in cooperation with Member States. It 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. It cautioned against political and sociological statements and reminded the Committee of the technical nature of the deliberations. It 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. On the specific issue of where the money comes from, for similar reasons it supported funding from a voluntary fund, not direct or indirect funding from the budget. It referred to the document and added that it would ensure that the support for government delegates remains firm. The Delegation supported Option 2B which established that recipients be identified through regional coordination with input from the relevant national governments. It added that this was a simpler way as no new entity needed to be established with consequent less costs. The Delegation added that the selection would ensure regional balance in the recipients and that the recipients be limited to already accredited NGOs. The Delegation supported the general proposals on enabling wider access to NGOs as contained in paragraph 49 of document WIPO/GRTKF/IC/5/11. Concerning financial support, it supported the proposed scale of support (paragraph 51), and the criteria for selection (paragraph 52). Concerning source of the funds, it supported the creation of a voluntary fund (paragraph 53) and the regional coordinators making the selection (paragraph 54), with the assistance of the Permanent Forum on Indigenous Issues as discussed in the main body of the document.

179. The Delegation of the Philippines, on behalf of the Asian Group, expressed support for the voluntary fund, with the funding mechanism and selection undertaken in close coordination with Member States. The primacy of Member State governments should be integral to the selection process.

180. The Delegation of Venezuela cited a declaration made by the *Consejo Nacional Indio de Venezuela* on behalf of the indigenous peoples of Venezuela, which had requested the Government of Venezuela to include a minimum of two member representatives, elected by the *Consejo Nacional Indio de Venezuela*, on national delegations taking part in international negotiations that affect them thus guaranteeing multiple presence and that was supported in all resolutions of the United Nations. The Delegation agreed with the measures for enhancing involvement set out in paragraph 10 of the document, noting that Venezuela had a constitutional mandate to include indigenous representatives in national delegations as well as supported paragraph 16 and 20. The Delegation supported Option 1 (additional financing from the current WIPO budget. The Delegation also lent support for the creation of a web page and assistance to the Permanent Forum, and agreed with the proposal for indirect funding through additional funding for Member State delegations. Voluntary contributions would also be welcome, but this might limit the level of support, so if it were a choice between sources of funds, WIPO regular funds should be used. Venezuela supported the principles in paragraphs (ii) and (iii) in paragraph 44 and the proposed selection criteria of paragraph 52 especially point (e), with strong emphasis on representatives living in their own community. The Delegation concluded by citing the declaration of indigenous people in which they had expressed total disagreement with the protection of TK through traditional IP mechanisms; they were concerned that TK would be transformed into IP assets and that this would lead to the marketing of their resources; and finally emphasized that it would be difficult to support the continuation of the Committee if it was without a focused function to develop a special mechanism of protection for TK.

181. The Delegation of Italy, on behalf of the European Community and its Member States, confirmed the importance of ensuring the involvement of indigenous and local communities in WIPO's work. In this regard, it stated that it was important to stress that the European Community and its Member States were implementing as appropriate most of the mechanisms proposed to facilitate the participation of indigenous and local communities. Concerning the crucial issue of financial support, it stated the European Community and its Member States believed that the participation of indigenous and local community should be assured option 2 described in document WIPO/GRTKF/IC/5/11. The Delegation stated that the European Community and its Member States, felt that this option could offer the most suitable and flexible solution to this issue. In this regard, it added that the European Community and its Member States were in favour of a Voluntary Fund based on a straightforward and low cost mechanism, which at the same time could also ensure the maximum level of transparency and objectivity in the management of the Fund. Concerning the selection criteria, the European Community and its Member States thought it was important to secure as far as possible a broad geographical distribution.

182. The Delegation of Switzerland voiced support for enhanced participation, as it was crucial for the work of the Committee which directly concerned these communities. Switzerland affirmed that it accepted the principle that WIPO should fund NGO participation in the work of the Committee, and had supported this in the WIPO program and budget process. Funding should comply with three criteria: low overheads and administrative costs (so funds would support as many representatives as possible), representatives nominated directly by communities themselves, and balance between regions.

183. The Delegation of Indonesia endorsed the statement by the Delegation of the Philippines on behalf of the Asian Group, and stressed that it laid great value on the information provided by local and indigenous communities concerning the issues covered by the Committee. Indonesia was a member of other IGOs which dealt with problems relating to

the rights of local and indigenous communities, such as the CBD, the FAO and UNESCO, and looked forward to continuing effective consultations between these organizations and WIPO. The Government of Indonesia had established a working group consisting of experts, officials and representatives of local and indigenous communities, to discuss and feed into national policy concerning GR, TK and folklore. On funding of NGOs, the Delegation associated itself with other WIPO Member States who had agreed with the principles that should be applied, as set out in paragraph 26 of the document. The Delegation distinguished between national and international NGOs, and suggested that national NGOs should be given priority because they had a direct influence on the preservation of GR, TK and folklore and also suffered the most from misappropriation. The WIPO Secretariat should consult with the existing UN Voluntary Fund concerning the financial assistance it provides for international NGOs. Member States, through respective regional coordinators, should be consulted on the selection of NGOs that require funding. Selection and capacity of participation of national NGOs should be decided in accordance with their wishes, and as agreed by their respective governments.

184. The Delegation of New Zealand said that enhanced participation was crucial to the success of the Committee, since any solutions reached must meet the needs of these groups. Indigenous and local communities should be part of government delegations and should participate in expert panels and presentations to sessions of the Committee so all Member States could learn from their perspective; their perspectives should also be published on the WIPO web site. Committee materials should be made available in local languages to enhance the flow of ideas, and in hard copies as internet access was often difficult for communities. Involvement in the development and distribution of documents should not be limited to accredited observers. The Delegation observed that all Member States agreed that enhanced participation was important, as shown in the accreditation process: this allowed for diverse inputs, capacity building, reporting back to communities, and take-up and field-testing of materials such as the toolkit. Funding was important as it was very difficult otherwise for these communities to take part. Government funding limited representation to those groups approved or sanctioned by the government, so New Zealand supported independent funding. The costs of a voluntary fund would limit funding for participation, and a voluntary fund may not guarantee enough resources for eleven participants to attend. Hence direct funding should be preferred.

185. A member of the Delegation of Denmark, speaking for the Greenland Home Rule Government, stated the importance of the human rights processes of the UN, the consultation procedures of the Nordic Fora of the European Community and the Arctic Council. The Delegation supported the idea expressed by the Inuit Circumpolar Conference of securing the rights of indigenous peoples. It preferred a simple and cost-efficient mechanism for funding which would also allow indigenous peoples ad hoc observer status in the Committee. It noted that there were approximately a dozen of well-established indigenous peoples' organizations that were accredited to the Committee. The Delegation suggested that these organizations could play a key role in identifying beneficiaries of grants and implementing the selection criteria listed in document WIPO/GRTKF/IC/5/11. The cost involved in the consultation and identification of beneficiaries could be kept at a minimum by putting the list on a closed WIPO webpage which would be accessible only to the members of this indigenous advisory team. The advisory team could forward their recommendations for the beneficiaries to the Secretariat. Based on the recommendations of the advisory team and the Secretariat, preferably in consultation with the Chairman, decisions could be taken. This way, the Delegation suggested, indigenous peoples would have a role in the selection of the beneficiaries.

186. The Delegation of Japan stated that the participation of indigenous people and representatives of local communities would be beneficial, since interventions based on actual knowledge and experience were indispensable for substantive discussion. Committee discussions should be consistent with the discussions among indigenous people, since they were closely linked with the issues under discussion. Regarding the Permanent Forum, the Delegation supported the invitation to the members of the Forum and thus supported subparagraphs (b) to (e) of paragraph 20 of document WIPO/GRTKF/IC/5/11. Regarding subparagraphs (d) and (e) the Delegation sought clarification regarding the financial implications. The Delegation considered it extremely important to invite and encourage the participation of indigenous peoples as far as possible. The Delegation did not have any views on the number of funded indigenous peoples and suggested that the Committee should first discuss the source of funds and then discuss the number of funded participants. The Delegation did not support indirect funding and therefore favored option two, namely the establishment of a Voluntary Fund. The Delegation supported selection of beneficiaries based on the regional coordinators.

187. The Delegation of Panama urged that the funding mechanisms should be agreed without delay and supported option two. It felt that the selection should be done in cooperation between the State and indigenous peoples. It therefore supported subparagraphs (ii) and (iii) on page 16 and paragraph (e) on page 19. The Delegation thanked the Government of Spain for the support which the Government of Panama had received from the Government of Spain and introduced an indigenous lawyer, who reported on the application of Law 20 of Panama to TK within Panama. He concluded that the Committee should make available genuine mechanisms for indigenous peoples' participation which for him meant the creation of a voluntary fund. He urged that WIPO give a follow-up to Law 20 since the Kuna people registered the Mola for IP protection under the Law on November 25, 2002. It was now necessary to create a collective rights organization to collect the resulting royalties from companies both nationally and internationally. He proposed that Panama could be a pilot project for the registration and recording of collective rights in TK through the example of the Mola. In closing, he quoted a Kuna leader who had stated that indigenous peoples wished to contribute in the construction of a just world for future generations by recognizing that human beings were a rainbow of different peoples.

188. The Delegation of the United States of America strongly supported the participation of indigenous communities in the work of the Committee. It noted that a member of an Indian tribe was able to serve as a non-governmental advisor to the Delegation during the present session of the Committee. It further welcomed the participation of the UNPF and accredited indigenous peoples' organizations. It raised questions however about the voluntary funding proposals, particularly if such a Fund were administered by WIPO. It stated its understanding the voluntary funding proposals would not implicate regular budgetary funds and expressed its concern about the administrative costs of such a fund and about how such a fund would be managed, invested and audited, and how the set of selection criteria might be applied in practice. It foresaw difficulties in having NGO representatives selected by an intergovernmental organization for funding at these meetings. It imagined the need for an appellate process for the purposes of due process as well as the need for a newly staffed office in the Secretariat to undertake these responsibilities. It foreshadowed that it would be very concerned to see the funds of WIPO diverted from its activities to pay for such activities. It advocated a more efficient way of facilitating indigenous participation, namely for donors to contribute directly to an NGO or for donor countries to include representatives of indigenous peoples on member state delegations. It suggested that donors establish and administer a

voluntary fund among themselves. It indicated its willingness to consider the establishment of a voluntary fund, established and administered by the existing UN Indigenous Peoples' Voluntary Fund. With respect to the selection criteria proposed in document WIPO/GRTKF/IC/5/11, it supported all the criteria. It summarized that it would be willing to explore with the aforementioned voluntary fund proposals how they could be best used to support participation in the Committee.

189. The Delegation of Mexico introduced Mr. Carlos De Jesus Alejandro, General Co-ordinator of the National Indigenous Assembly, who represented indigenous peoples of Mexico. Mr. De Jesus Alejandro appealed for recognition of the concept of "indigenous peoples" which was recognized by Heads of State at World Summit on Sustainable Development (WSSD). He emphasized that the direct and equal participation of indigenous peoples was essential. He felt that indigenous peoples representation in the Committee was still insufficient and demanded full and direct participation. He felt that it was necessary for the indigenous peoples not to speak through third parties, such as national delegations. He urged WIPO to give full guarantees for the full participation of indigenous peoples. A full participation should be fully recognized as in Convention 169 of the ILO. He stressed that participation mechanisms should be developed together with UNESCO, FAO and the CBD, where work on indigenous peoples was currently under way. He recalled that the World Summit on Sustainable Development had already recognized indigenous peoples and the value of its TK. He informed the Committee with concern that there were already cases of biopiracy in Mexico which the indigenous peoples of Mexico had not been able to stop.

190. The Delegation of Canada proposed options for funding of indigenous peoples and considered the degree of inclusion of indigenous peoples as part of the successes of the Committee. It supported the options in paragraph 49 and encouraged the Secretariat to integrate as many indigenous representatives as possible. On the second group of proposals for financing, it expressed caution on the use of funds from WIPO. It expressed concern about some WIPO meetings in other areas being cancelled in other areas because of limited funding. It proposed a two track approach: first, it supported full and direct funding from the WIPO budget for two members of the Permanent Forum, and, second, it proposed that the Voluntary Fund for Indigenous Populations to be responsible to put in place a fund that would help indigenous peoples come to WIPO. This, the Delegation suggested, may require a recommendation from WIPO that ECOSOC amend the terms of reference of the existing Fund, but it would keep WIPO out of the task of the selection criteria and the administration of the Fund. The Delegation left it open that there may be potential to have either of those options implemented between WIPO and the Permanent Forum. It suggested that donors would be able to require that their donations be conditional upon their use for the WIPO forum. In closing, the Delegation suggested that further down the road of this process the question of direct funding should be revisited.

191. The Delegation of Colombia considered the participation of indigenous peoples fundamental and a *sine qua non* condition for the development of any norms in this area. It endorsed the financial assistance of indigenous organizations with understanding that it would not restrict the participation of government representatives particularly from developing countries. Regarding the selection criteria it suggested to use the criteria contained in the document under consideration as well as regional selection criteria. The Delegation considered that the Committee should establish coordination with Permanent Forum. It suggested that WIPO must consider within its budget policy the direct funding of indigenous participants. The options 2 and 2(a) could be mechanisms which could contribute to the participation of indigenous peoples.

192. The Delegation of Brazil agreed with the proposals in the document under consideration and considered that the participation of indigenous peoples in the Committee should be funded by WIPO. It noted that the Delegation included indigenous representatives. It considered that indigenous and local non-governmental organizations should be funded by WIPO. As to the source of funds it favoured option 1. It considered eleven representatives too small a number to ensure sufficient indigenous representation. It remained open to discuss compromise solutions between options 1 and 2.

193. The Delegation of Spain reported that, within an agreement between the Spanish and Panamanian Patent Offices, a training seminar on “Patents and Biodiversity” would be held in the near future in order to train people on patents and biodiversity. The Seminar would cover both natural products patents and biotechnology patents, with the objective of explaining differences between the two.

194. The Delegation of Turkey made preliminary comments concerning this issue. The Delegation shared the views expressed by the Delegation of Japan and the Delegation of the United States of America on the issue of funding participation out of the WIPO budget. The Delegation commented that Turkey recognized the importance of the participants of indigenous peoples and therefore highly favoured their participation in the Committee meetings. It proposed to promote the participation of indigenous peoples in the context of national delegations. If that were not possible, the Delegation would choose option 2. It suggested that the selection criteria should be transparent and clear and the State should play a key role in the selection process.

195. The Delegation of Nicaragua considered that the Committee should move to the establishment of norms. It considered it adequate to have a webpage as expressed in paragraph 16 of the document. It suggested that the members should commit themselves to have a complete mailing list of indigenous peoples. It agreed fully with the criteria set out in paragraph 35 and stressed subparagraph (vii). Regarding funding it preferred option 2(b).

196. The Delegation of Norway stated that the participation of indigenous and local communities was important, not just in order to give representatives a possibility to participate in the work of the Committee but also because the representatives provided valuable insight and had first hand experience on the issues discussed. It was of the opinion that several points should be taken into consideration when deciding on how such funding should be provided, and added that in order to facilitate the independence of the representatives, it was preferable that their participation was directly financed. The Delegation stated that indirect financial assistance was and should be an important supplement, however, the main focus of the financial assistance should be direct financing. It stated that as the Permanent Forum had shown, the choice of representatives could be handled by those concerned and that this was the preferred solution. While financial mechanisms established by other organizations certainly could and should be looked upon for inspiration, it stated, the solutions found elsewhere need not prejudice the solution needed and likewise, the solution found in relation to the Committee should be regarded as context specific and be without prejudice to other Committees or organizations. Taking into account the particulars of the Committee and WIPO, it was of the opinion that the preferred solution would be to provide financial assistance through the regular budget. The Delegation concluded by emphasizing the importance of the participation of indigenous and local communities and the need for finding a solution on this issue.



197. The Delegation of Egypt stated that, with regard to the future work of this Committee, the mission entrusted to the Committee is to lay down conditions for the international protection that are just and equitable. The Delegation reaffirmed that: an internationally binding instrument would be needed; a precise schedule for the elaboration of the instrument was necessary; and there was no objection to the Committee continuing its work provided that at the end of the day it could arrive at an internationally binding instrument.

198. The representative of the Secretariat of the Permanent Forum on Indigenous Issues drew the Committee's attention to the relevant outcomes of the first and second sessions of the Forum concerning TK and IP. In relation to the first session of the Forum, the representative noted a general recommendation that participation by the Forum and Indigenous Peoples and their representative organizations in all matters of interest to them, including relevant working groups and annual sessions. It then highlighted the following specific recommendations from the first session: paragraph 20 (human rights) under which the Forum requested the Committee to extend an invitation to members of the Forum to participate in its sessions (which recommendation was being considered at the fifth session of the Committee); paragraphs 26, 27(c) and 29 (education and culture) in which, *inter alia*, the Forum recommended that WIPO, UNESCO, the CBD, UNDP and FAO should hold a technical workshop with Forum members, representatives of States and indigenous peoples and nations in order to promote models for environmental and sustainable development governance. As to the second session of the Forum, the representative noted document E/C.19/2003/OL/14 (Recommendation 10, paragraph 13) in which the Forum expressed the wish that the mandate of the Committee should have as a clear objective the continued development of mechanisms, systems and tools that protect GR, TK and TCEs at national, regional and international levels. The Forum affirmed its willingness to contribute to the work of the Committee and to play a consultative role and urged the Committee to assist two Forum members to participate systematically and effectively in the process by establishing a special fund; paragraph 14, in which the Forum recommended that WIPO should undertake a study, in collaboration with Forum members, on the use of indigenous knowledge relating to medicinal plants and resources, the commercialisation of such knowledge and an assessment of how indigenous communities might benefit from such knowledge; Recommendation 11; paragraph 15; E/C.19/2003/L/17 - Recommendation 2, paragraph 2 in which the Forum recommended that WIPO co-operate, where relevant, with other UN bodies; Recommendation 3, paragraph 3 in which the Forum called for indigenous participation in the work of the Committee to be enhanced through, *inter alia*, the greater use in the work of the representative of position papers, case studies and information materials reflecting community experiences and perspectives and the funding of representatives of indigenous peoples and local communities in future sessions of the Committee. The next stage was for members of the Forum to prioritise the recommendations, and to open negotiations with agencies concerning implementation. The Forum stood prepared to work closely with WIPO on matters of mutual interest.

199. The representative of the Indian Movement *Tupaj Amaru* stated that the international community owed an enormous outstanding debt to indigenous peoples. Given the amount of wealth that had been taken from indigenous peoples over the last 500 years (especially in the Andean Region), it was unacceptable to state that there was no money to fund indigenous participation in the Committee. The representative cited the Johannesburg declaration, which stated that, as the guardians of TK and Folklore, indigenous peoples should participate fully in all aspects of life. Further, the representative stated that he could not accept that indigenous participants should form part of government delegations since that was paternalistic. No government, other than possibly those of Venezuela and Cuba could state that they truly

represented their indigenous peoples. Nor could he accept that governments should nominate indigenous representatives to participate in the Committee; such representatives must participate independently. In concluding, the representative mentioned two current UN mechanisms for funding of indigenous participation, namely, the Voluntary Fund for Indigenous Peoples and the Fund for the International Decade for Indigenous Peoples. He stated that these had a Group of Advisors which carried out an independent analysis of the candidates. A similar system should be set up for WIPO. There should be no government interference in this system. The criteria should be whether the candidate properly represented a community and whether he or she had sufficient knowledge of the indigenous issues and problems, especially IP rights. Financing should come from the regular budget of WIPO. The Permanent Forum on Indigenous Issues should be invited, but since it had its own budget and did not deal with IP issues, it should not be funded. Finally, the Committee should recommend to the General Assemblies that indigenous organizations and NGOs should be given permanent status as observers to all WIPO meetings.

200. The representative of the Health and Environment Program stated that the title of this document should be amended to read "Participation of NGOs, local and indigenous communities." Regarding the approach adopted in that document, the representative stated it supported the drawing up of a voluntary fund with expanded support for NGOs, or through the general operating funds of WIPO. The representative further stated that the selection and accreditation mechanisms for NGOs should be like that of other UN organizations.

201. The representative of the Saami Council thanked the Chairman of the Committee for showing flexibility in allowing the NGOs to speak at this stage. The representative supported the ongoing mandate of the Committee, and in particular the possible establishment of sub-groups focusing on specific areas. It stated that, in its view, in most of the areas surveyed by the Secretariat, there now existed sufficient information to proceed forwards from the information gathering stage to concrete action. As to the future mandate of the Committee, the representative draw attention to the Report of the second session of the Permanent Forum (E/C.19/2003/22), which called on the Committee to have as a clear objective, "the continued development of mechanisms, systems, tools that adequately protect GR, TK and TCEs of indigenous peoples at national, regional and international levels". In this context, the representative called on the Committee to start elaborating upon *sui generis* systems for defensive protection of GR, TK and TCE currently regarded to be within the so called public domain, at least as regards uses that falsely suggested a connection with an indigenous people, or which were derogatory, libellous, defamatory, offensive or fallacious. The representative continued by noting that several participants had highlighted the important role that customary laws played with regard to GR, TK and TCEs. The representative said that it firmly believed that many of the problems discussed in the Committee could find answers if disputes over the acquisition, use etc. of indigenous peoples' heritage were resolved in accordance with the customary laws of the indigenous peoples or others concerned. Accordingly, in its future activities, the representative urged the Committee to explore the use of non-IP approaches for protection of GR, TK and TCEs, as indicated by paragraphs. 22 and 58 (xi) of document WIPO/GRTKF/IC/5/12. In addition, the representative called on WIPO to cooperate closely with other relevant UN organizations with regard to the protection of GR, TK and TCEs, in order to ensure that the work within the Committee did not pre-empt processes addressing these issues from others than the IP angle. In this context, the representative called upon the Committee to cooperate and consult constructively with the Permanent Forum and urged the Committee and WIPO in general to carry out the tasks requested by the Forum, in cooperation with the Forum and other relevant bodies. Moreover, the representative urged WIPO and the Permanent Forum, in collaboration with other relevant

UN organizations, such as the CBD, the High Commissioner for Human Rights, the FAO and UNESCO, to commence work on an international binding legal frame-work for the protection of GR, TK, and TCEs, which catered for the holistic nature of indigenous knowledge systems. Such work must clearly be carried out with the full and effective participation of indigenous peoples. In relation to indigenous participation in the Committee, the representative stated that it was very pleased to see that the awareness of indigenous issues within the Committee has increased considerably as the work of the Committee had proceeded. Interventions, as well as the Secretariat documents, have increasingly come to reflect that indigenous peoples are the major stakeholders with regard to GR, TK and TCEs. However, the representative was still concerned by the lack of adequate indigenous representation in the Committee and reminded the Committee that this issue had been under discussion since its second session. It stated that it was more than time to make a decision on this issue. Accordingly, the representative expressed support for Option 1 outlined in paragraph 39 of document WIPO/GRTKF/IC/5/11, which proposed that indigenous participation in the Committee should be provided for by the regular budget of WIPO. However, should it not be possible to agree on funding through the regular WIPO budget, the representative stated that it could accept the establishment of a voluntary fund, designed in line with Option 2A. The representative stated that it was flexible as to the design of that fund, so long as there was no government involvement in the selection process, as suggested in Option 2B. Such a solution would be unacceptable. The representative further underlined that should WIPO member states opt for Option 2, it must be with the understanding that they would contribute to the fund. As to the selection process, the representative supported the proposal that the beneficiaries of the funding would represent a vast geographical distribution. In this context, the representative suggested that WIPO respected the division into regions that the indigenous peoples themselves had agreed on, i.e. Africa, Asia, Eastern Europe and the former USSR, Latin America, North America, the Pacific and the Arctic. However, first there should be action and the representative urged the Committee to make a decision on this issue now. The representative also drew the attention of the Committee to paragraph 3(i) in document WIPO/GRTKF/IC/5/11 where reference is made to the inclusion of indigenous representatives in government delegations to the Committee. It commended countries such as Denmark, which included a representative from the Arctic region in its delegation, and New Zealand. The representative highlighted the important role that the Permanent Forum could play with regard to facilitation of a cohesive approach towards GR, TK and TCEs. It therefore supported all of the proposals outlined in paragraphs 20 of document WIPO/GRTKF/IC/5/11, in particular 20(b). It concluded by stating that an interactive cooperation between the Forum, the Committee and the Secretariat was necessary to ensure that the particular situation of indigenous peoples were given adequate consideration in the future sessions of the Committee. It also strongly supported the funding of the Permanent Forum participation in this process and stressed that the Forum was not a body representing indigenous peoples, but a body responsible for indigenous issues within the UN system. It was made up of indigenous and government representatives, with the aim of ensuring that indigenous issues should find their place in the UN system. The Permanent Forum was therefore not a representative of indigenous and local communities, and proposals suggesting that it should be funded as such were unformed and unacceptable.

202. The representative of the Tebtebba Foundation stated that the misappropriation of GR continued, especially in the developing world. In relation to the future work of the Committee, she proposed that more studies should be undertaken on the relationship between customary laws and existing IP systems of protection, and appropriate systems for TK holders should be identified. In addition, studies should be undertaken on the extent of bio-piracy currently taking place and on the standards of patentability of WIPO member states, which

allow for bad patents which permit the misappropriation of GR. Regarding the norm setting process, the representative stated that negotiations should start on the creation of international frameworks for the protection of GR and TK. The representative referred to other proceedings where there had been inter-institutional co-operation, such as the Rotterdam Convention on PIC Procedures for Certain Hazardous Chemicals and Pesticides which was jointly undertaken by UNEP and FAO. In relation to the funding of indigenous participants, the representative stated that she was currently the chair for the UN Voluntary Fund for Indigenous Populations. This had been very effective in involving indigenous peoples and in maintaining its independence from governments. This principle of independence should be re-iterated. The fund should not only be used to support participation in this Committee, but also in other WIPO Committees relevant to indigenous peoples. Finally, WIPO should work together with other UN agencies working in the areas of GR, TK and TCEs and should meet with these bodies to address these issues collectively.

203. The representative of the *Fundacion Nuestro Ambiente* (FUNA) stated that the indigenous community should choose their representatives, and that careful consideration should be given to the appointment procedure. As to the role of the Committee, it should urgently tackle the issue of bio-piracy. Indigenous peoples affected by such bio-piracy should participate in the Committee. Such participation may encourage the documentation of TK, since the indigenous participants would realise how such documentation may help to protect and preserve their knowledge. It may also motivate member states to pay more rapid attention to the issues under consideration, and may encourage the development a binding legal international instrument.

204. The representative of the Foundation for Aboriginal and Islander Research Action (FAIRA) reminded the Committee that indigenous peoples rights to IP were in the process of being finalized in a Declaration on the Rights of Indigenous Peoples and that Articles 12, 14, 24 and 29 referred to these rights. The representative welcomed the ongoing work in WIPO on the issues of GR, TK and TCEs, including whatever might be agreed regarding standard setting; he specifically asking that in the Committee's report to the General Assemblies, mention should be made of the International Decade of Indigenous Peoples (which ends in 2004) as being part of the motivation to continue the work of the Committee and to encourage indigenous participation; he stated that he looked forward to having an opportunity at the next session of the Committee to assist in setting the agenda; he expressed support for the voluntary fund and stated that many indigenous peoples did not have the means to attend international meetings, but nonetheless should be heard in such fora. It was therefore important to include indigenous peoples in State delegations. In its future work, the Committee should specialize on particular topics. There should be more joint activities between WIPO and the Permanent Forum, especially regional activities and consultations with indigenous peoples. There should be more sub-meetings and workshops that indigenous peoples could participate in. Papers should be developed and experts used to provide participation by indigenous peoples; and that web-based information should continue to be provided. The representative concluded by stating that the issue of resources would clearly need to be considered by both WIPO and the Permanent Forum. He hoped that in all cases proper consideration would be given to the disadvantages indigenous peoples faced when participating in international activities.

205. The representative of the *Métis* Council (MNC) expressed its support of the Committee's efforts to find suitable mechanisms to recognize, respect and protect the TK of indigenous peoples, and added that the mechanism selected to achieve this objective was less important as long as the objective was fairly achieved. The representative urged the Member

States to recommend to the General Assembly the continuation of the work of the Committee. The representative submitted a document entitled, “Indigenous Involvement in Environment and Resource Management - Research, Education, and Business Development”, to the Committee which resulted from a study undertaken in Canada and which now formed the basis of a proposal to take the study further. The representative stated that through cooperative efforts with universities and national government funding, on the ground initiatives aimed at enabling Indigenous communities to research, compile, database, store, disseminate, share and protect their TK was possible. The representative added that the work of WIPO would assist in setting standards and ethical guidelines for the ownership, use and databasing of TK.

206. The Committee noted that there was an unanimous view that the participation of local and indigenous communities was of great importance for the work of the Committee and that all appropriate measures should be undertaken to facilitate that participation. It was considered that Member States should make every effort to include representatives of these communities in their national delegations. It was also considered that both WIPO and Member States should increase their efforts to implement the practical measures for enhancing participation as set out in paragraphs 10 and 11 of the document under discussion.

207. The Committee agreed that the Secretariat should establish a web site for publishing submissions by NGO observers, particularly those representing local and indigenous communities, on issues relating to the issues under the discussion in the Committee.

208. As regards the source of the funding of participation of local and indigenous communities, the Committee noted that there was no consensus reached. Most delegations who spoke, however, favoured funding on the basis of a voluntary fund scheme. In view of the differing opinions expressed concerning such a scheme, the Secretariat would, before the next meeting of the Intergovernmental Committee or any other body with similar tasks, further develop, in consultation with existing funding programs, a proposal for a voluntary fund and transparent selection mechanisms for funding the participation of representatives of accredited indigenous and local organizations, based on the principles set out in the document and the issues raised during the session.

209. The Committee further noted the view expressed by delegates that the Secretariat should facilitate the participation in the work of the Committee of the Permanent Forum on Indigenous Issues in the ways mentioned in paragraph 22 of the document under discussion, and should develop proposals for the funding of two members of the Forum at future sessions of the Committee or any similar body. Reservations expressed by a number of delegations in this respect, stating that WIPO funding from the regular budget should be made available only for representatives of Member States, were also noted by the Committee.

#### ITEM 8: ADOPTION OF THE REPORT

210. The Committee reviewed the draft report (circulated as document WIPO/GRTKF/IC/5/15 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/5/15 Prov. The Chair noted that such amendments or corrections should be provided as soon as possible, to ensure timely conclusion and availability of the report in the Committee's three working languages.

ITEM 9: CLOSING OF THE SESSION

211. The Chair closed the Fifth Session of the Committee on July 15, 2003.

[Annex follows]

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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LETTONIE/LATVIA

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

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### THE UNITED NATIONS UNIVERSITY

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### UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

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ORGANISATION DES NATIONS UNIES POUR L'ÉDUCATION, LA SCIENCE ET LA CULTURE (UNESCO)/UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

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

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

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

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

Association américaine du droit de la propriété intellectuelle (AIPLA)/American Intellectual Property Law Association (AIPLA): Danny HUNTINGTON (Member, Virginia)

Association Benelux pour le droit des marques et modèles (BMM)/Benelux Association of Trademark and Design Agents (BMM):  
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Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI): Silke VON LEWINSKI (Ms.) (Munich)

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Institute for Food and Development Policy: Donna GREEN (Ms.) (Representative, California)

Institute of Social and Cultural Anthropology: Monica CASTELO (Ms.) (Oxford)

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)/Association internationale pour la promotion de l’enseignement et de la recherche en propriété intellectuelle (ATRIP): William T. FRYER III (Member, Executive Committee, Maryland)

International Environmental Law Research Centre (IELRC):  
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International Plant Genetic Resources Institute (IPGRI): Michael HALEWOOD (Scientist, Legal Specialist, Rome)

International Seed Federation (ISF): Bernard LE BUANEC (Secretary General, Nyon); Radha RANGANATHAN (Director, Technical Matters, Nyon); Pierre ROGER (Director, Intellectual Property, Chappes); Walter SMOLDERS (Head, IP Seeds and New Technology, Syngenta, Nyon)

L'Alliance pour les droits des créateurs (ADC)/Creators' Rights Alliance (CRA): Grey YOUNG-ING (Chair, Indigenous Peoples' Caucus, Penticton)

Ligue internationale du droit de la concurrence (LIDC)/International League of Competition Law (ILCL): François BESSE (représentant, Lausanne)

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

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Native American Rights Fund (NARF): Kim GOTTSALK (Attorney, Colorado); Melody McCOY (Ms.) (Colorado)

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Société internationale d'éthnologie et de folklore (SIEF): Valdimar HAFSTEIN (chercheur, Reykjavik)

Tebtebba Foundation - Indigenous Peoples' International Centre for Policy Research and Education: Victoria TAULI-CORPUZ (Ms.) (Executive Director, Indigenous Peoples' International Centre for Policy Research and Education, Baguio City); Daniel Salau ROGEI (Programme Officer, Ngong Hills)

The Rockefeller Foundation: Joan SHIGEKAWA (Mrs.) (Associate Director, Creativity and Culture, New York); Carolyn DEERE (Ms.) (Consultant to Indigenous Peoples International Property Rights Initiative, New York)

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Director and Head, Traditional Knowledge Division

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