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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

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

**Eleventh Session  
Geneva, July 3 to 12, 2007**

ADOPTED REPORT

*Document prepared by the Secretariat*

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## INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its thirtieth-second session further to extend a revised mandate, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) held its eleventh session in Geneva, from July 3 to 12, 2007.

2. The following States were represented: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Canada, Chile, China, Congo, Costa Rica, Côte d’Ivoire, Croatia, 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, Gabon, Germany, Guinea, Haiti, Holy See, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kyrgyzstan, Kuwait, Latvia, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Mexico, Morocco, Moldova (formerly the Republic of Moldova), Mongolia, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Venezuela, Viet Nam, Yemen, Zambia and Zimbabwe (107). The European Commission was also represented as a member of the Committee, and Palestine participated as an observer.

3. The following intergovernmental organizations (‘IGOs’) took part as observers: United Nations (UN), African Intellectual Property Organization (AIPO), African Regional Industrial Property Organization (ARIPO), African Union (AU), Benelux Organisation for Intellectual Property (BOIP), Food and Agriculture Organization of the United Nations (FAO), European Patent Office (EPO), Eurasian Patent Organization (EAPO), International Union for the Protection of New Varieties of Plants (UPOV), Office of the United Nations High Commissioner for Human Rights (OHCHR), Pacific Islands Forum Secretariat, South Centre, United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Trade Organization (WTO) (14).

4. Representatives of the following non-governmental organizations (‘NGOs’) took part as observers: Amauta Yuyay, American Folklore Society (AFS); Art Law Center; Berne Declaration; Bioresources Development and Conservation Programme (BDCPC); Biodiversity International (formerly IPGRI); Casa Nativa “Tampa Allqo”; Centre for Documentation, Research and Information of Indigenous Peoples (doCip); Centre for International Environmental Law (CIEL); Centre for International Industrial Property Studies (CEIPI); Congolese Association of Young Chefs and Gastronomie Consultancy International; *Consejo Indio de Sud América* (CISA); Coordination of African Human Rights NGOs (CONGAF); Creators’ Rights Alliance (CRA); El-Molo Eco-Tourism, Rights and Development Forum; Foundation for Research and Support of Indigenous Peoples of Crimea; Franciscans International; Friends World Committee for Consultation (FWCC); Gender and Economic and Social Development Actions (AGEDES); Health and Environment Program; Hokotehi Moriori Trust; Ibero-Latin-American Federation of Performers (FILAIE); Indian Confederation of Indigenous and Tribal Peoples North-East

Zone (ICITP-NEZ); Indian Movement “Tupaj Amaru”; International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP); International Association for the Protection of Intellectual Property (AIPPI); International Literary and Artistic Association (ALAI); International Centre for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Commission for the Rights of Aboriginal People (ICRA); International Council of Museums (ICOM); International Indian Treaty Council (IITC); International Federation of Library Associations and Institutions (IFLA); International Federation of Industrial Property Attorneys (FICPI); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Publishers Association (IPA); International Seed Federation (ISF); International Society for Ethnology and Folklore Studies (SIEF); International Trademark Association (INTA); IP Justice; Knowledge Ecology International (KEI); Max Planck-Institute for Intellectual Property, Competition and Tax Law; Mbororo Social Cultural Development Association (MBOSCUDA); Music in Common; Ogiek Peoples Development Program (OPDP); Paukuutit Inuit Women of Canada; Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Sustainable Development Policy Institute (SDPI); Tebtebba Foundation – Indigenous Peoples’ International Centre for Policy Research and Education; Third World Network (TWN); Traditions for Tomorrow; World Conservation Union (IUCN); Unisféra International Centre; West Africa Coalition for Indigenous Peoples’ Rights (WACIPR) (55).

5. A list of participants was circulated as WIPO/GRTKF/IC/11/INF/1, and is annexed to this report.

6. Document WIPO/GRTKF/IC/11/INF/2 provided an overview of the working documents distributed for the eleventh session, and WIPO/GRTKF/IC/11/9 provided a summary of the work of the Committee since its inception. Key documents are summarized under relevant agenda items below.

7. 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

8. The session was opened by Mr. Francis Gurry, Deputy Director General of WIPO, who welcomed the participants on behalf of the Director General of WIPO, Dr. Kamil Idris. The Committee had elected as its Chair Ambassador I Gusti Agung Wesaka Puja of Indonesia, and as its two Vice Chairs, Mr. Lu Guoliang of China and Mr. Abdellah Ouadrhiri of Morocco for the ninth and following two sessions of the Committee, including the current session. These officers therefore continued in those capacities. Mr. Antony Taubman (WIPO) was Secretary to the eleventh session of the Committee.

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

9. A draft agenda (WIPO/GRTKF/IC/11/1 Prov.) was submitted for consideration by the Chair, and was adopted by the Committee.

## AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE TENTH SESSION

10. The Chair submitted, and the Committee adopted, the report of its Tenth Session (WIPO/GRTKF/IC/10/7 Prov 2.).

## AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS

11. The Committee unanimously approved accreditation of all the organizations listed in the Annexes to documents WIPO/GRTKF/IC/11/2 and WIPO/GRTKF/IC/11/2 Add. and *Amauta Yuyay* as *ad hoc* observers.

## AGENDA ITEM 5: OPENING STATEMENTS

12. On behalf of the Group of Countries of Latin America and the Caribbean (GRULAC), the Delegation of Brazil considered the Committee's mandate to be of fundamental importance and believed that genetic resources, traditional knowledge and folklore should be the subject of appropriate and effective protection at the international level. The Group wished to cooperate and work constructively with the other member countries and, in particular, with the representatives of indigenous peoples and all the players of civil society so as to ensure that the work of the Eleventh Session would be successful and would achieve positive and favorable results. The following General Assembly should renew the Committee's mandate, making it more specific and directed towards obtaining concrete results. The Committee should take concrete steps towards developing an international instrument for the protection of traditional knowledge and folklore. No option should be discounted in obtaining the Committee's final result and no format should be ignored as regards the nature, content and legal effects of this international instrument for the protection of traditional knowledge and folklore. It was fundamental, in the coming ten days of the session, for the Committee to have a substantive and detailed discussion on the two lists of questions. The substantive aspects and elements of both lists should be discussed in their entirety by the Committee. GRULAC recalled the decision adopted at the last session, in accordance with which documents WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6 remained on the table. Such documents were the official working documents of the Committee and it would be a mistake for the efforts undertaken in the past few years to produce the documents to be wasted. The Delegation referred to the content of Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which had been approved at the first session, on June 29, 2006, by the Human Rights Council. Article 31 recognized the right of indigenous peoples to maintain, control, protect and develop the intellectual property of their cultural heritage, their traditional knowledge and their traditional cultural expressions. The Delegation emphasized to the Secretariat and the interpreters the importance of observing and ensuring the faithfulness of translations and interpretation in Spanish which was the language spoken by most of the countries of GRULAC.

13. The Delegation of China welcomed the convention of the Eleventh Session of the Committee. It observed that, since the first session in April 2001, WIPO, with active participation and contribution by Member States, had done a significant amount of work on the IP protection of GR, TK and folklore, which resulted in preliminary achievements by collecting inputs from various players and accumulating a wealth of materials. The Delegation was convinced that these achievements would help Member States better



understand the mission and objectives of the Committee, and would become a good basis for further in-depth discussion of the relevant issues. The Delegation indicated that it had taken an active part in the deliberations at all the previous sessions of the Committee, and had contributed its own share of efforts in advancing the process of discussions, which efforts included the WIPO Interregional Seminar on TK, TCEs and GR jointly organized by SIPO and WIPO in Zhengzhou, Henan Province, in December 2006. The seminar had brought together representatives from 31 countries in Asia and the Pacific, the Arab region, Africa and Latin America, as well as representatives from six international/regional organizations including ARIPO and the Pacific Community. The representatives had reached consensus on how to enhance the protection of TK, TCEs and GR, which was embodied in the “*Henan Statement of Seminar Outcomes of WIPO Interregional Seminar on Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*”, specifically calling upon the international community to take as its primary task the protection of traditional medical knowledge and traditional arts, and WIPO to prepare relevant technical documents to facilitate future work. The Delegation highly appreciated the unremitting efforts of WIPO and the international community in advancing the discussions in the Committee. It should be recognized that the Committee was entrusted with an important yet arduous mandate, and that the issues discussed in this forum were related to various fields such as environment, human rights, natural resources and cultural heritage, and had an important bearing on the further development and improvement of the international IP system. In this context, the Delegation regretted that, after ten sessions of the Committee and various symposiums, the progress made thus far was obviously unsatisfactory. The Delegation pledged its commitment to continuous support of the Committee’s work and active involvement in the deliberations on relevant issues. It concluded by expressing its hope that under the auspices of WIPO, and with the concerted efforts of all Member States, a reasonable approach, acceptable to all parties, could be found to the IP protection of GR, TK and folklore, thus better addressing the concerns and needs of all countries, especially developing ones.

14. The Delegation of Portugal on behalf of the European Community and its Member States appreciated the progress made by the Committee since its creation in 2001. In the areas of TK and TCEs, the Committee had been conducting extensive technical work on complex questions, which would serve as a good basis for future work. It also underlined the importance of further discussions in the field of GR. The working documents submitted to this eleventh session of the Committee basically reflected the positions and opinions expressed by delegations. The Delegation also welcomed the participation of Accredited Local and Indigenous Communities and expressed support to the constitution of the WIPO Voluntary Fund for those Communities, to which some Member States of the European Community had contributed. In this regard, the Delegation looked forward to the Advisory Board report to the Committee on the activities of the WIPO Voluntary Fund. The Delegation recognized the importance of ensuring appropriate protection of TK and, therefore, supported the work of the Committee on draft Objectives and Principles for the protection of TK as well as on the elaboration of the List of issues on TK that the Delegation had already the opportunity to comment upon. Regarding the list of issues, there were two crucial issues what was the definition of TK and what objective had to be achieved. The European Community and its Member States were ready to participate constructively in the discussion towards the development of international *sui generis* models or other non-binding options for the legal protection of TK. Furthermore, the European Community and its Member States emphasized that, in line with their preference for internationally agreed *sui generis* models, the final decision on the protection of TK should be left to the individual Contracting Party. Concerning TCEs, the Delegation welcomed the approach chosen at the last session of the Committee to pursue the discussion on the basis of the answers to a questionnaire.

Nevertheless, at this stage, it considered important to continue the discussions on the issues contained in the guiding principles and policy objectives. Recognizing the value that indigenous and local communities attached to their TCEs, a deeper analysis of the possibilities of protection offered by the current IP system, in the light of national legislations, constituted a useful step towards assuring an adequate legal framework for their protection. The Delegation looked forward to participating in discussions regarding the relationship between IP and GR and would like to see progress in this field. The Delegation acknowledged the efforts of the Secretariat in the preparation of document WIPO/GRTKF/IC/11/8 (a), that contained the list of options for continuing further works on GR, and document WIPO/GRTKF/IC/11/8 (b), related to a factual update of international developments relevant to the GR agenda. These documents provided the material requested by the Committee in previous sessions, covering the three clusters of substantive questions, which had been identified in the course of those sessions and constituted a good basis for continuing the work in this field. The European Community and its Member States had tabled several proposals on GR and the disclosure requirement contained in document WIPO/GRTKF/IC/8/11. The consideration of this issue was an important task for the Committee due to its expertise to tackle IP related aspects of GR. Such a proposal merited an in-depth discussion, particularly regarding the list of options set for continuing the work in this area. The European Community and its Member States continued to support the work of the Committee, as well as that of all the other Committees, which were doing an equally important work on further developing the IP system.

15. On behalf of the African Group, the Delegation of Algeria reiterated the importance it attached to the Committee's work and to the question of genetic resources, traditional knowledge and expressions of folklore, as well as its willingness to contribute positively and constructively to the negotiation process under way. Traditional knowledge related to very varied fields. The interest in protecting such knowledge lay not only in its close relationship with the traditional cultural and scientific heritage, but also in the benefits provided by traditional knowledge as a source of wellbeing and cultural, scientific and economic development. Certain genetic and biological resources were associated with the traditional knowledge to which they remained linked. This was the case in the medical, pharmaceutical, agricultural, ecological or scientific fields, *inter alia*. There were many examples of areas where traditional plants and methods were tested and studied in order to be used to develop new products or new varieties possessing particular features. It remained that knowledge was generally viewed as being "traditional", insofar as the creation and use of knowledge was based on the ancient traditions of indigenous communities. It should, however, be acknowledged that traditional knowledge could be inspired and created from particular traditional knowledge or techniques while being modern. It could constitute modern innovations obtained from traditional knowledge or know-how. That justified the claim for and feasibility of appropriate protection for genetic resources, expressions of folklore and traditional knowledge, in the same way as other innovations. That protection should be provided both at the national and international levels in order to guarantee the moral rights of their holders both collectively and individually. The protection recommended would allow countries and communities blessed with fine traditional wealth, in most cases developing countries, to be able to benefit from and participate more actively in the global economy. That would give the companies and firms interested in exploiting such wealth, which in general were from developed countries, the means to act with complete legality when concluding deals within the framework of well defined rules. Such a policy was able to establish reciprocal trust between the two groups of countries, contribute to the social and scientific program in the world, and to respect for and enhancement of the traditional cultural heritage of nations. In that regard, at the national level certain countries' legislation already

contained adopted *sui generis* measures for the protection of traditional knowledge and the genetic resources associated therewith. At the regional level, African Member States, for example, had also endorsed a model law for the protection of biological diversity and the interests of local communities. Other initiatives existed, such as the framework project for the protection of traditional knowledge and traditional cultural expressions. That was true of the project produced jointly by the two regional intergovernmental organizations, i.e. OAPI and ARIPO, and the draft guidelines of the WHO Regional Office for Africa on the protection of traditional medicine. However, the African Group was convinced that existing intellectual property rules, which tended to grant private rights to legal entities, ignored the collective rights of communities and developing nations, where the interests of those groups were at stake. The interests of those communities in the field of traditional knowledge, traditional cultural expressions and genetic resources could be well protected only if they were the subject of a legally binding international instrument. The African Group believed that traditional knowledge and traditional cultural expressions were part of a specific field of intellectual property rights, which should be protected. The difficulties encountered in relation to the definition of certain concepts should not serve as an alibi or subterfuge for delaying the process. The contributions made by the member countries on the basis of the 20 questions identified at the previous session would probably enable the process to move forward on substantive aspects. Protection should be granted not only to owners but also to researchers and databanks, as well as for the application and use of products. Rights owners were indigenous or traditional communities, as well as cultural communities, just as much as the people recognized within those communities, who created, preserved and handed down knowledge in a traditional and intergenerational context. Where the author of a work could not be identified, the State would be the owner. Owners should enjoy legal personality in order to be able to take legal action, in the eventuality of misappropriation of their resources. This legally binding instrument should provide, as was the case with other intellectual property rights, possibilities for appropriate recourse against the infringement of the rights of holders of traditional knowledge, genetic resources and traditional cultural expressions. The African Group urged the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to accelerate its work in a positive and constructive manner with a view to achieving specific results in line with the expectations of the majority of indigenous, local and traditional communities of the Member States. Their expectations were quite simple and clear. They wanted the process to lead to the adoption of a legally binding international instrument in order to counter the misappropriation and systematic misuse of traditional knowledge, traditional cultural expressions and genetic resources. The African Group had noted the programs produced by the Committee. Nevertheless, that progress was not yet in line with expectations and it hoped that during the current session tangible progress could be achieved on substantive matters in order finally to produce an international instrument. In the light of the discussions that had taken place during the session and the results which would sanction the work, the African Group supported the renewal of the Committee's mandate for a period necessary for its aims to be achieved. The African Group considered that the discussion document which would sanction the examination of the 20 questions identified should also provide details of the progress already made at previous Committee sessions. The current Committee session should thus determine the contribution of that document in relation to the basic documents, i.e. WIPO/GRTKF/IC/11/4 and WIPO/GRTKF/IC/11/5. Finally, the Group expressed satisfaction at the contributions made by donors to the Voluntary Contribution Fund for indigenous and local communities in order to increase the participation of the representatives of those communities in the work of the Committee. It thanked donors for their help and encouraged other members to support and sustain the Fund in financial terms.

16. The Delegation of Morocco joined other delegations in highlighting the strong interest shown in the Committee's work. Despite the importance which TK and TCEs had always had as factors in social, economic and cultural development, and elements of the historical identity of nations or communities, their international resonance had become clear only from the 1980s onwards in international organizations as varied as UNESCO, FAO, the CBD, WIPO and WTO. According to the report of the British Commission on IPR and, by way of example, in many countries traditional medicines were the only affordable form of care available to the poor. In developing countries, up to 80 per cent of the population depended on traditional medicines to meet their health needs. In addition, numerous modern drugs were based on knowledge of the medicinal properties of plants. In the region of North Africa, 70 per cent of wild plants had potential value in relation to medicine and biotechnology. That showed to what extent the increasing, and at the same time alarming, degree of misappropriation of GR, TK and EoF required the Committee to work for their protection. In that regard, the Delegation reiterated its attachment to the process of deliberations in progress within the Committee and expressed its desire for the consolidation of achievements with a view to realizing the anticipated aim, i.e. the establishment of an international legal instrument. The Delegation considered that the instrument was the best guarantee for providing effective protection against the misuse and misappropriation of TK and EoF, thus preserving the rights of the communities that owned such resources. That desired protection should not be perceived as an end in itself but as a means of achieving the objectives, including: (i) achieving awareness of the value and promotion of respect for TK and TCEs; (ii) taking account of the actual needs and interests of the owners of such wealth; (iii) suppressing acts of misappropriation and abusive and unfair use of TK, and acts of unauthorized reproduction, distribution or use of literary and artistic works; (iv) promoting and protecting creativity and innovation based on tradition; (v) promoting the use of TK and TCEs as part of an approach based on their social, economic and cultural development dimension; (vi) stressing the importance of the international dimension and the compliance of the desired instrument with other international treaties or instruments; (vii) taking into account the aims of the CBD regarding the sustainable conservation and use of GR, and the equitable sharing of benefits stemming from the use of those resources. The last aim was of particular importance for developing countries which possessed great wealth of biodiversity but did not enjoy an equitable share of the benefits gained from the use of their resources. As cited in the declaration by the African Group at the opening of the seventh Conference of the Parties to the CBD, the sharing of benefits based on good will had brought very little reward. If the transfer of technology cost money, the transfer of biodiversity should also cost money. The affairs of the Convention should be conducted in a professional manner. The Delegation considered that the successful conclusion of the Committee's deliberations would necessarily involve the following three imperatives: (i) the need to transcend the debate on procedural matters in order to launch a joint, realistic and well structured discussion on the ins and outs of all 20 basic questions, jointly agreed in relation both to TK and TCEs. The deliberations should therefore highlight the provisions contained in the main existing documents. The Committee had devoted a lot of time and effort to the long process, including examining the documents relating to general policy objectives, fundamental principles and basic provisions. Those documents, which were based on a decade of experience and related general policy debates, had proven their worth and importance as a source of inspiration in other national, regional or international policy or legislative processes; (ii) the need to promote a results-based approach and any convergence between points of view should be studied, in order to assess the progress of negotiations and move ahead with the process; (iii) the need for a recommendation based on consensus, to be addressed to the GA for the renewal of the Committee's mandate for two years, so as to allow the process to continue. As to GR, the Delegation was in favor of continuing negotiations within the Committee, without prejudice

to the related work done by other bodies, the aim being the obligation to disclose the source of GR and associated TK in patent applications. The Delegation expressed satisfaction at the successful establishment of the Voluntary Contribution Fund for the participation of the representatives of indigenous and local communities as well as the good performance of the Advisory Board, which had allowed and would allow them to participate effectively in the Committee's work. It was through the Committee's collective efforts that progress could be made toward achieving concrete, equitable and acceptable results. The Delegation hoped to be able to rely on an inclusive and constructive approach adopted by all the delegations in future deliberations, in order to make positive use of the comments made by all so as to produce results in line with expectations.

17. The Delegation of the Republic of Korea on behalf of the Asian Group attached importance to the GR, TK and folklore related subject matters. The Asian Group recognized the important work done in this area in the context of the Committee. The Asian Group reiterated its concern on the misappropriation of traditional expressions, TK and GR. It reiterated its conviction that the protection of GR, TK and TCEs was a fundamental principle of its work while taking into account the importance of the development dimension in its work. Furthermore, this effort should also ensure the interest of its peoples in promoting its interests and preserving its rich cultural expressions, TK and GR. The Asian Group was particularly mindful of the mandate given to the Committee by the 2003 WIPO GA which had provided that no outcome was excluded, including the possibility of an international instrument or instruments and had laid emphasis on the international dimension of the Committee's work. The Asian Group welcomed the debate and exchange of views which would contribute greatly in building international consensus, including the possible development of an effective international instrument for the protection of GRTKF. The Asian Group believed that the important work done by the Committee should be continued in the future on this basis. In that context, the Asian Group noted the useful recommendation to the GA made by the PCDA last month to urge the Committee to accelerate the process on the protection of GR, TK and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments. The Asian Group was optimistic about the future progress of work in the Committee and supported the efforts towards consensus building in the Committee. The Asian Group supported the initiative taken by the Chair to achieve an outcome on the basis of consensus. The Asian Group supported holding substantive discussions on the list of the issues, drawing upon the documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Asian Group appreciated the efforts made by the Indonesian Government to host the Asian African Forum on IP and TCEs/Expressions of Folklore, TK and GR, in Bandung, Indonesia, as a useful initiative to make progress towards consensus on the protection of GRTKF.

18. The Delegation of Indonesia associated itself with the statement made by the Delegation of the Republic of Korea on behalf of the Asian Group. Given the mass of substantive documents, it was now the task of all Member States to move the discussions regarding the issue of GRTKF briskly forward so as to achieve a satisfactory and concrete conclusion. The Delegation informed the Committee that Indonesia with the support of WIPO had organized the Asian-African Forum on IP, TCEs, TK and GR and extended its heartfelt appreciation to WIPO as well as to the participants who attended the Forum. During this forum, held on June 18 to 20, 2007, the participants had decided, inter alia, to take measures to prevent all forms of misuse and misappropriation of TCEs, TK and GR. They also had declared that efforts in this regard could only be effectively carried out through concerted international action at various fora. In light with this commitment, the Delegation pointed out that the Bandung Declaration and the Report of the meeting were both submitted to the WIPO

Secretariat as part of the documentation for the eleventh session of the Committee. Indonesia affirmed its readiness and commitment to actively participate and contribute to this meeting and to its eventual outcome.

19. The Delegation of Pakistan stated that, over the past years, the GRTKF discussions had been substantial and constructive. The challenge now was to move these discussions to concrete results. The Delegation had consistently expressed in the previous meetings that a legally binding international instrument should be the concrete result that the Committee should aim to achieve. It recognized that some of the members had called for recommendations and principles that would strengthen international consensus in the short term and left open the possibility of legally binding outcomes in the future. Similarly, the Delegation took note that the international recognition of the customary laws and knowledge protocols that applied within indigenous communities had also been highlighted. Besides making progress on substantive issues, the eleventh session of the Committee had the crucial task of submitting to the WIPO GA a recommendation for the renewal of the Committee and to ask for guidance for the future work of the Committee towards concrete results. For the Delegation, the ultimate outcome remained a binding international *sui generis* regime for the protection of TK and TCEs. In this regard, a fundamental question that had to be addressed was whether there were sufficient incentives provided in existing international laws for the use of TK/TCEs/GR. If not, additional policy intervention was deemed necessary. For example, in case of TK, the major obstacle to patent protection lied in the inventiveness requirement. This was because the three major criteria that were applied in assessing the inventiveness requirement were inconsistent with the characteristics of TK. Firstly, the nature of TK was such that it was difficult to determine the difference between a claimed invention and prior art, and this affected the delineation of the scope of protection. Secondly, it was technically difficult to apply the effect of the TK as the indication of the inventiveness of TK, which affected the predictability of achieving a patent. Thirdly, as the existing patent regime granted rights to prominent invention, it was not applicable to TK which was characterized as incremental innovation accumulated gradually over generations. Therefore, inventiveness was the key obstacle to TK obtaining a patent. In addition, as most TK was contained in the form of crude materials, it was unlikely to pass the industrial application standard required for the granting of a patent. Without an effective IPR that could be exchanged through the market, there would be no benefit-sharing among the stakeholders. Given the inadequacy of the above two IPR regimes, i.e. patent and undisclosed information, it was necessary to establish a *sui generis* regime that could provide incentives appropriate to the needs of TK holders. Therefore, it was necessary to ensure the provision of a *sui generis* regime and keep misappropriation at a minimum level. Moreover, it was necessary to create a *sui generis* right to the holders of TK/TCEs/GR at an optimal level. The delegation would be making comments on the specific issues as the discussion unfolded.

20. The Delegation of Ethiopia aligned itself with the statement made by Algeria on behalf of the African Group. It attached great importance to the work of the Committee. The working documents were carefully prepared and sent to the missions well in advance for preparation. Ethiopia had actively followed and participated in the previous sessions of the Committee. It had also benefited from the myriads of discussions and deliberations held so far. Ethiopia was one of the most biologically diverse countries in the world. It hosted an immense genetic and cultural diversity. It had also more than 80 “*nations, nationalities and peoples*” speaking different languages and having diverse cultural and TK systems, norms, practices and so forth. The Government of Ethiopia had taken several positive measures with the view to put in place protection regimes for TK, cultural expressions and GR, and enhance their effective utilization for the socio-economic development of the country. A number of

policies that had been adopted included the National Conservation Strategy, 1994, the Conservation Strategy of Ethiopia, 1997, and the National Biodiversity Strategy and Action Plan, 2005. As a part of its attempt to consolidate domestic legal regime for the protection of TK and GR, the House of Peoples' representatives, the lower house of the parliament in Ethiopia, had adopted two important proclamations that sought to ensure a greater protection for TK and GR: Proclamation No. 841 and 842/2006. Whereas Proclamation No. 841 dealt with the protection of breeder's rights, Proclamation No. 842 sought to protect TK and community rights. Ethiopia took advantages of all opportunities to protect its GR and the TK of its communities who had developed elaborate system of knowledge to protect these resources. On June 20, 2007, the Ethiopian IP Office had signed an agreement with the US based coffee chain Starbucks regarding distribution, marketing and licensing that recognized the importance and integrity of Ethiopia's specialty coffee designations. This was an example of mutual cooperation between the Government of Ethiopia and a private company to protect the interest of millions of poor farmers through recognition of their specialty breeds and the knowledge which they used to produce them. The Ethiopian government was of the view that private companies and CSOs such as OXFAM could play an important role in protecting breeder's rights and the benefits of traditional communities. In the words of the Ethiopian ambassador in Washington: "*Ethiopia salutes Starbucks for its exemplary display of global corporate citizenship. This alliance highlights the significance of visionary entrepreneurs in creating space for win-win engagements between corporations that operate globally and developing countries such as ours.*" Ethiopia believed that these national efforts would be meaningfully implemented within a context of a comprehensive international framework to protect GR, TK and TCEs. The Delegation hoped that the Committee's eleventh session would not only help achieving what it thought should be the ultimate goal: producing an agreed international instrument for the protection of TK, cultural expressions and folklores, and GR, but also inform domestic protection regimes. It also would serve as a platform for sharing of experiences and learning. Indeed the Committee had undertaken complex and quite important works. But, now a more focused deliberation and a concrete outcome would be expected. It was regrettable that despite so many sessions that had been organized so far and the numerous studies undertaken, the Committee's important mandate of producing a comprehensive and binding international instrument was as distant as ever. The Committee should be able to forward a clear timetable and plan of action for the consideration of the GA for the formulation of a binding international instrument. It was important that all stakeholders reached a consensus on this critical future direction. The Delegation encouraged the effective utilization of the Voluntary Fund for greater and enhanced participation of indigenous groups and communities in the future works of the Committee. Ethiopia hoped that the participation of the African traditional communities in the working of the Committee would be more evident.

21. The Delegation of Nigeria expressed profound appreciation to WIPO for making it possible for the Delegation to participate and engage in these discussions to find something sensible about GR and TK. WIPO had been given focus and a clear directive in terms of leading it to a better Development Agenda and having to do with issues of capacity building for developing countries particularly for Africa, dealing with issues of technical and technological know-how, addressing agriculture and other issues related which conclusively and collaboratively achieved some Millennium Development Goals. The Delegate endorsed entirely the statement by the Delegation of Algeria on behalf of the African Group. For Africa, GR, TK, and folklore were the basis of life. It was not as if one was talking about something separate about life because in Africa the only one way of passing message from generation to generation was folklore. Traditional that came out of stories. TK gave Africa and those in it the idea of what happened in agriculture, what happened in religion what

happened in education. In effect, it cut across all the issues of biodiversity, desertification, and climate change. That was how was expressed the issue of TK and folklore to Africa. For this meeting was important to really deal with the substance. That would help to arrive to a successful conclusion. The delegation supported Algeria that the mandate of the Committee should continue and pointed out that a lot had been done. A meeting running for six years or more without coming to a conclusion of the basis of it meant that something was missing somewhere. The Delegation commended the development partners for providing resources that would help enough and a number of people from indigenous nations to come to this meeting. But, more had to be done to prove that this meeting was not for publicity stunt, that this meeting was real, that by the end of this meeting there was a binding international instrument that protected GR. Yet, for Africa, a very long way had been gone. A lot of GR, TK and folklore had been lost. In the historical background, issues of empire building, issues of colonial administration, and issues of trade had come with their improvements, with their intelligence, with their resourcefulness. But they had gone away with a lot of African resources though there were now patents to control that. And even now at the 21<sup>st</sup> century, they still lacked the patents in a way GR were protected. In fact, what a colleague here had said, the inadequacy and the good nature of GR and TK had made it very difficult to meet the standard requirements of the so called civilized society. What Ethiopia had said that Starbucks had helped in providing protection for local farmers was a very good step. This should be governed by international rules and international law. It would not be limited to one company or the other. That it would be something that came across globally on all the things and activities been undertaken. They were here to develop a moving towards concrete issues of an international binding instrument and the mandate of this meeting had to be extended as much as they tended to conclude all decisions. But also in doing so, one should be mindful that it was not how long a meeting took but what was achieved while it lasted.

22. The Delegation of India was confident that the Committee would be able to achieve significant results on the issue of protection (defensive and positive) and would be able to evolve a consensus on an international legally binding instrument on protection of TK, TCEs and GR. India attached high importance to the work of the Committee and during the last ten sessions of the Committee, earnest efforts had been made in making all possible contributions so as to take forward the work of the Committee. It recalled that since the last meeting of the Committee, the PCDA, which also had been examining issues that had earlier seemed to be difficult to arrive at any consensus, had been able to reach at a positive outcome. The Committee needed to draw inspiration from the accommodative approach shown by the PCDA and take the present discussions forward in a constructive manner. The PCDA had, inter alia, urged the Committee to accelerate the process on the protection of GR, TK and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments. This was a welcome suggestion and it should be taken in the right spirit. The Committee now needed to move forward towards a more focused action plan, the core issues of concern remaining, (i) disclosure of origin, (ii) prior informed consent of the holder and (iii) ABS. Disclosure of the above had to be made mandatory for patent applications related to GR and TK. The work of the Committee on the issue of disclosure had to be consistent and complementary to the ongoing efforts in the TRIPS Council and CBD and within WIPO. The issue of disclosure should also form a part of the program of work of the SCP. India had always been appreciative of the excellent documentation being provided by the IB. The eleventh session had been no exception. The Delegation briefly mentioned some of the issues and areas of concern in the document *“Recognition of Traditional Knowledge within the Patent System”*, which primarily focused on the aspect of defensive protection of TK. It was very well recognized that TK in most of the countries existed in oral form. Further, WIPO/GRTKF/IC/11/7, paragraph 37 now



established that there were no practical solutions even for defensive protection of this vast pool of knowledge unless a holistic mechanism of protection was adopted through an internationally legally binding instrument. Therefore, there was a great urgency to move forward in adopting this instrument. For TK to be used in prior-art search, lack of classification tools had been recognized. The efforts of the Committee of Experts, IPC Union, in enhancing the number of sub-groups related to medicinal plants from one sub-group to 200 sub-groups were appreciated, a move initiated by India. However, even this was grossly inadequate. Hence, India had developed its own classification tool known as Traditional Knowledge Resource Classification (TKRC) on traditional medicinal system which in itself had 25,000 sub-groups. International initiative was necessary for developing a global TKRC so that TK could get effectively examined as a prior art; a key to defensive protection. Sub-groups on global TKRC would far exceed the IPC subgroups, clearly demonstrating the richness of TK. There was also a need to recognize inadequacy of the existing IP system in examining patent applications based on TK and associated GR since persons skilled in the art, in area of TK were not available in patent offices. This was one of the reasons for the gross misappropriation of TK at the international level. Training and awareness might provide some relief in the long term. However, there was a need to have a system of horizontal integration between the examining office and the country of origin of TK. This would provide a practical answer to the problem of blatant misappropriation of TK at the international level. The Delegation had presented data on misappropriation of Indian traditional medicinal knowledge at the seventh and eighth sessions of the Committee. This number had since grown substantially. The delegation also shared the national concern on patents, copyrights and trademarks being granted on Yoga which was an ancient Indian system of living. Such IP rights on Yoga had been granted in several other countries. Therefore a great urgency was felt in evolving consensus in the Committee for establishing an internationally binding legal instrument for the protection of TK, TCEs and GR in the interest of all holders of such knowledge systems. The Delegation reported the current status of the Traditional Knowledge Digital Library (TKDL), a well recognized initiative of India, in preventing misappropriation of its TK. TKDL at present had details in five international languages on 150,000 plus medicinal formulations and present size of the database of great magnitude. India was willing to provide access to the TKDL to all international patent offices under TKDL access agreements which permitted uninterrupted access to the database from servers located in India for the purpose of patent search and examination including the patent grant procedures. It was hopeful that, in the immediate future, TKDL access agreements would get finalized with some of the major patent offices, which would give a practical solution to this huge problem of misappropriation of Indian TK at the international level. India recognized that holders of TK, TCEs and GR had high expectations from the Committee and were awaiting the outcome of an agreed international legally binding instrument, which recognized and protected their rights as holders of these knowledge systems having huge economic and emotive value.

23. The Delegation of Peru supported the statement made by Brazil on behalf of GRULAC. The Delegation said that the Regional Meeting of Experts on Traditional Knowledge, Traditional Cultural Expressions (Folklore) and Related Genetic Resources “*Towards an International Agreement*” had been held on April 23 and 24, 2007 in Lima, Peru. The event had been organized by WIPO in cooperation with the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), the Secretariat General of the Andean Community (SG-CAN) and the Spanish Patent and Trademark Office (OEPM). The aim of the Regional Meeting had been to raise awareness of the development of subjects relating to traditional knowledge (folklore), cultural expressions and genetic resources, and their relationship with economic and commercial development in the region; it was also

designed to examine strategies and prospects for international protection in those areas. Eighteen Government representatives had participated in the event from Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Spain and Venezuela. Also specialists from Malaysia and South Africa and WIPO officials had participated as speakers. The Meeting had been organized in two parts: a first theoretical part which included papers given by noted specialists from the region on the following main subjects: challenges and progress achieved to date in the search for effective international protection; recent progress in Latin America; options for regional protection; options for international protection. The second part had consisted of working groups on the following subjects: (i) cultural expressions and folklore; (ii) traditional knowledge; (iii) related genetic resources and traditional knowledge: patent-related matters. The Meeting had provided a very enriching exchange of experiences and points of view that had contributed to greater knowledge of the progress made at the regional and international levels, and to a clearer perception of the pending international agenda.

24. The Delegation of the United States of America stated that at the tenth session of the Committee, Member States had agreed to undertake a sustained discussion of a list of ten issues related to the protection of TK and TCEs/EoF. The United States of America fully supported that decision, which would help move the discussions in the Committee forward. Over the last several sessions, the Committee had made substantial progress in exploring the web of complex issues related to the protection, preservation and promotion of TK and TCEs/EoF. Several concrete outcomes of the work of the Committee already were bearing fruit in a number of Member States. Nonetheless, to date, the members of the Committee had not had the opportunity to engage in the kind of focused discussion needed to reach a consensus on the many, important and complex questions related to the protection, preservation and promotion of TK and TCEs/EoF before the Committee. At this session of the Committee, therefore, the United States of America welcomed the opportunity to continue, deepen and enrich the discussions, with a view toward reaching a fuller, shared understanding of these difficult questions. The Delegation was also encouraged by the decision of the Committee to move discussions forward on issues related to GR. While there was a wide divergence of views in the Committee on issues relating to GR, the Delegation considered that progress could be made with respect to a number of concrete proposals outlined by the IB. Further, deeper consideration of fact-based examples and experiences could help identify commonalities, clarify differences and thereby help facilitate consensus. Moving forward in the work, the Committee should not lose sight of the significant progress made over the last several sessions in identifying and articulating policy objectives and general guiding principles on TK and TCEs/EoF. Although more work remained to be accomplished on these objectives and guiding principles, the progress to date would advance the work of the Committee. The United States of America looked forward to constructively engaging in these discussions over the next two weeks, with no outcome excluded and no outcome prejudged.

25. The Delegation of Thailand stated it had, once again, come to Geneva for this Committee meeting on the protection of GR, TK and folklore to try to move the discussion forward. This Meeting might be the last formal meeting under the current mandate. After years of extensive discussion and reflection, the Delegation was certain that members came to this Meeting in a hope that they could arrive at an agreement on necessary steps to move forward. In this regard, the Delegation supported the statement made by the Asian group. The Delegation reiterated Thailand's realization of a need for establishing at an international level, a kind of legal instrument on the protection of GR, TK and folklore. It was its hope that

this international binding instrument would delicately represent a ground rule, or minimum requirements along which members could eventually set up an effective system for protecting their GR, TK and folklore against misuse and misappropriation which was an increasing problem faced by many members here, in particular, developing countries. Thailand had recognized the importance of the protection and promotion of Thai GR, TK and folklore and as it was a central component for the daily life of people, particularly in the rural areas. GR, TK, and folklore were significant parts of culture of a community. They played a pivotal role in important areas, such as food security, agricultural development and medical treatment. Since the problem of misappropriation of GR, TK, and folklore was that most of them were being exploited and misappropriated abroad, national law could not grant protection in other countries outside its jurisdiction. Without adequate and effective protection of GR and TK and folklore at the international level, the problem of misappropriation would continue. Therefore, it was important to push forward the multilateral negotiation on international protection. The current multilateral discussion could play an important role. As far as the protection scheme is concerned, Thailand addressed a couple of positions. Firstly, the protection of GR, TK and folklore might, in certain contexts, need *sui generis* legislation in separation from other IP laws, simply because existing IP legislation did not adequately embrace some forms of local wisdom. Certainly, the would-be international agreement by WIPO on this matter would create a framework for such *sui generis* systems. Secondly, what was called defensive protection, where the three well-known essential elements come to play, namely: mandatory disclosure of origin, prior informed consent, and benefit-sharing. Today in the eleventh session, the Committee did not come very far from where it started few years ago. The Committee should continue this discussion in the future with a view to arrive at a substantive result in a realistic timeline. Members should be supported to meet at regional and intra-regional sessions more often. Parallel to the discussion, technical assistance and capacity building should be given to developing countries and LDCs. The Delegation stood ready to work to be able to achieve a legal international protection in this sphere in a manner generally preserving national value of countries where local wisdom had been originated and maintained.

26. The Delegation of Japan hoped that, at this session, constructive and fruitful discussions would take place on GR, TK and folklore. Many countries had been showing their interest in these issues. Japan also saw these issues as very important. It were complicated issues which required very careful discussion because they covered such various points as definitions of terms, definition of the issue itself, and the relationship between the issues and the IP system. The ongoing session was aimed at sorting out participating members' opinions on these basic points to make clear points of discussion. Japan welcomed this approach. At this session, Japan wished to have practical discussions with other delegations to actively deepen mutual understanding. For TK, and folklore, a common understanding had yet to be developed of such basic elements as what could be a subject or an object as well as definitions of terms. Through the discussions on listed issues, the participating members should focus on the clarification of such basic elements. Discussion about general principles and purposes was certainly important. Currently, however, a common understanding of basic elements had not yet been developed and the members' opinions greatly differed from each other. It would still be too early therefore, to start discussing substantive conditions or formulate any policies that were legally binding. Japan was ready to discuss such basic elements based on the relevant working documents to a practical extent. Constructive and steady discussion was indispensable for this issue. In this regard, this session could serve as a very meaningful process. With regard to GR, the delegation did not see any problem in the opinion that some effective measures should be taken against the so-called bio-piracy and unauthorized use of

GR. Bio-piracy consisted of the following two problems: one was erroneous granting of patents and the other was compliance with the CBD provisions concerning benefit-sharing and prior informed consent. First and most importantly, an accurate grasp of these problems was essential. After that, discussion should be held clearly distinguishing between the policies to be taken within the framework of IP and those relating to other frameworks. At the ninth session of the Committee, Japan had introduced a proposal to develop an one-click database search system (document WIPO/GRTKF/IC/9/13) as a solution for the problem of erroneous granting of patents. To deepen discussion about this problem, Japan would give an additional explanation about this proposal at this session. Now, the time had come for the Committee to deepen discussion about these complicated issues. As an UN organization specialized in the field of IP, Japan believed that WIPO would be able to meet the expectation of its Member States regarding these issues. Towards a reporting at the WIPO GA session in 2007, Japan would constructively take part in the discussion about these issues.

27. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Asian Group. The Delegation listening to the debate came to two fundamental questions which needed to be addressed. One was what had been achieved thus far during the last ten sessions of the Committee, and the second was what should be done in the weeks which were ahead and in the future? On the first question the Delegation noted a good understanding of the issues and enough sensitivity at the national, regional and international level of these very significant issues of TK, folklore and GR. This sensitivity awareness building was one of the achievements. Second, now the international community had recognized that for developing countries these issues were fundamental and the majority of the Member States were from the developing world. Now there was a good atmosphere of the development agenda in WIPO and in other international fora. Development was key in the millennium goals and everywhere. It was very important that it should relate to the development processes and it could be very significant and fundamental. The third achievement was the understanding that the key issue was protection and this was at the core of the old issues that had been discussed. But the Delegation knew also that the protection had not been operationalized, legalized and to a level where an internationally legal binding instrument could be available for everything, for everybody, and for the international community. But these achievements also should be taken into account. The second question was what should be done? First of all, this goal of a legally binding instrument had to be achieved. This was the core of the goal and at least the Islamic Republic of Iran as a one of the major developing countries associated itself with the other Member States which really emphasized on a legally binding instrument. It was not that easy but it was a goal that had to be achieved. Second, this legally binding instrument should be a focused one, a speedy one and not linked to the other issues in the total IP as there existed conflicts and dissenting views and there could not just be trade offs. It was a very important issue, it should be a focused one and a very speedy one. The mandate of the Committee really had to be appreciated and more work should be done. In that regard, the work of the Committee should be continued.

28. The Delegation of Canada expressed its continued commitment to working cooperatively and constructively with other Member States and observers during the eleventh session of the Committee. Canada would be providing detailed substantive comments under the relevant agenda items. Building on discussions at the last session, Canada encouraged the Committee to take full advantage of the eleventh session to engage in discussions on all three pillars given that the Committee was at the end of its two years mandate. This would provide a solid base to build on for future work. Canada thanked Member States and observers for contributing written comments on the list of issues in preparation for this session and invited Member States and observers to consider Canada's submissions on these two documents.

Canada looked forward to contributing to the discussions on the options for future work on GR and encouraged other participants of the Committee to do the same. The Delegation also thanked the panelists for their excellent presentations that morning.

29. The Delegation of Australia found that the documents prepared for this meeting provided a useful resource for the deliberation of the Committee and for the consideration of these issues at the national level as well. Australia commended the good work of the Committee and the practical outcomes of its work to date. The Delegation thanked Member States for their consideration of and comments on the list of ten core issues concerning the protection of TK and TCEs and EoF, as agreed at the last session. Australia had been pleased to provide comments on this list of issues and invited Member States to consider those. The submissions had provided much food for thought and might begin to bring clarity on these very complex and challenging issues. Australia welcomed the opportunity of the eleventh Committee to discuss these issues. Making full use of the comments from Member States would facilitate discussion of the important substantive issues included in the lists and it was hoped that this would provide the capacity to illuminate a constructive way forward. While the debate over the issues had been ongoing for some time it was important to note that although much useful work had been undertaken, more needed to be done before the Committee would be in a position to make recommendations on what steps needed to be taken regarding the IP aspects of GR, TK and folklore.

30. The representative of the Pacific Island Forum on behalf of the fourteen Pacific Island States thanked members and delegations for the opportunity to observe and make this statement on behalf of the Pacific Islands Forum. The Pacific Islands Forum was an intergovernmental organization whose members included fourteen Pacific Island States, Fiji, Papua New Guinea, Samoa and Tonga being WIPO members, as well as Australia and New Zealand. TK protection formally came onto the Pacific Island Forum agenda in 1999 when its leaders tasked it to develop a response to the unfair use of the regions' GR and cultural expressions and associated TK, taking place outside the region. In 2002, in collaboration with the Secretariat of the Pacific Community (SPC), and under the guidance of WIPO, the region's Ministers of Culture followed by Forum Trade Ministers in 2003, endorsed the Pacific Model Law on TK and Expressions of Culture to adapt by the Pacific Island Forum's Member Countries in drafting their national legislation. The Pacific Model Law on TK and Expressions of Culture as widely referred to internationally, including in this forum, as one way of advancing their protection at a regional level. Although it had been open to adoption to its Member Countries since 2003, the countries felt that there was a need for further guidelines to assist them to consider policy questions when adopting national legislation based on the Model Law. Guidelines were subsequently developed for this purpose last year. The guidelines were considered at a Workshop held last week for a number of its countries which were undertaking activities towards the Model Law's implementation. The representative acknowledged WIPO's support for, and its role in providing technical assistance at the Workshop. This assistance would go a long way in providing the impetus which the Pacific Island Forum's countries needed to help them see the Model Law through to adoption at the national level. At least one Member Country had indicated that it was likely to adopt legislation in the near future, paving the way for the others to do likewise. It was their hope that these developments would contribute to and guide the international norm-setting for binding rules for TK and Expressions of Culture at this and other fora. The Pacific Island Forum was also developing a framework for the protection of, and access to biological resources and associated TK in collaboration with the Secretariat of the Pacific Regional Environment Programme (SPREP) and later this year it would convene a Workshop to finalize the framework. While national laws and regional systems governing TK and TCEs

was considered positively amongst Pacific Island Countries, they were only too aware that these efforts had to be complemented and supported by effective, internationally binding rules. They therefore shared the concerns expressed by other delegations on this important subject and looked forward to make some progress on this issue at this session. The representative referred to the Bandung Declaration on the Protection of TCEs, TK and GR which had been adopted by representatives of the New Asia-Africa Strategic Partnership countries at their meeting held in Bandung, Indonesia, on June 18 to 20, 2007. Fiji and Papua New Guinea, both Pacific Island States, were represented at the meeting in Bandung. The representative reaffirmed support for the Bandung Declaration, which amongst other issues, acknowledged the urgent need to expedite the establishment of international legally binding instruments inclusive of *sui generis* mechanisms on TCEs, TK and GR. On a separate but related note, the Pacific Island Forum aligned itself to the call for a development agenda to be incorporated broadly in the work of WIPO. They believed that only then would norm-setting priorities fairly reflect the interests of both developed and developing countries, including in the work before the Committee.

31. The representative of the International Indian Treaty Council (IITC) expressed gratitude to the Secretariat of WIPO for enabling the participation at this session which was extremely important for indigenous peoples and their communities. The representative thanked and congratulated the panelists for their brilliant presentations and gave comments on the panel. IITC believed that the panel was extremely important for indigenous and local communities as a way of expressing their particular concerns in relation to TK. IITC hoped that the indigenous peoples' panel would continue to be held at subsequent meetings of the Committee. IITC appealed to the Member States that were not present at the panel if possible for them to be present at the next panel because the information provided by the indigenous peoples was very important to understand the importance of developing an instrument that protected the TK and EoF of indigenous peoples. The representative suggested that at the next panel session the Secretariat considered essential theme indigenous peoples and GR, which might possibly contribute to the discussion on GR in the Committee. Prior informed consent was an essential element if indigenous peoples were to be able to participate in this process to protected TK and the recognition by WIPO that the protection of indigenous peoples depended on the protection of their environment and the recognition of their lands so that they could protect and promote TK in indigenous peoples. The IITC agreed that what had been said by the delegation of Brazil on behalf of GRLUC to take into consideration existing elements in the declaration on indigenous peoples of the UN adopted by the Human Rights Council on June 29, 2006.

32. The representative of Tupaj Amaru emphasized that the mandate of the Committee was and continued to be to draft, examine and adopt an international binding instrument on the legal protection of TK, GR and the cultural expressions of peoples and local communities. The representative asked why the same rhetoric was seen today after six or seven years. In this time which might be considered long or short no progress had been made. No progress had been made towards the adoption of a clear instrument that would ensure the protection of their knowledge and of their cultural traditions that were permanently being eroded. The representative had gone to many countries, Bolivia, Peru, and had seen with great sadness the extinction of many historic communities on the continent. Their knowledge, their secrets, their memories were disappearing, disappearing from the international community, and it should be realized the tragedy of what was happening. An international instrument was needed today instead of national legislation or *sui generis* types of protection because since the war of conquest TK, GR and folklore had been and continued to be the subject of pillage, permanent pillage and misappropriation and piracy both national and international. The

representative asked why an international instrument was needed that would be binding to protect what might be called the material and spiritual support of mankind. Not only of the indigenous peoples but of humanity which the political and economic interest did not take into account because in a globalized world subject to the laws of the market nothing got away and TK in Mexico and Bolivia was the subject of international piracy. They were the subject of misappropriation, misappropriation of this wisdom, this ancestral wisdom and, in a globalized world, if consistent norms were wanted that were capable of protecting this TK in the collective interest of the whole of humanity, and secondly an international instrument was needed that was consistent because today there was the ferocious behavior, the greedy behavior of large multinational enterprises. The representative said they had seen in the traditional communities in Bolivia and Peru how large enterprises whose headquarters were in highly industrialized countries were pillaging the natural resources of these indigenous peoples and there was no government that could defend itself from this because all these governments depended on the major interests of globalization on international policies run by the World Bank and the IMF and they had seen that their indigenous peoples lived on one or two dollars a day in situations of extreme poverty and on the other hand they had seen, according to the local newspapers of these countries, that the multinational enterprises whether Swiss, Canadian or American, earned 25 million dollars a year. This showed the difference and the total injustice and inconsistency of all this. The representative stated that they could not preserve their TK and have access to their use. On the other hand large multinational enterprises were using their TK. One had to be aware of this reality. This morning the Declaration was mentioned by Brazil. The representative appreciated their policies and supported the position of Algeria, Morocco and other countries who had expressed their position because they were the defenders of ancestral traditions because they too were countries that were colonized that were under the colonial yoke and so their policies coincided. The Declaration on the Rights of Indigenous Peoples in Article 3 and 31 spoke of the autonomy of indigenous peoples and today this right had been denied. They had denied the paragraphs that were included in the Declaration on the Protection of Cultural and Intellectual Heritage of Indigenous Peoples. It were the Western countries present in this room who had denied this, especially Canada and Russia who had voted against that Declaration in the Human Rights Council on June 29, 2006. So those who had spoken this morning to people from the indigenous peoples to the Inuit people one from Kamchatka had not mentioned this position, this painful position adopted by their own governments that did not wish to recognize the elementary rights of the indigenous peoples. One had to say this. It had to be stated clearly that highly industrialized countries did not want to recognize this because in indigenous lands there was much wealth both in Russia or in Peru or in Bolivia and in other parts of the world. There were many natural resources. So they did not want the indigenous peoples to have access to their own resources or administer their own resources or their territories and lands in natural resources. This was the main reason why they denied the elementary rights of indigenous peoples in the international arena and in conclusion what was need here was not rhetorical speeches, political will was needed, the political will of States and of the international community of States to draw up an international instrument that was capable of defending and protecting the cultural values and the cultural heritage the GR and TK of the indigenous peoples.

33. The representative of the Third World Network stated that the Committee, now meeting for the eleventh time and at the close of the renewed mandate given to it by the GA in 2005, should ask if it was near its aim of expediting its work, especially since the GA had urged the Committee to accelerate its work. The Committee was currently faced with a list of issues from the tenth Committee that if the spirit of consensus would not prevail among the developed and developing countries here, would set it back for a long time. If that happened,

WIPO would be seen as one arm of the UN system that had failed to resolve some of the long-standing issues in the area of sustainable development, namely bio-piracy and the other on giving justice to the developing countries and the indigenous peoples and local communities who were the custodians of the TK, TCEs and GR. The representative asked whether we had forgotten what bio-piracy was, the taking of biological resources and community know-how and eventually applying patents or other IPRs thereon without anything going back to the community. It appeared that this scourge of indiscriminate patenting of TK, TCEs and GR had been continuing through the years, with the following more recent examples: (a) Yoga - according to the *Times of India* in a series of articles in the month of May 2007, the USPTO had granted 150 yoga-related copyrights, 124 trademarks on yoga accessories and 2,315 yoga trademarks, so far; there was also a US based Indian who had applied for a patent on a type of yoga produced in a 45 degrees centigrade steam room when it was ideally taught in the cold Himalayas; (b) Batik – this was an example where both TK and TCEs were expressed in the beauty of the resulting textile; this art form mainly seen in Indonesia and Malaysia had at least 3 US patents, namely Patent No. 6821303, dated November 23, 2004 for a method and kit for batik art, Patent No. 5400257 dated March 21, 1995 for a method of producing a batik type image on cloth and Patent No. 4254520 dated March 10, 1981 for batik process and apparatus; now, there could be more out there for there were other patents describing a similar process yet it did not use the term batik; (c) Green tea formulation and method of preparation – this was a very recent US patent, with No. 7232585 dated June 19, 2007; wasn't this beverage part already of the way we take our tea from wherever part of the world we were, and should we pay royalty now to this patent holder aside, from enjoying this tea; (d) Pain balm from pepper (*Genus capsicum*) – a very recent patent, with US Patent No. 7235270 dated June 26, 2007, an example of a biological material being patented, though in this case, the way the balm was prepared including the idea thereof, would most likely have come from TK. These examples challenged the Committee to think of appropriate international mechanisms to protect these types of knowledge and biological and GR from being appropriated by patents or other forms of IPR indiscriminately and without regard to where it came from, especially the people or country who would be put to ridicule, embarrassment or harassment, should the patent holder now insist on the “rights” they had sectored through the IP system. These examples would also drive home the point that each form of TK, or TCE or even GR, by itself or with associated TK, would need different treatment or effective protection and from there we needed to find a concrete solution that would solve the problem of misappropriation of each form. One thing was clear from this exercise of searching the existing patent databases - we needed to analyze the problem in an in-depth manner, particularly so if the TK involved had passed not only from a community to another community, but now from a country to another country. It was important to set out now the minimum standards from where the principles would be based that could be used for dealing with these problems. These minimum standards could be found in the UN Declaration on the Rights of Indigenous Peoples. With this, the representative urged the members of the Committee to endorse the approval of this Declaration at the UN GA. Doing this would give importance to indigenous peoples who were one of the major stakeholders of this issue. Such recognition of their rights would surely give momentum to the efforts that WIPO was doing to solve their problems in this area.

34. The representative of the Arts Law Centre of Australia, also on behalf of its Artists in the Black service, thanked for the opportunity to present its perspective through the opening Indigenous Panel and participation through the eleventh session of the Committee. The Arts Law Centre of Australia as newcomers to this process appreciated the progress been made to developing both the objectives and the substantive principles to date. The many expressions of Aboriginal culture in Australia were something that made its nation unique and drew



attention to Australia world-wide. In view of the wholesale misappropriation of indigenous cultural heritage, there was need for leadership at an international level. The Arts Law Centre of Australia, therefore, was very interested in seeing the Committee's work progress towards the development of an international treaty. To date many national governments had not demonstrated a high level of accountability in terms of protecting TK and TCEs especially in countries where the indigenous peoples comprised a small percentage of the population. A strong international framework would assist countries to develop legislative protections at a national level. To benefit from the protection being discussed, it was important that the conditions not be too onerous for indigenous people to meet. A system requiring registration of TK and TCEs was likely to make access to rights and protections difficult for many indigenous communities. In Australia a large number of indigenous communities were extremely remote from the mainly non-indigenous city centers, the information technology and communication systems were minimal, and many people spoke English as their third or fourth language. These factors made access to highly formalized systems difficult for many of Australia's indigenous peoples. It was also important that the burden of proof placed upon indigenous communities seeking protection of their TK and TCEs not be such that it created a massive disincentive for them to access the rights and benefits that were developed. The need for prior consent should be a requirement before third parties was permitted to use TK and TCEs, particularly if it involved their commercialization. This should be the case even if under existing IP laws the work or material had entered the public domain. Otherwise it was almost impossible for indigenous peoples to protect their TK and TCEs, leading to compromise of their culture. The Arts Law Centre of Australia understood the Committee's approach of discussing the protection for TCEs and TK separately but side by side, however, in its experience these two systems were often so closely interrelated as to be inseparable. The representative also emphasized the need for extensive work to be done at a national level to educate indigenous communities about the work that the Committee was doing and for national governments to take a lead in consulting with indigenous communities about this process rather than leaving it to extremely under-resourced not-for-profit organizations to assume this role. The representative noted that last week in Australia the government announced dramatic measures, including sending the military into aboriginal communities in the Northern Territory, in order to deal with shocking levels of violence and abuse that had recently been reported upon. But these problems had been well known for decades and no action had been taken. Rather than strengthening the capacity of indigenous communities, rights had been eroded. The protection and nurturing of TK and TCEs was part of a complex set of actions that had to be taken for the situation of Indigenous people to be improved.

35. The representative of the Hokotehi Moriori Trust acknowledged and thanked the Secretariat and those states who had contributed to the Voluntary Fund which had enabled his presence in the Committee. There was much material in the Committee policy objectives and principles that would be of use in developing policies and legislation at the national and regional levels. This had been put forward in submissions to the Waitangi tribunal in New Zealand in the Wai 262 claim. The representative had been participating in this process since 1998 when he met with WIPO representatives in Wellington in New Zealand on their fact finding mission. It seemed that Indigenous Peoples had been consistently saying the same things over the past eight years since that fact finding mission had begun. The Hokotehi Moriori Trust was saying the same things today. It also seemed that a commitment from some states to agree on a way forward was lacking. Indigenous peoples knew what they wanted but they did not have control in the decision making process. This was a situation that all colonized peoples were accustomed too. But that did not lessen the passion for the issues and hence the Hoko Teni Moriori Trust's continued presence in these fora. The representative agreed with his brother from Tupaj Amaru that the political will was lacking to move forward

in a progressive manner. He also supported his sister from the Aboriginal community that a binding international instrument was needed that was robust and had teeth for dealing with the issues. Indigenous peoples had long term vision. The elders did not think in three or five year timeframes but in 25, 50 and 100 year timeframes. Indigenous peoples had been around a long time and would be here for a long time to come. Indigenous peoples are survivors. My representative's own Moriori people were thought to be extinct and this was taught in schools in his country for 150 years. But they were still here and were now acknowledged by the New Zealand government and here in this forum. They were taking their own destiny in their hands. Irrespective of what happens in this forum his people would continue to practice and rebuild its culture. Not because they wanted to commercialize it (although they might wish to in accordance with their cultural preferences and values), but because it was fundamental to their culture and continued identity. That was a crucial difference between state parties and indigenous peoples. One was at a purely political level and the other was crucial to their survival as distinct peoples. The representative hoped that this meeting could resolve a way forward and not shy away from taking the hard decisions.

36. The Delegation of South Africa supported the statement of the Delegation of Algeria on behalf of the African Group. South Africa's proposal for the Committee was based on the comprehensive understanding that any further work of the Committee had to constitute a step towards developing an internationally binding legal instrument that aimed to protect indigenous knowledge, TCEs and GR. South Africa reaffirmed its stance that the work of the Committee should be strengthened with a renewed and clearly defined mandate. Any future work had to progress towards an accelerated completion. The Member States' responses to the decisions of the tenth session of the Committee, therefore, had to be directed towards the objective of developing an internationally binding legal instrument. The fruitful deliberations should streamline the outcomes into a document which reflected the progress that had already been achieved and the Committee should determine the status of this document. South Africa proposed that the provisions adopted during the last few sessions of the Committee be brought together and consolidated into a single text, and that a treaty should be drawn up defining basic principles and rights. In response to the decisions of the tenth session of the Committee, South Africa had presented to the Committee a comprehensive analysis of the questions and underlying issues. These had been incorporated into the documents WIPO/GRTKF/IC/11/4 and WIPO/GRTKF/IC/11/5. South Africa's position on IPR was duly informed by the fact that it had an Indigenous Knowledge Systems Policy. In addition, South Africa had submitted amendments of existing copyrights and patent laws to Parliament. Draft regulations on ABS on GR and associated indigenous knowledge had recently been completed. At the recent regional Southern Africa Development Coordination Workshop and the Asian-African Forum on GR, TK and Folklore, in which South Africa actively participated, members had agreed that WIPO should provide the leadership on the development of an internationally binding legal instrument. The many regional initiatives were an expression of a deep desire for a comprehensive international legal framework for the protection of indigenous knowledge, GR and TCEs. However, it remained the responsibility of the WIPO Member States to generate a positive outcome. South Africa remained as committed now as before and encouraged the Committee to work towards a comprehensive, integral internationally legally binding instrument to promote and protect the rights and dignity of local and indigenous communities. The Delegation encouraged and urged Member States to approach these deliberations with a positive spirit and common purpose to promote finding consensus on the substantive issues encapsulated in these questions. The challenge now was to ensure to continue work together to sustain the progress that the Committee had achieved since its inception. South Africa remained committed.

37. The Delegation of New Zealand supported the continuation of the Committee's work in all its mandated areas. The key issues that had emerged from the last session were a constructive step in addressing the complex more contentious issues at the interface between IP, TK and TCEs, a step upon which the Committee should build. The Delegation had provided a written response to the set of key issues and would be making substantive comments in the course of this session. It reiterated its position on the need to reach some consensus on policy objectives and guiding principles before determining potential international legal mechanisms for the protection of TK and TCEs. This approach was essential prior to entering into discussions on potential legal options to address the issues. The revised policy objectives and principles still required substantial work. That and the work on the set of key issues should be the Committee's priorities. The Committee should focus on in depth analysis of the key issues and the revised policy objectives and principles of protection, try to reach some common understanding and consensus on these before turning its focus to potential forms of substantive protection and whether international obligations were warranted and if so, of what form. The Delegation looked forward to substantive discussions of the key issues and the revised objectives and principles, in order to better understand their practical implications for Member States and indigenous peoples and local communities. The focus should be on the concepts of misappropriation and misuse of TK that underlay a number of the objectives and principles, and which were the driving force behind the establishment of the Committee. From this in depth analysis and without prejudice to the ongoing work on the policy objectives and principles or the development of any other tools or instruments in the future, there could emerge the development of practical guidelines for users of TK and TCEs and for policy makers who are attempting to address issues associated with TK and TCEs domestically. The development of guidelines, would go some way in addressing concerns expressed by developing countries in terms of the urgency to start developing mechanisms to prevent misappropriation and misuse of TK and TCEs and those of developed countries to see more foundational work done prior to embarking on the negotiation of any international instrument to address the issues. Those guidelines would need to be agreed to by Member States and agreed to be promoted both internationally by WIPO and domestically by Member States. The Delegation would further elaborate on this proposal in the context of the discussions under agenda item 10, relating to future work, and welcomed comments from Member States and accredited observers on this proposal.

38. The Delegation of Norway stated that the list of questions, agreed upon at the last meeting, provided an excellent basis for focusing the work of the Committee. The Delegation fully supported this approach and had provided written comments to the list. It would, of course, participate in the discussions of the issues at this meeting. From its point of view, rather than focusing on the legal status of the outcome, it was presently prudent to focus on the content, on the substance, on the specifics. And in particular where there were gaps that should be dealt with on the international level as opposed to the national level. The Delegation referred to what was said *inter alia* by the Asian group, and that was also touched upon by South Africa: it was time to move forward – following the principles of consensus building.

39. The Delegation of Egypt thanked the Secretariat for the documentation and commended the Committee for the progress achieved and opportunity allowed to exchange experience and develop tools and concepts. Firstly, it was a common understanding that existing national and international legislation failed to provide adequate protection for genetic resources, traditional knowledge and traditional cultural expressions. Secondly, there was a consensus on the necessity to establish an international mechanism that would ensure such protection, in the form of a mandatory international instrument or a *sui generis* protection system. Thirdly, it

was agreed that the task of the Committee was important and difficult, and provisions or legislation needed to be developed in response to the aspirations of peoples and communities claiming protection for their resources and heritage and wishing to make material and moral use of such protection. In that context, the Committee should continue its work and build on the progress made. The Delegation referred to the recurring issue of definitions, stating that any definition, particularly in the field of culture and humanities, was a cultural product of the definer and the culture of that definer, hence the difficulty, in the present forum, where a wide variety of cultures was represented, to agree on a single comprehensive definition. On the other hand, the same countries represented in the present Committee, had agreed, in a different forum, the UNESCO, on definitions for cultural heritage and intangible cultural heritage, both closely related to traditional knowledge and traditional cultural expressions; two instruments, the Convention for the Safeguarding of the Intangible Cultural Heritage and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions had been concluded and had recently entered into force. Acknowledging the fact that WIPO and UNESCO had different missions and goals, the Delegation invited the present Committee to build on the results achieved in the UNESCO context. It was explained that, in the UNESCO context, reaching an agreement on definitions was simpler because such an agreement did not give rise to any rights or material benefits; countries were rather concerned with cultural values, identity preservation and safeguard of cultural heritage, as a contribution to the common wealth of humanity, at the expense of none. Reaching an agreement had been difficult but possible because no direct material interests had been involved. In the present Committee, problems relating to the subject-matter of protection could be settled provided there was good faith and political will. The Delegation noted that there was confusion as to what was political and what was technical; unless such confusion was clarified or, at least, it was understood that cooperation served the political interests of all, the desired development and peace would not be possible to achieve.

40. The representative of the Mbororo Social Cultural Development Association (MBOSCUDA) thanked the donor countries for the support to the Voluntary Fund for Indigenous People to participation. He reiterated the support for on international legal binding regime for the protection of TK and TCEs. The representative shared with the Committee some of the example cases of the Mbororo pastoralist people of Cameroon. Some ten years ago, a research organization had carried out a research to gather information on the pastoralist medicinal knowledge on medicinal plants for animals and they had collected and documented this knowledge without the proper use of the free prior informed consent and MBOSCUDA was afraid that, without the use of the free prior informed consent, the risk of misappropriation of this TK was very high. The representative reiterated the support for capacity building for indigenous populations to be able to deal with the issues at hand.

41. The representative of the Indian Confederation of Indigenous and Tribal Peoples North-East Zone (ICITP) thanked for the financial support for his participation in eleventh session. His name was Jebra Ram Muchahary. He belonged to the Boro Indigenous People in Assam in India and represented ICITP as Chief President. They were over hundred million indigenous people in India, but they were described as residual tribes in India. The official census of 2001 had said they were 8.2% of the total population in India. ICITP was the only effects body of the tribal people in India that was working for the total cause of indigenous and tribal people in the country. They had heard the opening statements from various countries, including India. And they appreciated the effort and concern of governments, including India, in protecting and promoting the IP, TK and TCEs while appreciating the tremendous work and contribution, especially India, in this effort. The representative urged the government of India to make the ongoing effort to be more collaborative and inclusive in

order to work out more effective and practical approaches in the ground for the mutual benefit of the rights' holders and the state. The representative also urged the government of India to this august forum to recognize the very fundamental issue of indigenous status by ratifying the ILO Convention 169 in order to strengthen the national position in safeguarding the TK and TCEs in the international forum. The representative felt the government of India and also the Asian governments, particularly the countries who abstained in the last GA, thereby failing to support the UN Draft Declaration of Indigenous People which would demonstrate and strengthen the mutual understanding and cooperation towards finding a peaceful solution to all matters that affected directly and indirectly, especially in promoting and protecting the GR, TK and TCEs, to create a positive outcome and address the issues in future days to come.

42. The representative of the International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) stated that IFPMA was representing the research-based pharmaceutical industry in over fifty developing and industrialized countries and, as an NGO member of civil society with official relations with WIPO, he welcomed the constructive contributions to the discussion on the complex issue of the use of TK and biodiversity resources. He emphasized that IFPMA like other partners here, were all united in opposition to the misappropriation of TK and GR. In fact, IFPMA's governing Council made up of CEOs and other industry leaders had publicly stated that IFPMA was against taking genetic resources without proper authorization and it had official guidelines on ABS for its members. IFPMA certainly welcomed the opportunity to work in collaboration with WIPO, its Member States, and other responsible stakeholders to promote the use of biodiversity resources for the benefit of the entire world while also protecting the rights of the owners of such resources. Further to this point. IFPMA welcomed this week's efforts to concentrate on areas where agreement could be reached and also to clarify the realities behind this debate. It should not be forgotten that the issues around GR also included the sustainable use for the benefit of humanity. Policies which made access to GR too difficult and burdensome had been shown to reduce R&D on such resources, thus limiting the possibilities for researches to develop new medicines and cures based on such resources. Flexibility in the system was also very important. That was why a contract-based system worked effectively, as each contract could meet the specific needs of each party in a mutually beneficial manner. In seeking more clarity regarding how to handle issues of TK and biodiversity Member States would be well-advised to review existing national standards. Such experience could be useful in clarifying how TK could be protected within existing systems in a manner which gives needed certainty to all parties. IFPMA and its members were firmly against the misappropriation of TK and GR and looked forward to working with WIPO and its Member States in efforts to have transparent, effective, and fair treatment of all parties in the protection and use of TK and GR.

43. The Representative of Amauta Yuyay, Mr. Cesar Guana of the Quichua people of Otavalo, Ecuador, explained that the name of his organization translated into Spanish meant "*wise thinking*". The representative expressed thanks for the accreditation of his organization at the current forum. Various events had taken place in the past few days concerning the strengthening of ancestral knowledge among his peoples. June was the month when one of the most important events in the Andean world had taken place. The summer solstice had marked the beginning of the agricultural year when Greenwich Mean Time would mark, at the solar midday, the hour of 12.15. The Andean world was by nature ordered and respectful in maintaining the harmony both of its nature and of its society, as well as the family nucleus. In Otavalo, Ecuador was the Main Square of Crafts of the Andean world, where various artistic currents had come together in motivating the creativity of numerous craft products, textiles, and manufactured goods, had served to establish marks of large local and international commercial firms, and had been exported throughout the world, although the benefits had not

been equitable. His people had benefited in parallel and his organization would in future contribute to the possible development of a binding legal instrument. He believed that the talent and virtues of every one of his people could help to establish such a process.

44. The Representative of the *Health and Environment Program* introduced the aims of its work which were to: provide resources for issues of public health and safety, of concern to the indigenous Bassa peoples, such as the prevention of HIV/AIDS, water quality, and emergency and disaster care; treat and educate the women of the Bassa indigenous community in the city of Douala; and promote the rights and protection of the traditional knowledge of women from the Bassa peoples in Cameroon in relation to health, in the vulnerable districts of Douala. Cameroon was a Central African country, covering 475,000 km<sup>2</sup>. It was bordered in the east by Chad and the Central African Republic, in the south by Congo, Gabon and Equatorial Guinea, in the south west by the Atlantic Ocean, in the west by Nigeria, and finally at the upper end of the triangle in the north by Lake Chad. Cameroon was a bilingual country, and English and French were the two official languages. It had more than 200 national languages and the country consisted of ten provinces, 58 departments and 268 administrative regions. Several political parties carried out their activities. The Health and Environment Program focused on Bassa indigenous women. The Bassa were a Bantu people native to Cameroon, sons of Egypt from which they originated, and a mystic people of the forests. Bassa women encountered problems including female genital mutilation (FGM), evacuation washing with stimulant products, vaginal injections by self-medication, the vaginal insertion of plants and other products by self-medication. The Health and Environment Program was engaged in raising the awareness of the Bassa indigenous community regarding the harmful practices affecting health. Information, education and communication activities should be expanded through the training of village leaders in relation to excision, violence inflicted on women, raising the age of marriage, early and/or forced marriages, and the risks of early motherhood. As to intellectual property rights, there were many women from Bassa indigenous communities who did not know how to protect their traditional knowledge in relation to health prevention. There was a lack of infrastructure to educate them on a permanent basis. The aim of the Health and Environment Program was to inform women as much as possible since it was said that women were the key to the family, that family hygiene and health passed through them, and it was women that provided hygiene lessons.

45. The Delegation of Sudan noted some misuse as far as TK and folklore protection was concerned, hence the need to establish norms for protection without making a distinction between folklore and TK. The Delegation explained that unfair practices affecting traditional arts and lack of remuneration for the artists, resulted in a lack of IP protection, and suggested that written agreements be established to enhance protection for TK as the cultural heritage of the population, and provide adequate legal protection for such invaluable heritage.

46. The Delegation of Yemen expressed the hope that the meeting would be successful in reaching the desired objectives and agree on a common denominator that secure the interests of all stakeholders in the form of a consensual, balanced language, for definitions and norms of protection for genetic resources, traditional knowledge and folklore, that would be acceptable to all countries. It noted that Yemen intended to host a regional seminar genetic resources, traditional knowledge and folklore, at the end of year.

47. The representative of the International Council of Museums (ICOM) hoped that ICOM's participation in this session would be the beginning of a fruitful and mutually beneficial relationship between ICOM and WIPO. ICOM had been founded in 1946 and had

a close association with UNESCO. ICOM now had over 21,000 individual and institutional members in 140 countries around the world. ICOM covered a wider range of institutions and organizations than what were traditionally thought of as museums – buildings holding and displaying collections of objects relating to the sciences, humanities or the arts. ICOM also had a strong commitment to the support of indigenous and other traditional groups, and to the preservation of the world's intangible heritage, and therefore covered a wide range of organizations and institutions working in these fields which might not have collections of museum objects in the traditional sense. However, ICOM's interest in, and expertise in relation to, TCEs, folklore, TK and related fields, was far wider than these, often quite small, specialist bodies. Many larger museums had been very actively involved in assisting with the conservation and promotion of indigenous and traditional cultures, both at home and abroad. For example, the world's largest museum organization, the United States of America's Smithsonian Institution, was very active in these areas through its Center for Folklife and Cultural Heritage, the new National Museum of the American Indian, and major ethnographic and traditional knowledge fieldwork programs in the United States of America and around the world. To give two other out of very many examples, Te Papa – the National Museum of New Zealand – involved the indigenous populations and had major research and collecting programs, while the National Folk Museum of Korea was similarly very closely involved in both recording and actively supporting the intangible heritage, not only nationally but now through its sponsorship with ICOM of the International Journal of Intangible Heritage. ICOM was, therefore, very actively concerned about the many issues relating to ensuring the proper recognition and protection of the many different IP interests of indigenous communities and those holding and transmitting the various aspects of TCEs. However, very many thousands of museums and related cultural institutions and organizations were also among the most important holders of both historic and contemporary records and other evidence of the intangible heritage of communities, as for example with the very large photographic, film, field notes and other documentation of TCEs and folklore in the major university museums of Oxford, UK, and Harvard, the United States of America, and many other places, of many national and regional museums with an international orientation, or the 50,000 sound recordings totaling more than 3,000 hours of traditional African music collected from the beginning of the twentieth century to the present collected, preserved and researched by Belgium's Royal Museum of Central-Africa. Similarly, in relation to TK, especially in relation to traditional agricultural and medicinal resources, a lot of advanced research was now being carried out within the museum sector, including major international natural history museums and the research institutes of botanic gardens. Museums with such collections (and indeed the museum movement more generally) were anxious to ensure the proper use of such material already in museum collections and documentation, and that respect be shown for the communities and individuals (or their descendents) who were the sources of such important resources. However, it had to be recognized that current international law, along with most national measures on copyright, other IPR and patents were wholly inadequate in these respects. ICOM recognized that it was not going to be easy to develop concepts of IP rights which sought to recognize communities as the creators or owners of TCEs and TK rather than the key and long-established IP concepts derived from copyright and patent law. However, ICOM believed that it was now time to complete and implement workable systems of measures to ensure that the collective moral rights of the originators, inheritors, transmitters and performers etc. of the world's TCEs, folklore, and TK. It was now generally recognized that such intangible expressions of the cultural heritage were under very serious threat around the world: for example, the 2003 UNESCO Convention on the Intangible Heritage already had 78 States Parties. A new WIPO Convention or Conventions covering these issues would be a very important addition to the measures now being developed under the 2003 Intangible Heritage Convention.

48. The representative of UNESCO thanked for the invitation to be present at this session as an observer. UNESCO and WIPO had a longstanding and complementary history of cooperation and mutual information concerning the study and regulation of different types of protection for TK and folklore, or as UNESCO was used to say “*intangible cultural heritage*”. The representative reported about developments concerning UNESCO’s Convention for the Safeguarding of the Intangible Cultural heritage, the adoption of which in October 2003 was the culmination point of UNESCO’s standard-setting activities in the domain of intangible or – a name which was becoming more and more popular – “*living heritage*”. The Intangible Heritage Convention called upon its States Parties to cooperate to ensure the continued enactment and continued intergenerational transmission of the oral traditions, and – indirectly – languages, traditional dance, music and theatre, social traditions, rituals and festive events, knowledge about nature and the universe, and traditional handicrafts. The Convention, adopted at the end of 2003 by now had been ratified by 78 states. UNESCO expected some 85 States Parties by the end of this year, with a fairly good regional spreading. The Convention entered into force three months after the thirtieth ratification that was in April 2006. Subsequently, the GA of States Parties had met twice, both times in 2006, in Paris: its major deed so far had been the election of the members of the first Intergovernmental Committee. The Committee had met for the first time in Algiers, it had met again, for its first extraordinary session in Chengdu, China, in May of this year, and it would meet very soon again, in upcoming September for its second ordinary session in Tokyo. The Committee was now developing, as required by the Convention, a set of operational directives that had to guide the implementation of the Convention. These guidelines had to be submitted for approval to the GA of States Parties. The next session of the GA was scheduled to take place in June 2008. The Committee was now concentrating on criteria for inscription on the two lists of the Convention; criteria for granting international assistance, criteria for the use of the fund of the Convention, modalities for regulating consultative assistance to the Committee, not only by NGOs, but also by communities of practitioners and tradition bearers. Once these subjects would have been regulated, the Convention would be fully operational. UNESCO hoped that would be within one year from now. Other subjects as well, however, the ones mentioned were the major subjects which together were sufficient to allow the Convention to start its really operational life by summer 2008. Many states had started to implement the Convention on the national level. Most of them had started by drawing up one or more inventories of their intangible cultural heritage, in cooperation with the communities concerned. Another task for the immediate future was to have the Committee of the Intangible Heritage Convention and the newly elected Committee for UNESCO’s Convention define how the two Conventions could cooperate in protecting and promoting, each in its own way, cultural diversity and creativity of humanity. Full and updated information on the Intangible Heritage Convention could be found on UNESCO’s website: UNESCO – Culture – Intangible Heritage. UNESCO had profited a great deal from the experiences and good practices built up by WIPO over the years. UNESCO’s efforts and aims shared the same spirit of respect for the ownership of the intangible cultural heritage by communities and groups of tradition bearers and the wish to see states and organizations from all regions cooperate on an equal level. Since the endeavours were complementary and mutually enriching, UNESCO was happy to continue the relations of cooperation and collaboration with WIPO.

49. The representative of the Secretariat of the Convention on Biological Diversity (CBD) provided an update of ongoing activities undertaken by the Secretariat of the CBD in the follow-up to COP-8 and in the light of COP-9 to be held in Bonn, Germany, in May 2008. Considerable efforts by the CBD and its partners were still focused on the achievement of the



2010 target to reduce the current rate of biodiversity loss, as adopted by heads of state at the World Summit on Sustainable Development in 2002. These efforts had also focused on increasing worldwide awareness to the CBD by reaching out not only to Governments but also to key partners and major groups of stakeholders in the protection of biological diversity, including international organizations, scientific and technical bodies, indigenous and local communities, industry and the private sector. The work carried out in the Committee was of great relevance to the work of the CBD, particularly as it related: to the implementation of the third objective of the CBD, that was the fair and equitable sharing of benefits arising out of the utilization of GR; to the respect, preservation and maintenance of TK, innovations and practices relevant for the conservation and sustainable use of biological diversity and to the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; and to access to and transfer of technologies, an important component in the implementation of the CBD. The representative, therefore, took the opportunity to brief the Committee on some of the recent developments in these three areas of work of the CBD and informed that a side-event would be held on Tuesday to provide further information on the work carried out under the CBD process in these three areas.

**Access to GR and benefit-sharing:** The representative recalled that the COP, at its eighth meeting, instructed the Working Group on ABS to complete the negotiation of the international regime on ABS as soon as possible before the tenth meeting of the COP. In addition, co-chairs were designated for the negotiating process: Mr. Fernando Casas of Colombia and Mr. Tim Hodges of Canada. The Working Group would meet twice before the ninth meeting of the COP in May 2008: the fifth meeting would be held in Montreal, Canada, from October 8 to 12, 2007 and the sixth meeting would be held in Geneva, from January 21 to 25, 2008. This would provide the opportunity for those involved in discussions related to the IP and trade aspects of GR in Geneva to become more familiar with the work of the Working Group. This could certainly contribute to a greater mutual understanding among the environmental, trade and IP communities, of the issues and concerns at the heart of the negotiation of an international regime on ABS. The representative also recalled that an internationally recognized certificate of origin/source/legal provenance was a possible element of an international regime on ABS currently under consideration. A group of technical experts established by the COP to examine this issue more closely and provide advice had met in Lima, Peru, last January. The Group had explored possible options, without prejudging their desirability, for the form, intent and functioning of an internationally recognized certificate, and had analyzed its practicality, feasibility, costs and benefits. The Working Group on ABS would be invited to consider the report of the expert meeting. With respect to the issue of the disclosure of origin/source/legal provenance of GR in IPR applications, an issue of interest to the Committee, this matter would also be considered by the Working Group on ABS as one of the potential elements of an international regime. The agenda and annotated agenda for the next meeting of the Working Group on ABS were now available at <http://www.cbd.int>. These had been prepared by the Secretariat in close collaboration with the co-chairs. The next meeting of the Working Group would focus on possible key elements of an international regime in the hope that progress on the substantive elements of the regime would facilitate discussion, at a later stage, on the nature, scope and potential objectives of the regime.

**TK (Article 8(j) and related provisions):** In light of the relationship between the work on TK and ABS, the COP had invited the Working Group on Article 8(j) to contribute to the negotiation of the international regime on ABS. The next meeting of the Working Group on Article 8(j) and related provisions would be held back-to-back with the meeting of the Working Group on ABS, in October 2007. COP-8 had acknowledged the work being done in the Committee on the IP aspects of sui generis systems for the protection of TK against misappropriation and misuse, as well as the discussions within the WTO to examine the relationship between the TRIPS Agreement and the CBD as regards the protection of TK. As requested by COP-8, the

Working Group on Article 8(j) at its next meeting in October would continue its work in order to identify priority elements of sui generis systems. Other elements of the work program on TK of particular interest to the Committee, which were being addressed in preparation for the next meeting of the Working Group on Article 8(j) included: the further development of draft elements of an ethical code of conduct for submission to the ninth meeting of the COP; further work on the identification of processes that threatened the maintenance, preservation and application of TK, including measures and mechanisms to address the underlying causes of the decline of TK, innovations and practices; a request to the Executive Secretary to explore the possibility of developing technical guidelines for recording and documenting TK and to analyze the potential threats of such documentation to the rights of holders of TK (The draft recommendations that would be considered by the fifth meeting of the Working Group on Article 8(j) acknowledged the work of WIPO in developing a toolkit for documenting TK and might explore the possibility of collaboration on the toolkit; the convening of regional and sub-regional workshops to assist indigenous and local communities in capacity-building, education and training, and networking with particular emphasis on the participation of women; and the adoption of criteria for the operation of the voluntary funding mechanism for the participation of indigenous and local communities in matters related to the objectives of Article 8(j) and related provisions. The work of the CBD on TK and the work of the Committee, therefore, continued to be highly complementary. Technology Transfer and Cooperation: The representative reported that a revised version of the study on the role of IPR in technology transfer in the context of the Convention had been prepared in cooperation with the Secretariats of UNCTAD and WIPO. The study identified potential options to increase synergy and overcome barriers to technology transfer and cooperation. The Secretariat of the CBD looked forward to further close cooperation with WIPO in the timely finalization and release of the study. The representative recalled that COP-8 had decided to establish an ad hoc technical expert group with a view to identify, collect, and analyze ongoing tools, mechanisms, systems and initiatives to promote the implementation of the CBD provisions on technology transfer and scientific and technological cooperation, and to propose strategies for the practical implementation of the program of work. The meeting, co-hosted by UNEP and UNCTAD, was scheduled to take place in Geneva from September 10 to 12, 2007. The Secretariat of the CBD looked forward to the active participation of WIPO in this important initiative. It also acknowledged with appreciation the WIPO initiative to develop, in close cooperation with the Secretariat of the CBD, an electronic search tool on the IP online database with a view to support technology transfer under the CBD, in particular with regard to providing tailored online access to information on proprietary technologies that were of relevance to the CBD. The Secretariat of the CBD looked forward to continued collaboration with the Secretariat of WIPO in the framework of the Memorandum of Understanding between the two institutions. Clearly, there were many areas of mutual interest in the work of the CBD and WIPO, particularly with regard to the Committee. The representative wished the Committee every success in the continuation of the deliberations in the course of this eleventh session, confident that they would also contribute significantly to the work of the CBD with regard to access to GR and benefit-sharing, as well as traditional biodiversity-related knowledge.

50. The representative of the UN Permanent Forum on Indigenous Issues (UNPFII) stated that TK and TCEs were issues closely being monitored by the UNPFII. Firstly because it was a vital concern of indigenous peoples and it had been consistently raised by indigenous representatives during the sessions of the Forum. Secondly, it was an issue that cut across the mandates, policies and programs of the many UN bodies and as of the last count eleven UN bodies, agencies and funds were dealing with this issue. Thirdly, misappropriation and misuse continued not only at the national level but transnationally and governments and

indigenous peoples and local communities were still largely incapable of stopping this. Fourthly, the erosion of TK and TCEs, mainly because violations of indigenous peoples' basic rights and fundamental freedoms, was still unabated. The UNPFII expressed its appreciation to the Committee and the Secretariat for the work it had been doing in on this issue. The fact-finding missions held, the researches done and the extensive documents produced, undoubtedly, were important contributions which provided more clarifications on the debates on these complex issues. The Revised Outline of Policy Options and Legal Mechanisms and the Draft Objectives and Principles for the protection of TK, TCEs and Folklore which had emerged from this body and which were the subjects of discussion in the past sessions including this one had shown how far it had gone. The representative acknowledged the efforts WIPO had taken to ensure the active participation of indigenous representatives in this body which had been helped with the establishment of the Voluntary Fund. Another important contribution of WIPO was the active engagement of some members of the WIPO secretariat with the Forum and the Inter-agency Support Group on Indigenous Issues (IASG). The UNPFII was a subsidiary body of the ECOSOC established through Resolution E/Res/2000/22 which was mandated to "*provide expert advice and recommendations on indigenous issues to the Council, as well as to programs, funds and agencies of the United Nations, through the Council*". The representative reported what the Forum had done to address TK and presented some ideas on the ways forward. As early as its first session, in 2002, the Forum already had made a recommendation that the various UN agencies, including WIPO, conducted workshops to establish the linkages between cultural diversity and biological diversity, ecosystem approaches and collaboration between scientific and TK; to evaluate the IP regime; to consider elaborating a sui generis system for the protection of indigenous bio-cultural heritage, GR and TK; and to identify a support system for indigenous peoples to develop and consolidate their own policies and principles for the protection of biological resources, TK, innovations and creativity, including modes of ABS, with the free and prior informed consent of indigenous peoples and local communities (paragraph 29, E/2002/43/Rev.1 and E/CN.19/2002/3/Rev.1). At its second session, UNPFII had recommended that WIPO undertook a study, in collaboration with Forum members, on the use of indigenous knowledge relating to medicinal plants and resources, the commercialization of such knowledge and how indigenous communities are benefiting from such commercialization (Paragraph 59, E/2003/43 and E/C.19/2003/22). It also recommended that WIPO continued to cooperate, where relevant, with other organizations and agencies within the UN system, such as the secretariat of the CBD, UNEP, the Office of the UNHCHR, the FAO and the UNESCO (paragraph 96). The Forum had recommended at its third session that, under the auspices of the Forum and in partnership with the CBD and the UNHCHR, indigenous peoples, states and other stakeholders, WIPO developed guidelines, ethical codes of conduct, best practices and practical guides relating to IP issues and the access to and use of TCEs and TK by, among others, commercial users, ethnologists, folklorists and anthropologists, and museums and archives (paragraph 37.c: E/2004/43 and E/C.19/2004/23). In its forth session it recommended that an "*International Technical Workshop on Indigenous Traditional Knowledge*" would be held and this was done in Panama City from September 21 to 23, 2005. The objectives of this workshop were to: identify indigenous perspectives and experiences with indigenous TK issues at the local, national and international levels; gain a better understanding of the various methodologies, programs and activities of the UN system and other IGOs and agencies relating to indigenous TK; and formulate recommendations for the Permanent Forum aimed at promoting collaborative, complementary and holistic approaches to indigenous TK in order to enhance better understanding of indigenous peoples' concerns and possible solutions. The representative of the WIPO Secretariat, Mr. Wend Wendland, was the rapporteur of this workshop. The report of this workshop was available in Document E/C.19/2006/2. It had been mentioned earlier

that eleven UN bodies, agencies and funds were dealing with various aspects of TK and TCEs and these ranged from norm-setting to capacity-building activities. Indigenous experts had expressed their difficulties with the fact that all these different entities worked with this issue within their own specific mandates which therefore inevitably led to compartmentalization and reductionist approaches in handling TK and TCEs which were integral parts of indigenous cultures and livelihoods. The Workshop had stressed that it was crucial that indigenous peoples' engagement should be facilitated in these various bodies as some processes could lead to the development of standards and undertake technical assistance or capacity-building activities which could undermine the gains achieved in other processes in the national, regional and international levels. The Permanent Forum had been urged to play a key role in coordinating indigenous issues within the UN system and contribute by transmitting indigenous perspectives and concerns, doing its own research, and providing expert advice and substantive comments to the rest of the UN system and other intergovernmental bodies. At its fifth session it had recommended that an expert report be prepared by Mr. Michael Dodson on customary laws pertaining to indigenous TK. This had been in response to a recommendation of the International Workshop in Panama. During its sixth session which had been held from May 14 to 25 2007, Mr. Michael Dodson presented his report which looked into what extent customary laws should be reflected in international and national standards addressing TK. He also did an analysis of indigenous customary law as potential *sui generis* system for protection of this knowledge. The report could be found in Document E/C.19/2007/10. The representative highlighted some points raised in his report which could inform the debate going on in this Committee session. The Rapporteur had identified the international instruments already existing which recognized the rights of indigenous peoples to protect and enjoy their TK and these included, among others, Article 27 of the Universal Declaration of Human Rights, Article 15, paragraph 1(c) of the International Covenant on Economic, Social and Cultural Rights, Article 27 of the International Covenant on Civil and Political Rights. It also cited existing regional (e.g. Bangui Agreement of ARIPO, Tunis Model Law on Copyright for Developing Countries, etc.) and national laws (e.g. South Africa Traditional Health Practitioners Act, 2004, Philippine Traditional and Alternative Medicinal Act of 1997, Indian Medicine Central Council Act, etc.). According to him, the most explicit provision for the protection of indigenous TK was Article 31 of the UN Declaration on the Rights of Indigenous Peoples (as adopted by the UN Human Rights Council in 29 June 2007). This stated: "*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions. 2. States shall take effective measures to recognize and protect the exercise of these rights*". He also had cited Article 11 of the same Declaration which stated: "*(a) Indigenous Peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present, and future manifestations of their cultures, such as archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature; (b) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*" The report had acknowledged the leading role played by this Committee in WIPO in pushing for recognition of TK and TCEs and its protection from misuse and misappropriation. However, it also had stated that "*the*

*pre-eminent role of WIPO has also meant that the international debate has occurred primarily within the parameters of intellectual property law*". While this could suffice in some cases, *"for the most part intellectual property law fails to protect indigenous rights and interests because western constructs of intellectual property focus on individual knowledge and creativity rather than communal transgenerational knowledge."* Even the call for *sui generis* protection within IP had limitations because *"it fails to account properly for the unique experiences of indigenous peoples, the unique nature of indigenous traditional knowledge and the role of customary law"*. For the purposes of the report indigenous TK was used in general terms to mean *"traditional practices and culture and the knowledge of plants, animals and of their methods of propagation; it includes expressions of cultural values, beliefs, rituals and community laws; and it includes knowledge regarding land and ecosystem management. It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available event to members of a particular group."* (E/C.19/2007/10). The main recommendation of this report was that the *"Permanent Forum should commission a study, under its mandate, to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so, how this should occur. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, thereby providing guidance to both States and subsequently protection at the national and regional levels."* It identified a number of issues which such a study should address. The first issue was the challenge of definition. It mentioned the various terms used for indigenous TK and said that it was difficult to provide a comprehensive definition of TK. The report said that *"If traditional knowledge is to be recognized and protected by providing a framework within which customary laws, as they relate to traditional knowledge, can operate it maybe in the best interests of indigenous peoples to leave the term undefined"*. By leaving it undefined the content of the term was not fixed which allowed it to adjust and adapt to dynamic customary legal systems and the novel aspects of TK. To address the possible uncertainty which could result because of the absence of a definition the Rapporteur had pointed out that Article 31 of the UN Declaration on the Rights of Indigenous Peoples could provide considerable guidance. Another issue was the need for a clear understanding of what exactly was being asked for when there was a call for a *sui generis* system of protection and what was the nature of a *sui generis* system that would work for indigenous peoples. It had been noted that proposals for developing such a system of protection was (1) an indication of the inadequacies of the dominant IPR regime to provide protection of TK and TCEs as well as GR. This was a challenge for the IP system to *"adapt itself in unique ways in order to properly address the misappropriation and misuse of indigenous traditional knowledge"*; (2) a result of the unique nature of indigenous peoples, their culture, knowledge and law. There was a need for a unique system of protection that was not bound by current systems and structures of international law; and (3) indicated that indigenous legal systems were of their own kind and, as customary systems, beard little resemblance to western legal systems of common law, civil law and international law. Because of this, a unique way of protecting indigenous TK was needed that was grounded in indigenous legal systems. The third issue was the intended benefits of the study and the intended beneficiaries. Much of the focus of the work had been in protecting indigenous peoples from misappropriation and misuse of TK without their free, prior and informed consent. The continuing misappropriation and misuse was an indication of the commercial value of TK. The need to protect TK was inextricably linked to the right to own and control it which provided indigenous peoples opportunities to utilize such a valuable resource. The

ability to protect secret and sacred aspects of TK was an important element to consider. If indigenous peoples choose to use their TK to engage with local, national, international economies in a commercially viable manner, then they should be provided the tools and instruments to do this to their own benefit. The report had an extensive discussion of customary law. First, it reiterated that with the very nature of customary law and TK, the indigenous community was the central component in these issues. Generally, it was the indigenous community collectively, as distinct from the individual that owned TK. The report also looked into the relationships between the national, regional and international fora as far as the rights of indigenous peoples were recognized and protected. While national law was key in the protection of TK the role of international standards to guide domestic implementation was still needed. The regional dimensions were also important because indigenous communities were not necessarily located within national borders. Indigenous customary systems might cross borders. There was a tension between uniformity and the recognition of the diversity of customary laws and indigenous TK. If uniformity was given premium over the protection of diversity, this might be to the detriment of recognition of customary law and the dynamic development of customary law. The report said that any attempt to codify indigenous customary law at the international level was artificial. This could lead to a trap where customary law got straitjacketed making it inflexible. On the other hand, if diversity was prioritized over uniformity, a complex legal web would be created which might result in varying levels of protection. The role of international law in providing guidance to both national and regional processes was still important because otherwise protection might end up being ad-hoc. The report had identified some areas where work was needed and these included the necessity to identify existing systems, activities and resources and all works in progress across the UN system, other intergovernmental bodies and independent entities. This would help avoid unnecessary duplication and improve coordination. Assessments of these different processes and activities should be done to establish assumptions underpinning these and to see whether the question and potential solutions were located only within the framework of IP law, had represented customary law and were ensuring indigenous peoples' effective participation. The relationship between the PF study and subsequent actions which would be taken should be mindful of other processes, such as the Committee, and identify areas of complementation and potential conflicts. Another issue which the future study could deal with was what mechanisms should be established to handle disputes over interpretation of indigenous TK. If WIPO for instance came up with legally binding instruments for the protection of TK and TCEs the question of who interprets the law was important. If the power to interpret a legal regime and the power to interpret customary laws fell into the hands of those who did not understand indigenous worldviews and systems, this could be disastrous. The Issues Paper of WIPO on "*Customary Law and the Intellectual Property System in the Protection of Traditional Expressions and Traditional Knowledge*" had addressed several of the questions posed in the PF report. The Rapporteur might use it to inform the work he would do for the next study. After studying what was happening in the various processes and bodies of the UN, it could only be concluded that maybe the most realistic path to take was to allow the various processes to proceed with their own work according to their own mandates. There was no central body which could take on the responsibility to develop an all-encompassing instrument which covered TK, TCEs and GR not only within the IP framework but even beyond. For the Committee whose mandate was to promote IP Law and to protect TK, TCEs and GR within the IP framework, it should continue what it was doing with the participation of indigenous representatives. However, the coordination with other UN bodies, especially UNESCO, CBD, FAO, etc. should be enhanced so that sharing of experiences and complementation would be improved. This point had been reiterated in the various documents of the Committee. The UN Declaration on the Rights of Indigenous Peoples should already serve as

the guiding document for the development and implementation of various instruments protecting TK and TCEs. At this eleventh session of the Committee and judging by the documentation alone, certainly a long way had been come. Looking at how the debate was going, however, it seemed that no consensus could be reached yet in relation to the establishment of legally binding international instruments to regulate and stop the misappropriation and misuse of TK and TCEs. The African Group and most states in the GRULAC and the Asia group supported the establishment of these instruments. Most indigenous representatives participating in this process also supported this proposal. The documentation regarding experiences at the national and regional levels was very extensive already. These could enable the Committee to work with more confidence towards the goal of coming up with international instruments and mechanisms which could control misappropriation and misuse and complement the efforts from other bodies to safeguard and promote TK and TCEs. From the comments compiled one could see that there was great support for most of what had been put in the Draft Policy Objectives and Guidelines. UNPFII supported some of the suggestions in terms of improvements, such as being more firm on the importance of respecting the rights of TK holders. UNPFII was aware of the work that UNESCO was doing in relation to its Convention for the Safeguarding of the Intangible Cultural Heritage. The Permanent Forum was closely monitoring the activities of the CBD particularly, the Working Group on Article 8(j) and the Working Group on ABS. The quality and extent of indigenous peoples' participation in the various fora was very uneven. The representative raised some additional points which had to be considered in the future work. One was the issue of ownership. It had to be strongly affirmed that the rights-holders of TK and TCEs rested with the creators and practitioners of these which were mainly indigenous peoples and local communities. They were the rights-holders. UNPFII strongly supported the position of the Saami Council in section (f) of the General Guiding principles of the Protection of TK that stated sovereignty over genetic and other natural resources did not preclude the sovereign rights of indigenous peoples to their natural resources. The failure to recognize this would lead to non-support of indigenous peoples of any legally binding international instrument. UNPFII also supported the Saami Council's view that paragraph (h) suggesting that indigenous peoples' customary laws should be recognized only subject to national legislation be removed. This was the subject of the study being done by the Forum and if within WIPO indigenous customary law over TK, TCEs and GR could not be represented, then there should be another body which should deal with this issue. UNPFII appreciated the results of the workshop in Bandung but regretted that there was no mention at all of indigenous peoples and local communities. Any discussion, guideline, principles or instruments which talked of TCEs and TK without any reference to the rights of indigenous peoples and local communities would not gain any support from indigenous peoples. There had to be more discussions on the issue of indigenous customary law and the protection of rights to TK, TCEs and GR as far as these affected indigenous peoples. It might be a good idea for WIPO to consider hosting an international workshop on this. The Expert Paper from the Forum and the relevant documents of the Committee could provide the initial ideas to be discussed. This could be the implementation of the recommendation of the Forum's sessions, in particular, the one from the first session mentioned above. The Permanent Forum would work in close collaboration with WIPO if it decided to undertake such a workshop. The adoption of the UN Declaration on the Rights of Indigenous Peoples was before the GA 61<sup>st</sup> session which would be concluding in less than three months. Indigenous peoples and the 67 co-sponsored Member States were working hard to ensure that when it came to a vote, the votes in favor of adoption would prevail. The representative once again appealed to the states here, who were also members of the GA of the UN to vote for the adoption of this Declaration. Such an instrument would facilitate the various processes of developing other instruments pertaining to indigenous peoples' rights on various issues, such as TK and TCEs.

The representative thanked for this opportunity to speak before this body and thanked the indigenous representatives who had been engaged with this process and had represented the views of their own communities and organizations. He looked forward to receiving the results of this session.

51. The Delegation of Botswana associate itself firmly with the statement delivered by the Delegation of Algeria on behalf of the African Group. It acknowledged the progress that had been made thus far by the Committee and believed that the current session would build on that progress towards tangible recommendations to be made to the GA later this year. The Delegation expressed its continued interest, participation in, and support for ongoing efforts towards the conclusion of this work. It continued to take a keen interest in these negotiations towards effective protection of TK, TCEs and GR. The Delegation believed that the protection of TK, TCE and GR was essential, particularly at the international level. This should help in the prevention of the misappropriation of TK, TCE and GR. This would assist countries and communities derive positive and tangible benefits arising out of the relevant IP system, in order to effectively participate in the global economy, as well as help develop the same communities and peoples endowed with that wealth of knowledge and resources. Botswana continued to assess its existing domestic legislation, with a view to adapting it to emerging fresh demands in this regard. The Delegation recognized the efforts in this regard at the regional level, through ARIPO and OAPI. The Delegation was cautiously optimistic that this session would find a way to effectively address the substantive issues in this negotiation, particularly guided by the questionnaire issues at the last session. The Delegation was hopeful that the Committee would not delve extensively on aspects of concept definition, which it believed had been belabored at previous sessions. The onus was on the Committee to move the process forward, and report positive progress to the GA of WIPO later this year. The Delegation remained seized of the matter, and undertook to engage constructively with other members during this session and in future, towards a fruitful and desired outcome.

52. The Delegation of Yemen expressed the hope that the meeting would be successful in reaching the desired objectives and agree on a common denominator that secured the interests of all stakeholders in the form of consensual and balanced language for definitions and norms of protection for genetic resources, TK and folklore, that would be acceptable to all countries. It was noted that Yemen intended to host a regional seminar genetic resources, TK and folklore at the end of the year.

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

### *Indigenous panel presentations*

53. In accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63), the eleventh session was immediately preceded by a half-day panel presentations, chaired by a representative from a local or indigenous community: the panel was chaired by Mr. Greg Younging, representative of Creators' Rights Alliance (CRA), and presentations were made according to the program (WIPO/GRTKF/IC/11/INF/5). At the invitation of the Chair, the Chair of the panel submitted the following report of the panel's proceedings to the Committee:

“The Indigenous Panel on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held its introductory meeting with the participation of eight indigenous experts from different geographical regions of the world:



Mr. Greg Younging from Canada; Ms. Patricia Adjei from Australia; Ms. Lucia Fernanda Inácio Belfort from Brazil; Ms. Anastasia Chukhman, from the Russian Federation; Ms. Jennifer Dickson, from Canada; Ms. Violet Ford, from Canada; Mrs. Chuluunchimeg Luvsandagva, from Mongolia, Mr. John Ole Tingoi, from Kenya.

Ms. Patricia Adjei spoke of the grass-root work done by the Arts Law Center. She said that in Australia TK and TCE's were inseparable and not well protected by western law. They should be better protected by the adaptation of protocols and contract law. She gave examples of how in the Burrup peninsula rock paintings had been destroyed or under threat from development and had recently been added to the national heritage list. She spoke of cultural harm being recognized in case studies of individual aboriginal artists and draft legislation of indigenous communal moral rights being considered under Australian copyright law. She also supported the development of sui generis legislation at national and international levels and the need for prior informed consent to be included in an international treaty developed by WIPO in consultation with indigenous communities.

Ms. Lucia Fernanda Inácio Belfort spoke about the wide diversity of indigenous peoples and knowledge systems which comprise some seven hundred cultural universes in Brazil. She said the UNESCO concept of cultural and material heritage which TK is part of was problematic and emphasized that cultural heritage is inherited from indigenous ancestors. She emphasized how TK was collective and could not be separated from indigenous identity. She said that when TK is taken out from its indigenous context it falls into the public domain where there is no control of access. She said that collective rights were important and that intellectual property legislation in Brazil could protect TK but was not implemented well. She said that many existing mechanisms such as UNESCO/WIPO instruments were not linked and were largely unknown to indigenous communities who were not consulted in making improvements to those legal frameworks. She spoke of how the CBD Bonn guidelines and the binding ILO Convention 169 had recognized indigenous peoples as rights holders for years and that the development of new law on ABS (Access and Benefit Sharing) was under consideration in Brazil. She mentioned the importance of capacity building for indigenous people and the need to train indigenous experts.

Ms. Anastasia Chukhman spoke of the population of twenty thousand indigenous people comprising forty plus groups of indigenous groups in Russia that are divided into two administrative areas. She emphasized the importance of the vast amount of TK related to fishing and indigenous people's initiative to provide education courses to teach young indigenous people's TK on fishing. She said the main problem was the lack of legal protection for TK which was in danger if not protected and passed on. She also spoke of the development of TK workshops for non-indigenous people who might have limited access to fishes and other resources in indigenous territories.

Ms. Jennifer Dickson outlined the Pauktuutit Inuit Women of Canada project, the objective of which was to build Inuit women's community capacity to protect and market clothing designs and motives. She noted that although this aspect of Inuit traditional cultural heritage had regional distinctions and was an expression of identity, it had been considered to be public domain and appropriated by outsiders. She spoke of various workshops held in Inuit communities to discuss IP issues and raise awareness among Inuit women on WIPO, CBD and other UN forums. She told

the delegates that the workshop manual was available in English and Spanish and had been used by indigenous women in Latin American communities. She said the project had concluded that IPR's were often confusing to Inuit and not sufficient to protect TK and obtain prior informed consent and/or contract in the access and use of TK. She also said that Inuit clothing makers were considering forming an association and establishing a protective trademark. She concluded that additional funding was needed for further research on the problems with IPR's for Inuit and to develop ways so that Inuit could benefit financially from TK, as many of their communities had lost their traditional economies.

Ms. Violet Ford spoke of how the Inuit's Circumpolar Conference in Canada maintained that TK and TCE's are living knowledge and linked to identity, territory and environment. She stressed that Inuit traditional ecological knowledge was an objective and accurate reflection of the state of the environment and also a tool for managing environmental damages including climate change. She said customary law was the means for safeguarding TK and TCE's and providing prior informed consent under custodianship systems and that Inuit land claims also provided a base for applying customary law. She gave examples of Inuit governance and the Inuit knowledge policy. She also outlined case studies including the floe edge boat project as examples of appropriation of TK without benefiting Inuit communities. She stated that Inuit land claims enforced prior informed consent and were in conflict with patent law in Canada. She concluded that IGC future work must reflect indigenous frameworks.

Mrs. Chuluunchimeg Luvsandagva stated that there was a wide variety of TCE's in Mongolia that represent the specificities, the essence and resources of indigenous peoples. She noted that a Mongolian musical instrument had recently been put on a UNESCO list of cultural heritage. She said that Mongolia had no specific protection for TCE's but that a new law of 2006 provided for protection of rights for performers of folklore. She also told delegates that the IP office in Mongolia had played an active role in managing TCE's which it sees as important and had been involved in developing a database of TCE's.

Mr. John Ole Tingoi told the delegates that the Maasai peoples represented 10 per cent of the population of northern Kenya. He said the Maasai culture had been used to promote Kenya's tourism industry, as it was appropriated and used to market products. The name "Maasai" has been used for products unrelated to the Maasai community, noting that all this occurred without prior informed consent. He said that TK and TCE's were inseparable and a gift from the Creator to Maasai ancestors, which is held mostly by elders. He then outlined a case study where successful Maasai community initiatives led to skills development, local economic development and culturally appropriate tourism. He informed the delegates that Kenya's Office of the Attorney General had set up a task force on TCE's and TK and he outlined also a project developed in partnership with WIPO and Maasai people which resulted in a handbook of guidelines on the use of Maasai culture and the Maasai name. He also said that there was interest in developing a Maasai trademark.

The report concludes with some brief comments made by the Chair of the indigenous panel on the possible expansion of the format, based on informal discussions with the WIPO Secretariat and some of the indigenous NGOs. Up until now the panel format has been to have indigenous representatives report from their regions on issues around

a theme and/or a number of questions. At this point this format could be opened up and be more flexible to include such elements as the following: a focus on a specific program or project; a feature of indigenous art forum, artists or group of artists; clips of indigenous performances or short films; a focus on indigenous/state government partnership, indigenous/WIPO partnership or on one of the WIPO research initiatives. It may also be possible for the informal indigenous caucus and the indigenous NGOs to remove some of the burden off the Secretariat and take on an increased role for the panel which could start with providing the Secretariat with a list of potential speakers and other ideas.”

*Voluntary Fund for accredited indigenous and local communities*

54. The Chair recalled that the Committee had taken many steps to enhance the participation of indigenous and local communities in its work, including the panel of indigenous and local representatives. One important development in that sense was the decision by the General Assembly in its 32<sup>nd</sup> session to create a Voluntary Fund to support the participation of accredited indigenous and local communities’ representatives. That decision was based on the recommendation made by the Committee developed in the course of eight previous sessions of the Committee. This Fund has now been formally established in line with the General Assembly decision and is now successfully in operation. The Chair informed the Committee about the generous contributions that had been made by Governments and NGO’s, such as the Swedish International Biodiversity Programme (SwedBio/CBM), the Government of France, the Christensen Fund and the Government of Switzerland. Those donors gave a generous contribution to the Fund and ensured that the Fund could immediately operate for the benefit of holders of TK and TCE’s. The Chair added that the Government of South Africa and the Government of Norway had made generous pledges. The Chair warmly thanked those generous donors for their valuable show of support. The contributions have enabled the Fund to provide support for 16 eligible applicants recommended by the Advisory Board and this is expected to continue. The Chair drew the attention of the Committee to the fact that the recommendations on funding are not taken by WIPO or by the Secretariat, but by an independent Advisory Board whose members serve in an individual capacity. The Chair added that those members were appointed by the Committee on the proposal of its Chair and that the membership of the Advisory Board was required to be reappointed at each session of the Committee, past members being eligible though.

55. The Secretariat introduced document WIPO/GRTKF/IC/11/INF/4, adding to the Chair’s presentation that the mentioned document was a periodical information report that is required by the rules of the Fund, one of the principle being complete transparency on its operation. The document gave details of the funds received, the current balance in the Fund’s bank account and the allocation of fund to support the recommended representatives. The Secretariat highlighted the very generous level of funding in the account of the Fund. Based on current projection depending on the recommendations of the Advisory Board, the Secretariat pointed out that there was ample funding for all applications that had been received for future sessions of the Committee. The Secretariat introduced document WIPO/GRTKF/IC/11/3 that provided a little more background on the development in the operation of the Fund and recorded the decision that the Committee might have to make, firstly to take note of the implementation of the Fund so far. The Committee might wish to welcome the contributions and pledges made for the fund and would have to elect the members of the Advisory Board for the present session, as the Chair pointed out. Finally, the

Committee might encourage further contributions to the Fund and potential applicants to apply for support from the Fund.

56. The Delegation of Switzerland recalled that it had actively and constructively supported the work of the Committee since its creation in 2000. It was crucial that indigenous and local communities, as one of the main stakeholders involved, could directly participate in the meetings of the Committee and provide substantive input to its discussions. In light of this, the WIPO Member States set up a Voluntary Contribution Fund for Accredited Indigenous and Local Communities in October 2005, in order to facilitate the participation of indigenous representatives in the work of the Committee. The Delegation of Switzerland was pleased to announce that the Swiss Federal Institute of Intellectual Property provided the WIPO Voluntary Fund with a payment of 150,000 Swiss francs. This payment was made prior to the present session of the Committee, with the view to support the participation of indigenous representatives in its 12<sup>th</sup> session. The Delegation of Switzerland was confident that its donation to the WIPO Voluntary Fund would further facilitate the important participation of representatives of indigenous and local communities in the discussions of the Committee.

57. The representative of Hokotehi Moriori Trust expressed appreciation to the Secretariat of WIPO for the wonderful performance of Mongolian Folk Music and Dance on July 3, 2007. On the issue of the Voluntary Fund, he thanked the contributors to the Fund, SwedBio/CBM Programme, the Christensen Fund, the Government of France and the Government of Switzerland. He considered as encouraging that the Government of South Africa and the Government of Norway had agreed to make pledges. He took note of the fact that there were sufficient funds available for assisting indigenous and local communities' participation. However, he urged other Member States, particularly those who had indigenous populations on their soil, to seriously consider making a contribution for the Fund in order to ensure that indigenous peoples from the respective countries and nations could attend and fully participate in the work of the Committee.

58. The Delegation of Ukraine informed the Committee that the regional group of countries from Eastern Europe, Central Asia and Caucasus nominated Mrs. Larisa Simonova, Deputy Director, International Cooperation Department, Federal Service for Intellectual Property, Patents and Trademarks (ROSPATENT), Moscow, Russian Federation, as a candidate for the election of the membership of the Voluntary Fund Advisory Board.

59. The representative of the Ogiek Peoples Development Program (OPDP) announced that the indigenous caucus met in on July 4, 2007 in the morning and proposed three candidates for the election of the membership of the Voluntary Fund Advisory Board: from Africa, Mr. Musa Usman Ndamba, representative of the Mbororo Social Cultural Development Association (MBOSCUDA), from Latin America, Mr. Estebancio Castro Diaz, representative of the International Indian Treaty Council, and from the Russian Federation, Mrs. Anastasia Chukhman, representative of the Russian Association of Indigenous Peoples of the North (RAIPON).

60. The representative of Indian Movement *Tupaj Amaru* recalled that he had been fighting to obtain the Voluntary Fund here in WIPO in order to increase the participation of indigenous peoples in the work of the Committee. He requested more transparency in terms of appointing the membership of the Advisory Board and drew the attention of the Committee to the fact that he had not been invited to those proceedings. He spelled out those criteria which should be handled in recommending the application for funding. Candidates should be able to represent the indigenous beneficiaries, contribute to the debates, and reflect

geographical balance. He was struck by the appointment of the Advisory Board and said that there were contradictions. He recalled in that regard that the African group proposed a decision in the third Committee of the UN General Assembly to block the draft Declaration on the Rights of Indigenous Peoples and in particular on intellectual property rights. He stated that the African Group was of the view that African peoples are all indigenous and that was no need to go beyond that. The representative of the Indian Movement *Tupaj Amaru* added that there were groups and Delegations of Governments in WIPO responsible for defining whether or not organizations are indigenous or not. That seemed to him contradictory. He also pointed out in a spirit of transparency that the Governments who voted against the Declaration on the Rights of Indigenous Peoples are those who are members of the Advisory Board. He asked how they could be advising in that sense. He noted that there were other mechanisms for minorities in the UN and that the Committee should not be used just to gain a bursary. He said that for the thirty years he had been working in promoting human rights in the UN, he had never asked and never received any bursary to represent indigenous peoples. He said that he had come to the Committee directly from Peru and Bolivia, after a long journey, visiting indigenous and local communities in order to know about them and hear their knowledge. He produced a document from indigenous ancients in Bolivia which described how they transmitted their knowledge from a generation to another. He added in a spirit of full transparency that he had been consulting with indigenous communities in order to get this information, in particular with the descendants of the Incas, the Mayas and the Aztecs.

61. The representative of the Health and Environment Program said that her organization is a non-governmental organization working on health and environmental issues for people in Cameroon, in particular the most vulnerable groups who face epidemics, such as HIV/AIDS and malaria. She thanked all the members of the Advisory Board and the Secretariat who allowed one of its members to come from Cameroon to Geneva. Referring to the Advisory Board membership, she said that it was unfair to choose an African caucus at this session, since all NGOs were not necessarily present in Geneva of the eleventh session. She added that she had not been consulted during the indigenous caucus meeting which took place on July 4, 2007 in the morning without her knowledge. She deplored that situation. She wished the Advisory Board to be made up only of decision makers and not to include any of those who could benefit, because that would not be fair. She also thought that it is not up to the indigenous peoples to choose among themselves the people who should benefit or to choose who should take decisions on behalf of all the others.

62. The Delegation of New Zealand referred to the nominations for membership of the Advisory Board and recalled that nominations were conducted according to regional groupings. For this purpose, she noted that New Zealand is part of group B, a grouping of developed countries that nominated France at the last session of the Committee, given that it had made a substantial contribution to the Voluntary Fund. At the last session of the Committee, the Delegation of New Zealand expressed concerns that there was very little opportunity for representation of Pacific Member States on the Advisory Board, and in the Committee more generally, given that Pacific members were part of the Asia-Pacific regional grouping. Papua New Guinea was the only Pacific State present at the meeting. The Delegation of New Zealand was hoping to nominate Mr. Jacob Simet, delegate of Papua New Guinea, to be a member of the Advisory Board; however there was no mechanism for Group B to make such nomination. The Delegation of New Zealand recalled that after discussions with the Secretariat, it made an intervention urging the Committee to consider the contribution that Pacific peoples had made to the consideration of intellectual property and TK issues and the contribution they might make in the future. It asked the Committee to take

steps to ensure the effective participation of the Pacific peoples in the work and sub-groupings of the Committee. It said that the key purpose of its intervention was to highlight the need for greater participation of Member States at WIPO and in the Committee and to reiterate its previous statement. It expressed the hope to see progress in terms of making the proper adjustments for this participation to occur.

63. The Delegation of the Republic of Korea said that regarding the concerns just raised by the Delegation of New Zealand, the Asian group had not yet decided on who should be nominated on the Advisory Board on its behalf. It added that the candidate from Papua New Guinea could be considered by the group and that it would proceed with consultations in that regard in the course of the day.

64. The Delegation of Nigeria commented on a previous intervention made by the representative of Indian Movement *Tupaj Amaru* in order to correct the impression that the African group of the third Committee of the UN General Assembly had taken a position against the draft Declaration on the Rights of Indigenous Peoples. The African Group might be very right in saying that all Africans were indigenous peoples, because one could trace the history of every African back to a definite origin and a certain place. But it added that being indigenous did not mean being against a decision that would help indigenous people. The African group was not against the Declaration, otherwise the Declaration could not have survived the hostility of a regional grouping made up of fifty four countries.

65. The representative of the Mbororo Social Cultural Development Association (MBOSCUDA) referred to the concerns raised by some of the representatives of indigenous organizations related to the decision process within the indigenous organizations. He recalled that the indigenous organizations met twice, on July 3 and on July 4 in the morning, as it was previously announced. He said that the indigenous organizations had some time left for reconsidering the question and reaching a consensus on the nominees for the membership of the Advisory Board.

66. The representative of the Ogiek Peoples Development Program (OPDP) responded to the Delegation of Nigeria which stated that all Africans were indigenous. He said that it was not true. One was indigenous because of the practice, because of the culture, because of the minority status, because of the uniqueness of the language. Indigenous peoples are indigenous because of their specific situation forced upon them by governments or any other party. TK was rooted in local indigenous peoples, but it had been used and applied by governments long time ago, even before the invasion of Africa. Indigenous peoples requested international instruments in order to protect that TK. There were not against their governments but asked their specific way of life be recognized by them and their TK to be protected from extinction, patenting or copyright.

67. The Delegation of Nigeria wished to make clear that in Nigeria alone there were more than four hundred and fifty ethnic groups. One would not walk more than five kilometres before he or she met a very distinct group that did not speak the same language. It added that the only thing people in Africa would have in common from that perspective would be the colour of the skin. It agreed to say that the status of a group being indigenous or not is not a matter of debate, since it would not lead to any conclusion. What was important was to encourage indigenous peoples, no matter they were from Nigeria or from the Pacific or from any other part of the world.

*Decision on Agenda Item 6:  
Participation of Indigenous and Local Communities: Voluntary Fund*

68. The Committee (i) took note of the implementation of the WIPO Voluntary Fund for Accredited Local and Indigenous Communities; (ii) welcomed the pledges and contributions received; and (iii) encouraged its members and all interested public or private entities to pledge or to contribute to the Voluntary Fund.

69. The Chair proposed, and the Committee elected by acclaim, the following eight members of the Advisory Board to serve in an individual capacity: as members of delegations of WIPO Member States: Ms. Susanna Chung, Second Secretary, Permanent Mission of South Africa, Geneva; Mr. Michael Epoko, Senior Planner, National Cultural Commission, Port Moresby, Papua New Guinea; Mrs. Marie Kraus-Wollheim, Legal Advisor, Swiss Federal Institute of Intellectual Property, Bern, Switzerland; Mr. Alejandro Neyra, First Secretary, Permanent Mission of Peru, Geneva; Mrs. Larisa Simonova, Deputy Director, International Cooperation Department, Federal Service for Intellectual Property, Patents and Trademarks (ROSPATENT), Moscow, Russian Federation; as members of accredited observers representing indigenous and local communities or other customary holders or custodians of TK or TCEs: Mr. Estebancio Castro Diaz, representative of the International Indian Treaty Council; Ms. Anastasia Chukhman, representative of the Russian Association of Indigenous Peoples of the North (RAIPON); Mr. Musa Usman Ndamba, representative of the Mbororo Social Cultural Development Association (MBOSCUDA). The Chair nominated Mr. Abdellah Ouadrhiri, Deputy Chair of the Committee, to serve as deputy Chair of the Advisory Board.

AGENDA ITEM 7: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

70. The Chair introduced documents WIPO/GRTKF/IC/11/4 (a), WIPO/GRTKF/IC/11/4 (a) Add., WIPO/GRTKF/IC/11/4 (b), WIPO/GRTKF/IC/11/4 (c), and WIPO/GRTKF/IC/11/6.

These documents were summarized in WIPO/GRTKF/IC/11/INF/2 as follows :

WIPO/GRTKF/IC/11/4(a): a collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a commentary process agreed by the Committee at its tenth session (the List of Issues is provided as Annex I of the present report);

WIPO/GRTKF/IC/11/4(b): a compilation of comments on the draft Objectives and Principles, written comments provided between the ninth and tenth sessions, in line with a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

WIPO/GRTKF/IC/11/4(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth and tenth sessions, but provided for ease of reference to assist in the reading of the present set of comments.

WIPO/GRTKF/IC/11/6 : provides background information on technical or practical aspects of these questions :

(i) *what* should be the *content* of the outcome – the question of substance, or what subject matter, focus and level of detail should the outcome have (including the substantial element of its international dimension);

(ii) *what* should be the *nature, format or status* of the outcome – the question of what the format or nature of an outcome should have, and what legal or political status and legal, political or ethical implication should the outcome have, including any international legal implications;

(iii) *how* should the Committee work towards the outcome – the question of what procedures or processes, and what forms of consultation, would help lead to understanding on the content and status of any proposed outcome; and what timelines or interim steps should apply.

It reviews the possible approaches concerning the format or status of an outcome as including: a binding international instrument or instruments; a non-binding statement or recommendation; guidelines or model provisions; authoritative or persuasive interpretations of existing legal instruments; and an international political declaration espousing core principles and establishing the needs and expectations of TCE/TK holders as a political priority.

71. The Delegation of Kyrgyzstan stated that folklore as artistic heritage occupied a special place in non-material and material cultural heritage. Its protection, together with the protection of genetic resources and TK, had been the subject of enormous attention by UNESCO and WIPO for many years. In that regard, the Kyrgyzstan had prepared a draft Law on the Preservation and Legal Protection of the National Folklore of the Republic of Kyrgyzstan, which was in the process of being updated and approved. In the country, the need had arisen to adopt measures to protect folklore. Globalization was leading to the commercialization of folklore subject matter on a worldwide scale, since the forms of use of that part of the cultural heritage had been expanded, and the technological revolution had led to broader possibilities for disseminating the cultural traditions of various peoples. With the aid of modern digital technologies, works of national folklore were subject to commercial use at the global level, without due observance to the cultural and economic interests of the peoples creating them. However, the unlawful use of folklore was only one aspect of the problem relating to folklore protection. The other was related to the expropriation of folklore, its assimilation in order to create another ethnicity, distortions of use, and the absence of information on ownership. In the context of increased attention on the part of the international community to the protection and preservation of folklore, and in addition to the absence of a relevant international instrument designed to regulate the relations in question, a number of countries were rushing, by all accessible means, to fix and disseminate, as their own national folklore, the traditions and customs and cultural heritage of other States. Moreover, as the cultural property of a particular people, folklore was an instrument of its cultural self-expression, general human value and the property of universal culture. Works of national culture constituted spiritual and material values. Heritage in the form of literary, musical and artistic works was the pride of any ethnicity. A striking example of such a work was the Kyrgyz national epic “*Manas*”, a unique model of national creation, handed down from generation to generation, and also the art of national storytellers “*akyns*”, which had been included in a UNESCO list of 28 masterpieces of oral and non-material art. Material



works of national creation were widely known and much loved. For centuries, the national masters had honed their knowledge in order to create original objects from different kinds of materials which even today had not lost their value and originality. The Delegation explained that the draft Law contained provisions on the preservation, legal protection and defense of national folklore, which were implemented on the basis of special legislation, similar to IP legislation. Likewise, expressions of national folklore were defined as a non-traditional form of IP. As a manifestation of individual or collective intellectual creation, folklore deserved legal protection no less than works of intellectual creation. Such folklore protection was essential as a means of allowing this form of the heritage, both inside the country and beyond its borders, to develop, guarantee continuity and be more widely disseminated. The Republic of Kyrgyzstan was striving to adhere to the following policy regarding the legal protection of expressions of folklore: creating a legislative base guaranteeing the preservation of such expressions; creating the conditions for international cooperation with the aim of ensuring legal protection for expressions of folklore belonging to the Kyrgyz people on the territory of other States; and, popularizing the importance of folklore as an element of cultural originality. In conclusion, the Delegation thanked the Committee for the major work that had been done in this area and also for the opportunity to exchange opinions and discuss subjects of interest to all.

72. The Delegation of Algeria, speaking on behalf of the African Group, enquired as to the methodology to be followed by the Committee in discussing this agenda item.

73. The Chair stated that he proposed that each item be discussed, one at a time, in numerical order.

74. The Delegation of Algeria, speaking on behalf of the African Group, stated that it had not yet been possible to read fully all the documents prepared. It was suggested that the plenary be suspended to allow regional groups to meet to discuss the issues in an effort to streamline the proposals to allow the groups to come up with a few proposals on each issue.

75. The Delegation of Portugal, speaking on behalf of the European Community and its Member States, welcomed the opportunity to continue sharing information and ideas on the subject of TCEs. The Delegation was keen on continuing the constructive work of the Committee in a spirit of open and responsible collaboration and building upon what had already been achieved. The WIPO Secretariat was thanked for having once again prepared extensive and useful documents for the meeting. These documents included some general comments submitted by the European Community and its Member States. The Delegation would, however, have further observations to make during the session. The Delegation reiterated that at this stage it was felt that discussions should concentrate on the policy objectives and general guiding principles, on which there was not yet consensus. Moreover, national experience on the protection of TCEs would be very valuable. In this regard, those States seeking protection of TCEs were encouraged to continue working to develop national solutions and to share these with the Committee.

76. The Delegation of South Africa supported the proposal made by Algeria on behalf of the African Group. It was assumed that the various responses made to the List of Issues had been studied before the session. It was, therefore, not useful to repeat the responses in the plenary. Supporting the African Group's proposal, it was suggested that a regional approach would be the most effective way to discuss the issues. It was already clear what the relevant objectives and general principles were, it was now necessary to discuss the substance of the protection with a view to narrowing down the issues and identifying the key issues.

77. The Chair thanked the African Group and South Africa for their suggestions. The Chair stated that he proposed to combine plenary sessions with regional meetings and that he would consult with the regional coordinators towards establishing an appropriate working methodology.

78. The Delegation of the United States of America stated that the methodology for the current session had been decided upon at the previous session. The Delegation was prepared to have a full debate on the List of Issues. The Delegation would not repeat the responses it had already provided in writing, but was ready to build on those comments taking into account the comments made by other delegations which it had studied.

79. The Delegation of New Zealand agreed with the statements made by Algeria on behalf of the African Group and by South Africa but also with the statement of the United States of America. The Delegation added that on the issue of the policy objectives and guiding principles, it agreed that there seemed to be some common understanding of the definitions of those and what they meant from a theoretical perspective. A next step would be to look at the policy objectives and guiding principles and assess the practical implications in terms of how one would go about considering structures and mechanisms to see these objectives and principles fulfilled. In that light, the key issues that had emerged from the 10<sup>th</sup> session of the Committee were a very positive step, which allowed the Committee to dwell deeper into the practical implications for both Member States but also for indigenous and local communities and other stakeholders in the private sectors, both internationally and domestically. The Delegation also supported the comment that one should not narrow the scope of discussion prematurely but rather allow Member States who had taken the time to write comments to identify what their key or important issues were and it might be possible then to identify what were the common contentious issues that needed to be debated further and which ones were agreed to.

80. The Delegation of Japan supported the position of the Delegation of the United States of America. The Delegation recognized that the issue of TCEs was important for many Member States. However, Japan believed that the depth of understanding among the States on this issue was still insufficient for any kind of agreement at the international level. Therefore, as the first step to deepening understanding of the issues, the Delegation welcomed fundamental discussions based on the List of Issues. In discussing the List of Issues, it was useful to discuss fundamental issues, such as the definition or the content of certain terms. There were some issues that could not be resolved because these fundamental issues were still unclear. Even before attempting to finalize certain terminology, what was more problematic was the lack of common understanding as to what such words should mean. Arguing, however, that under these circumstances, it was impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of Member States was a failure to face up to the problem squarely. If discussions were to take place in regional groups, one could not reach a consensus because the differences of regional groups were so broad. Therefore, the List of Issues should be discussed in plenary and not in regional groups, the Delegation concluded.

81. The Delegation of Canada supported the positions adopted by the United States of America and Japan, and stated that discussions on the List of Issues should continue, in numerical order, in plenary. This was important because plenary discussions were accessible to all the observers as well.

82. The Delegation of Italy expressed support for the statements made by the Delegations of the United States of America, Japan and Canada.

83. The Delegation of Algeria, speaking on behalf of the African Group, clarified that it was not opposed to a discussion of the issues but was concerned that there would not be enough time to discuss all the issues with a view to presenting conclusions to the WIPO Assembly in September 2007. The proposal to discuss the issues first in the regional groups was aimed at consolidating proposals and identifying key issues to facilitate the plenary discussions.

84. The Chair recalled the decisions taken at the previous session that discussions on the List of Issues would commence in numerical order, and that it was not intended to prevent any delegations from expressing their positions with regard to the Issues. The Chair opened discussion on the first Issue, that is, the definition of TCE/EoF that should be protected.

*Issue one: definition of TCEs/EoF that should be protected*

85. The Delegation of Italy stated that the definition of TCEs should be covered by article 2 of the Berne Convention. However, not everything that came from local communities should necessarily be protected as folklore. For that which did not fall under article 2 of the Berne Convention, such as handicrafts and designs, these could be protected as marks or designs. In conclusion, a new definition was not necessary and it was sufficient to reuse the definition that was already in the Berne Convention.

86. The Delegation of Ethiopia was of the view that TCEs should to some extent be self-definitional, allowing the understanding of traditional or local communities of what constituted cultural expressions. This required the recognition of customary laws. The search for an acceptable definition should be informed by traditional and customary legal practices. Ethiopian cultural policy included the following under the rubric of culture: languages, heritage history, handicraft, fine arts, oral literature, traditional lore, beliefs, archeological findings (as expressions of the past), Ethiopia's alphabets, and other cultural features. Domestic legislation defined intangible cultural heritage, in Proclamation 209 in 2000, as any cultural heritage that could not be felt by hands but could be seen or heard and included different kinds of performances and shows, folklore, religious beliefs, wedding and mourning ceremonies, music, drama, literature and similar cultural values, traditions and customs of nations, nationalities and peoples.

87. The Delegation of Japan stated that the expression "traditional cultural expressions/expression of folklore" gave a rough idea of its general meaning, but from a legal perspective, the expression remained very vague. In WIPO/GRTKF/IC/6/3, paragraph 50 listed the common elements that appeared in definitions of TCEs/EoF in national laws of member States as follows: handed down from one generation to another, either orally or by imitation; reflect a community's cultural and social identity; consist of characteristic elements of a community's heritage; made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so; constantly evolving, developing and being recreated within the community. With regard to these common elements, there were the following problems and difficulties: (1) The range of the meaning of certain words and the scope of public domain. It was not clear how words such as "traditional", "handed down from one generation to another", "heritage" and "characteristic" were to be interpreted and applied. These words covered a wide spectrum. There were TCEs that were handed down only to certain individuals within a small community through strict rituals, and there were also TCEs in a wider sense, such as those

that had taken root as part of the national traditional culture of a country among its citizens in general, and were used by city dwellers and might be at times even be used commercially. Among these, the criteria that divided those that were protected from those that were not were unclear. Applying these words too loosely would bring about a fear of according IP protection to traditional culture in general. Such a consequence was not appropriate, as it would unfairly limit the public domain. On the other hand, if one were rigidly to interpret the meaning of these words and limit the scope of protection, it would be necessary to have a justifiable explanation as to why certain types of expressions were protected while others are not.

(2) Criteria to fall under public domain due to uses outside the community: It was understood that TCEs/EoF fell into the public domain once they had lost their link with a certain community. However, it was unclear what extent of uses outside the community would be sufficient to render a TCE/EoF public domain. Geographically, it was unclear how much the use should expand outside the community for a TCEs/EoF to be in the public domain. Time-wise, it was unclear as to how long the TCEs/EoF should be used by non-community members for it to fall in the public domain. It was inappropriate to deny public domain status to TCEs/EoF that had been used outside the community for centuries in the past, as this would lead to the denial of the fruit of cultural development through cultural exchange.

(3) Non-traditional cultural expressions: It was unclear why non-traditional cultural expressions that had fallen under the public domain should not be protected while TCEs were to be protected. WIPO/GRTKF/IC/5/3, paragraph 42(c), had listed examples such as works by Shakespeare, heritage of Greek, Egyptian and Roman cultures and had posed a question: “Should ‘traditional’ creations enjoy a privileged status vis-à-vis other public domain ‘non-traditional’ creations?” This question was still unanswered by the Committee.

(4) TCEs/EoF “that should be protected”: There was a view that the meaning of the expression TCEs/EoF could be made clear if requirements for protecting TCEs/EoF were clearly established, even if the meaning of the expression TCEs/EoF itself was vague. However, it should be noted that no consensus about “protection” had yet been reached. The following opinions about the List of Issues were just for the purpose of discussion and did not mean that Japan agreed to start discussing the listed issues for any other purpose than for clarifying issues. The criteria for “TCEs/EoF that should be protected” were inextricably linked with the criteria for judging what benefits society could enjoy through the protection of TCEs/EoF. Would the TCEs/EoF be made widely available to the public (as were patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or, would the maintenance of TCEs/EoF itself be regarded as serving the public interest? Taking into all these questions into account, discussions should focus on public interest and the return of benefits to the society. Without discussing such public interest, it would not be made clear if any protection was necessary or what should be protected. The subject matter of protection might vary by the form/level of protection. The level of protection required to ensure that TCEs/EoF were respected could cover a substantially wide range of cultural expressions. If the level of protection was that of granting an exclusive right, the scope of the subject matter would be greatly narrowed. In addition, levels such as granting a right to remuneration or providing government subsidies for its conservation were also conceivable. To clarify the expression “TCEs/EoF that should be protected,” a discussion about public interest, identification of existing problems, and practical needs for protection was indispensable, the Delegation concluded.

88. The Delegation of Canada believed there were two parts to defining protectable TCEs: first, developing an appropriate definition of TCEs, and second, determining the full scope of the protectable subject matter. Both represented a challenge given the complexity of the issues and the particularities of all Member States. The Delegation further believed that

achieving consensus on the objectives of protecting TCEs could help to define the subject matter that was to be protected and assist with terminological clarity.

89. The Delegation of Thailand stated that the draft description of TCEs/EoF in the draft objectives and principles was adequate, and that it would be very happy to go along with any consensus that could be achieved on this very fundamental question in order to pave the ground for future advancement of the work. However, cultural situations varied from region from region and from country to country, and even from community to community within each country. In this connection, the Delegation hoped that further development measures, particularly the sharing of best practices, capacity building and technical workshops, should be further promoted to allow the deepening and further clarification of this underlying concept. In addition, perhaps the concept of tangible and intangible cultural heritage should be linked or associated with the definition of TCEs.

90. The Delegation of Brazil reiterated its position that there was a need for an adequate and effective protection at the international level of TCEs/EoFs. Such protection could be pursued by mainly two kinds of measures or mechanisms. The first were defensive mechanisms which should be designed and implemented to prevent misappropriation of TCEs. Among those defensive mechanisms, Brazil wished to point out the role must be played by the twin principles of prior informed consent and access and benefit-sharing. Those twin principles were enshrined in the CBD. The second kind of measures would be positive measures or, more accurately, IP mechanisms. The Committee should also consider the adequacy of IP mechanisms to provide for the protection of TCEs. When it came to the definition of folklore, it was the opinion of Brazil that that definition, or the subject matter of protection, should cover all the elements belonging to the traditional cultural heritage of a community or a people. The concept or definition to be developed should take into consideration that TCEs/EoFs had a dynamic, evolving and iterative nature. That protection must not be in any way of contingent upon registration. That was something that the Delegation had been repeating in the Committee and it was of utmost relevance that the protection should be granted without conditioning it to registration. In conclusion, the Delegation believed that the definition proposed in Article 1 of the annex to WIPO/GRTKF/IC/10/4, represented an adequate basis to discuss this issue.

91. The Delegation of Kyrgyzstan stated that the draft legislation of Kyrgyzstan for TCEs/EoFs had a provision that TCEs were based on traditions and culture of a community, giving protection to this community for its TCEs, particularly in the area of handicraft and arts, taking into consideration social and cultural aspects which had an influence on arts, handicrafts, literature, music, dancing and festivities. In this legislation, the protection of folklore particularly took into consideration oral traditions.

92. The Delegation of Burkina Faso stated that its intervention was associated with the statements made on behalf of the African Group. The Delegation stated that the definition contained in Article 1 of WIPO/GRTKF/IC/11/4(c) provided a good basis for work and that there was no reason to be unduly worried about the absence of a precise definition of the concept TCEs. Firstly, in the copyright field, for example, the concept of author had never been defined by international instruments, but the absence of such definition had never prevented those instruments from working. Secondly, it was a mistake, as implied by certain delegations, to refer to the Berne Convention to find a definition of TCEs. However, it was necessary to look from the angle of artistic and literary creation for the material to protect as TCEs. That was what permitted a distinction to be made between TCEs and TK, which belonged to the other branch of intellectual creation, namely creations of a technical nature.

Finally, the Delegation said that there was good reason to change the wording of Article 1, paragraph (a), by adding the words “in particular” after the word “comprise”.

93. The Delegation of the Islamic Republic of Iran stated that the definition in the current text was generally acceptable and was a good base definition. However, it should not be considered to be an exclusive one. Second, due to the diversity of cultures, the definition might get different variations and nuances. Third, with respect to the tangible and intangible nature of TCEs, it was necessary to pay attention to mixed expressions which combined both tangible and intangible elements.

94. The Delegation of Indonesia was of the opinion that the definition of TCEs contained in the draft provisions in WIPO/GRTKF/11/4(c) was acceptable. Nevertheless, there was still one element that had not been included, which was related to theater. Therefore, it was proposed to add wording as follows to the definition: “theater, included, among other: puppet performance, and folk drama.” This wording could be inserted after the sub-paragraph (iii) of the definition.

95. The Delegation of the United States of America was pleased to participate in a sustained and robust discussion of TCEs/EoF, beginning with the fundamental issue of the definition of TCEs/EoF. Some delegations had suggested that Article 1 of the Annex to WIPO/GRTKF/IC/11/4 (c) would provide an “adequate basis” for a discussion of the definition of TCEs/EoF. In the view of the United States of America, the efforts of the Committee to define TCEs/EoF, while providing helpful background information, also embodied and illustrated the very challenges that the Committee had faced and continued to face in defining with precision TCEs/EoF. As would be recalled, this provision attempted to capture the richness and diversity of TCEs/EoF by canvassing the broad array of materials that might be regarded as “expressive” of a “traditional culture” or “traditional knowledge.” In this attempt, the subject matter of TCEs/EoF was said to consist of four broad categories of expressive materials, illustrated by more than 40 examples, which exhibited four characteristics. Into these four broad categories, materials as diverse as stories, songs, dances, vernacular architecture, and baskets – whether tangible or intangible – might fit provided that they “express, appear, or are manifest” a “traditional culture or knowledge.” In turn, to qualify as TCEs/EoF, the expressive materials must be: the products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural and social identity and cultural heritage; and, maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. This comprehensive approach to defining TCEs/EoF might prove, from time to time, helpful in the discussions. In particular, the United States of America noted that the general criteria may serve as helpful background as the discussion advances. Nonetheless, for the same reasons that have proved so frustrating to the Committee in the past, broadly worded definitions that, in turn, were based on vague, undefined concepts, as the Delegation of Japan had usefully pointed out, did not hold great promise in advancing our work. However satisfying such broad formulations might be in suggesting the vast scope, richness and diversity of TCEs/EoF, in the end, they might not serve the Committee well in its task of defining with greater precision the gaps in protection for TCEs/EoF. The United States of America recommended a more concrete, focused, fact-based approach to the work of the Committee. For example, the United States of America would appreciate learning more about, among other things, specific successful national and indigenous experiences in defining “traditional culture,” including: (i) temporal issues (for example, how many generations or years were required for expression to qualify as “traditional”); (ii) geographic issues (for example, how was protection accorded, if at all, for

widely diffused expressions); (iii) what criteria were used to determine whether the expressions, appearances, or manifestations of a traditional culture were “characteristic” of the “cultural or social identity” of a particular traditional culture; (iv) the many definitions of TCEs/EoF in use by Member States today. The United States of America would be interested in learning more about definitions of folklore used by other Member States in managing cultural heritage collections. For example, the United States of America had a useful working definition of folklore that was legislatively mandated in the American Folklife Preservation Act of 1976. While this definition had been very helpful in advancing the protection, promotion and preservation of folklore in the United States of America, it might not necessarily fit the needs of all other countries and communities. The United States of America would be very interested in exchanging similar definitions with other Member States. Finally, the Delegation agreed with the Delegation of Italy that it might be useful to consider existing definitions of folklore in other appropriate international agreements.

96. The Delegation of Mexico stated that TCEs meant all those primary or other expressions of a local community or indigenous people, which referred to the literary, artistic, technical or practical spheres, popular art or crafts, handed down from generation to generation in their own languages, uses and customs. These could be tangible or intangible, were closely related to TK, and either had or did not have an identifiable author. In this regard, consideration should be given to the definition of “intangible cultural heritage”, contained in Article 2 of the International Convention for the Safeguarding of the Intangible Cultural Heritage. In the light of the above and in accordance with the Federal Copyright Law of Mexico and the Regulations made under it, the TCEs that should be protected were: (i) verbal expressions such as stories, popular tales, legends, traditions, popular poetry and other similar expressions; (ii) musical expressions such as popular songs, rhythms and instrumental music; (iii) corporal expressions such as dances and rituals; (iv) tangible expressions such as works of popular art or traditional craft, and, in particular, pictorial works or drawings, wooden carvings, sculptures, pottery, terracotta, mosaics, cabinetmaking, ironware, jewelry, basket making, needlework, textiles, glassware or crystal, stonework, metalwork, leather goods, typical costumes, spinning, tapestries and the like, popular or traditional musical instruments, architecture specific to indigenous peoples or communities and any native expression that constituted a literary or artistic work or popular art or crafts, which could be attributed to a community or indigenous peoples.

97. The Delegation of Morocco stated that the definition needed for TCEs should be general and it should contain all of the elements reflecting the traditional artistic expressions and the work of local communities and indigenous peoples. At the previous session of the Committee, delegations had made enormous efforts to try to find a definition of TCEs and the result was document WIPO/GRTKF/IC/11/4 (c), which should be the basis of any future discussion on this matter. The definition in Article 1 of this document was acceptable for the Delegation. It contained numerous elements and was the result of tremendous efforts to take into account definitions in other conventions or treaties. The definition should take into account any forms, whether tangible or intangible, expressed and manifested by the individual communities who were representatives of those expressions. The definition might include traditional music, dancing, poetry, painting, woodcraft, textiles, needlework and so on because those elements should be contained within any definition that was eventually settled upon.

98. The Delegation of Cameroon stated that in respect of the definition of TCEs there were at least two elements. First, there was the word “expression”, which referred to the form or the representation of something. That was the first element, needed to distinguish TCEs from

TK, which was the knowledge itself. Then there were also the elements “traditional” and “cultural”, which were also important because they were specific characteristics of TCEs. So the “expression” or the “representation”, as WIPO/GRTKF/IC/11/4 (c) said, needed to be the representation of that traditional culture and that TK. These were the specific aspects/elements of a TCE, as reflected in the document referred to. However, reference to “any forms, whether tangible and intangible” seemed superfluous. This seemed circular and confusing, and should be deleted. Then one would have the actual substance of the definition.

99. The representative of the Ogiek Peoples Development Program (OPDP) stated that a definition should recognize the cultural identity, collective ownership and transmission from elders to younger generations.

100. The Delegation of New Zealand stated that the first question was whether a formal or rigid definition was needed. This was particularly important given the evolving nature of knowledge and culture. By attempting to define TK and TCEs, there was a risk of freezing or restricting the rights at the time that they were defined, hence not fully taking into account their evolutionary nature. Rather one should explore models of protection which did not require the elaboration of a formal definition of TK and TCEs or that fully recognized the changing nature of TK and TCEs. The Delegation agreed with Ethiopia that any definition should be a self-definition from TCE holders and should be informed by customary laws relating to the TCEs. The Maori Advisory Committee, created under the New Zealand Trade Marks Act 2002, was an example of possible policy mechanisms and measures which did not require a formal definition of TCEs. The working definition for TCEs in article 1 of WIPO/GRTKF/IC/11/4(c) reflected a strong focus on IP. Many indigenous peoples defined their TK and TCEs much more broadly to include other tangible and intangible expressions and practices such as: learning systems and practices, traditional practices for environmental management; common-property management practices; traditional decision-making processes; local classification and quantification structures; practices relating to health; animal breeding practices; water and soil conservation; agriculture; building materials; and, energy conservation practices, amongst other things. The individuals and organizations with whom the Delegation had consulted domestically on the article 1 working definition had said that they generally agreed with it, as it appeared to cover most areas of concern. They also agreed that TK and particularly *mātauranga Māori* (Māori knowledge) and its cultural expressions were often orally transmitted and distinctly linked to the local culture and to the relationship that the community had to the land and its natural resources. The key characteristics of TK and TCEs were that they: originated, were preserved and transmitted in a traditional context; were transmitted from generation to generation; pertained to a particular local or indigenous people or community; were not static, but rather evolved as communities responded to new challenges and needs; and were collective in nature. Any definition of TK and TCEs that should be the subject of protection should also take account of the commonly understood facts that: Indigenous knowledge was a subset of TK; TCEs were the manifestation of TK; TK and TCEs were embedded in cultural systems of intergenerational transmission and preservation, which each community had developed and maintained in its local cultural and physical environment; the term ‘traditional’ in “traditional knowledge and cultural expressions” did not necessarily imply that the knowledge or cultural expressions were old or unscientific in nature. They might be new tradition-based evolutionary creations or innovations, which built upon cultural traditions and emerged when individuals and communities took up the new challenges and realities presented by their social and physical environment. Lastly, the Delegation stated that TCEs could not be dissociated from the TK itself or from the cultural and physical environment from which they emerged.



However, TCEs, being specific cultural manifestations or practices of TK, were possibly easier to protect than TK.

101. The representative of Amauta Yuyay said that a TCE constituted knowledge, an “ancestral” practice inherent in indigenous peoples, be it manifested in the form of music, dance, the clothes used for different festivities, crafts, visions, gastronomy, ceremonies and so on. Research into such ancestral knowledge by academics, companies or artists, be they white or racially mixed in the multicultural society of Ecuador, and who commercialized such knowledge and used it in different artistic or similar scenarios, was known as folklore. H<sub>2</sub>O was the physical and chemical formula which was taught in schools but *yacu*, the quechua word for water, was their source of life and was the elder sister of Mother Earth. In that regard, the representative proposed that the term “ancestral” be taken into consideration.

102. The Delegation of China considered that the definition of TCEs contained in the present draft provisions was relatively comprehensive and flexible, and thanked the Secretariat for its extensive and effective work in this regard. The Delegation was ready to accept the definition as the basis for further deliberations. The Delegation, however, suggested that the Committee make a clear distinction between TCE and TK in order to facilitate the discussion of the two issues, which it had noted was also a point of concern for many Member States.

103. The representative of Tupaj Amaru stated that indigenous peoples, particularly the Tupaj Amaru, were confused because the documents before the Committee made almost no reference to the original document which described the TCEs to be protected. So what should be protected as TCEs? The contributions made by Committee participants were not definitions but proposals. The Committee had asked for new proposals for article 1 of the substantive provisions, but this had not been provided. The Tupaj Amaru movement wished to contribute from an indigenous point of view regarding the definition of cultural expressions. TCEs referred to the spiritual value of life. TCEs were expressions of the identity of indigenous peoples, their memory and their souls. It referred to singing, dancing and so on that was in constant evolution and constant transformation and change. It was very difficult to define as tomorrow these manifestations would be slightly different. It was ultimately the memory of humankind that was constantly evolving. How could this be translated into commercial merchandise? Some knowledge and TCEs were secret for indigenous peoples. What could be done in these circumstances was to say what indigenous peoples wanted to protect and for whom. Indigenous peoples were trying to protect TCEs from illicit use and piracy. WIPO, UNESCO, the CBD and other bodies and institutions already had a clear definition. What was needed was a consensus on what one was trying to protect as TCEs/EoFs. Tupaj Amaru would like to broaden Article 1 of the definition and introduce other elements like designs, sculpture, photography, engravings, sacred objects, and writings. Its language, for example, quecha, had been stolen and was now in the British Museum. Musical instruments were also in western museums. The representative referred also to the studies that had been carried out by Dr. Erica Irene Diaz for the Working Group on Indigenous Populations which should be studied.

104. The representative of the Arts Law Centre of Australia stated that the definition as set out in Article 1 of the Revised Draft Provisions for the protection of TCEs in WIPO/GRTKF/IC/4/11(c) provided a useful starting point. In addition, it was suggested that satisfying Article 1 (a) (cc) might make it difficult for some indigenous communities in Australia to gain protection of their TCEs due to their dislocation and the breakdown of customary law. This was a direct result of Government policies over the last two centuries. It would be better if the definition provided greater recognition of this reality, only requiring

that TCEs be “maintained, used or developed...in accordance with customary law OR practices of that community.” Otherwise it was possible that having to prove the relevant customary law would be extremely difficult for some indigenous communities.

105. The Delegation of Ecuador stated that it wished to see the Committee’s work on TK and TCEs lead, in the near future, to legally binding international instruments. It also noted that the documents currently available had been well prepared and thanked the Secretariat for the work it had done. Through its legislation, Ecuador guaranteed the existence of TCEs, and protected the collective IP of its ancestral knowledge; similarly, it stimulated creativity and innovation in local communities. In that regard, the Delegation supported the comments made by Amauta Yuyay, and also considered that in particular the sounds and whistles produced by ancestral instruments, by the same human being, should be protected and included in the criteria for the definition of TCEs.

106. The representative of the Hokotehi Moriori Trust stated that the distinction drawn between TCEs and TK was one created in these fora to “accommodate” TK within IP systems. It was not a distinction recognized by Moriori and most other indigenous peoples. TK and TCEs were inextricably linked. While definitions could be problematic, the current wide definition of TCEs was preferable to a more narrow approach being advocated by some member states. In response to the comment of the Delegation of Japan that it did not know why TCEs in public domain should be protected when non-TCEs such as the works of Shakespeare could not, the representative noted that the concept of “public domain” was a western construct and one not recognized by indigenous peoples; Western systems introduced through hundreds of years of colonization had greatly and adversely impacted TK systems; and, the protection of TCEs was fundamental to the maintenance, survival and integrity of indigenous peoples cultures and their identities as distinct peoples within modern day societies. The representative illustrated his intervention by referring to cases in which “Maori Mix” and “Natural Spirit” cigarettes, displaying an Indian Chief in headdress smoking a long peace pipe, were being marketed and sold without the knowledge or consent of Maori people. Indigenous peoples needed to have control over how their TCEs were used and by whom because of the growing culturally offensive uses by companies promoting the sale of their products. The representative agreed with the Delegation of New Zealand that there was a need to be careful in defining something that continued to evolve and grow. The interventions by the Saami Council and Tupaj Amaru that TCEs were connected and important to the identity of the cultures of indigenous peoples were also supported.

107. The representative of the Ibero-Latin American Federation of Performers (FILAIE) thanked the Secretariat for its commendable work in producing such detailed documents which covered all the issues that were being debated and without which it would be impossible to reach relevant conclusions. FILAIE comprised an enormous number of artists who expressed themselves in Spanish and Portuguese, and consisted of management societies from Mexico, Central America, South America and, in Europe, the Iberian Peninsula. The Delegation said that it had perceived a fair degree of consensus between the government delegations on continuing to work to adopt a relevant resolution, so that the General Assembly of Member States could take decisions with a view to an international instrument. Notwithstanding, the FILAIE was concerned that by discussing TCEs, TK and GRs as a joint package, any discrepancy in one area would be prejudicial to the others. The representative also said that WIPO had acted on and responded to the basic questions that had been raised in relation to TCEs and which were contained in WIPO/GRTKF/IC/11/4(a), to which reference was made. The representative considered that TCEs was a good name, above all since certain delegations were reluctant to accept the expression “folklore” because they considered it to be

pejorative. Thus, a distinction should be made between TCEs and TK. The expressions referred to the whole variety of artistic forms with which a person or group of persons performed literary or artistic works, or expressions of folklore, a term which had been used to define performers in the 1996 WIPO Performances and Phonograms Treaty (WPPT), while the term TK referred to production technologies or behavior as a response to the social reality and the environment in which indigenous communities lived. FILAIE considered that protection was required, preferably through an international instrument which covered, defended and protected the TCEs which were the subject of misappropriation. The best way to achieve such protection was through IP rules, already referred to in both the Berne Convention and in the WPPT. Finally, performers were the main active agents that were familiar with cultural expressions, and they loved, defended, developed and conserved those expressions, and therefore played a vitally important role.

108. The representative of the International Indian Treaty Council (IITC) referred to the definition of TK and TCEs and stated that it believed its TK and TCEs were alive and had developed over time collectively with its peoples. Many of its cultures were manifested in traditional and contemporary arts. The authenticity, quality and cultural integrity of its TK and art forms had been maintained throughout the generations. TK was dynamic and could not be limited to a specific definition. The definition of the Council's TK should not be limited but should include cultural landscapes and places of major significance for indigenous peoples, knowledge of contemporary use, prior use and potential use of plants and species of animals, minerals, and soil. For example, in the Kuna culture, traditional medicine was produced using plants, minerals, animals, food products, small roots, non-edible fruits, and it was also practiced through therapeutic songs and orations. Thus, collective indigenous TK could be said to contain all the intellectual creations, knowledge of the use of natural resources which indigenous peoples had used and produced, throughout their history, including their indigenous knowledge of the sustainable use of biodiversity in the field of medicine and food products, and other fields could be mentioned, in which indigenous peoples had their TK. The representative summarized that TK was a concept that encompassed tangible and intangible creations, cultural manifestations, technologies, sciences, agricultural knowledge, designs, literatures, and visual and performance arts derived from oral and written traditions. TK was also connected to indigenous traditional territories, lands, natural and genetic resources, and was transmitted from generation to generation.

*Issue two: who should benefit from any such protection or who would hold the rights to protectable TCEs/EoF?*

109. The representative of the Saami Council reiterated its belief that it was most efficient that the Committee had as a starting point for its discussion the concrete language contained in the draft Policy Objectives and Core Principles. That said, the fact that as fundamental an issue as who should be the beneficiary of protection was outstanding, indicated a need to clarify some fundamental matters before the Committee could in an effective manner commence crafting an international instrument. Naturally, the answer to essentially all the other listed questions - such as what objective was sought to be achieved through protection, what forms of behavior should be considered unacceptable, the term of protection, and to what extent existing IPRs already afforded protection - would greatly depend on whose rights were being considered. If the Committee wished to make any real progress, it had to stop beating around the bush, and recognize what should be self-evident in a forum with IP rights as mandate - that the right-holders to TCEs were the creators of the same. Until then, the Committee could hardly proceed with its work in a meaningful manner. Clearly, only when it

was known whose rights were being addressed could an intelligent debate be held. At present, the Policy Objectives and Core Principles, as well as the background documents before this session, were ambiguous on this subject matter and, as a consequence, contradictory. As clarified on page 17 of the Annex to WIPO/GRTKF/IC/11/4 (c), Article 2 of the Substantive Provisions claimed that, if national law so provided, TCEs should vest in a governmental authority, rather than in the people that created the TCEs. Similarly, paragraph (d) on page 7 of WIPO/GRTKF/IC/4 (c) suggested that states were free to proclaim that TCEs belonged to the state, rather than the people they originated from and paragraph (f) consequently declared that it was up to national law to decide whether authorization to access TCEs should be granted by the creators of such, or a national authority. The representative stated that the Saami Council found it unacceptable that the documents presented before this session suggested that the cultural heritage of an indigenous people could legally be confiscated by a mere act of legislation. It was also questioned whether this proposal did not go beyond the mandate of WIPO. Was WIPO not supposed to respect, protect and promote the rights of humans to their own creativity? For instance, the 1974 Agreement between the UN and WIPO recognized WIPO as the specialized agency to “promote creative intellectual activity”. Yet these documents offered an alternative system, under which the creators of arts, literature and songs held no rights to the same, but where these rights could legally be appropriated by someone that had nothing to do with the creation at all. In addition, to so suggest contradicted other provisions in the Policy Objectives and Core Principles. Article 1 of the Substantive Provisions defined what constituted TCEs eligible for protection. In doing so, the Article underlined that creativity, to constitute TCEs, had to be characteristic of a community’s cultural and social identity and be maintained, used or developed by the community. The Saami Council supported these criteria. Indeed, it was difficult to see how TCEs could be defined in another way. It was exactly the fact that TCEs had been created in a traditional cultural context that rendered a TCE a TCE. If an element of human creativity had been created outside a traditional cultural context, it was hardly distinguishable from conventional art, literature and music, and could consequently presumably be protected by conventional copyright. In the same vein, Article 6 of the Substantive Provisions, addressing the term of protection, proclaimed that TCEs should enjoy protection as long as they continued to be characteristic of a community’s cultural and social identity and were maintained or used by the community. The Saami Council supported this provision as well. But from these provisions it also followed that if the subject matter as well as the term of protection of TCEs were defined by their intrinsic connection to an indigenous people, it was also the same people that had complete factual control over the TCEs, in the sense that it was up to the group to decide whether the creativity constituted a TCE, and whether it should continue to do so. This seemed to contradict the suggestion that the TCEs could vest in the state. Was it not strange that the creation process belonged to an indigenous people, but as soon as something had been created, the item belonged to the state; however, the indigenous people could at any time, at its own wish, extinguish the property of the state. This made no sense. Such a provision, if agreed on, would indeed constitute a *sui generis* property right. The Saami Council submitted that the Committee wrap up the discussion on the issue of beneficiaries at this session with the only logical conclusion: that human creativity vest in the creators.

110. The Delegation of Italy stated that in Italy, and more broadly in Europe, there were many local communities which were not necessarily indigenous, but nevertheless, had their own TCEs. The Delegation was of opinion that adequate protection should be given to these TCEs as well even if they did not originate from an indigenous community.

111. The representative of the Arts Law Centre of Australia stated that draft Article 2 was a good basis for the discussion, but that the rights to TCEs and any benefits should be held by indigenous peoples and their communities who were directly connected to the TCEs. Article 2 could be problematic if communities were required to prove that they had been “entrusted in accordance with customary law and practices”. There might be evidentiary difficulties in view of histories of widespread dislocation. For example, in Australia, indigenous groups claiming native title rights who had to prove continuous connection with land had faced huge hurdles in this regard and it was not unusual for cases to take over 10 years to resolve. There should be an assumption in favor of the indigenous community claiming to be custodians of TCEs, the representative added. A further issue arose where there were multiple communities with responsibility for the TCEs. For example, certain dreaming stories in Australian indigenous culture. There was a need to recognize that there might be more than one community which was the rights holder and should receive benefits in view of the diversity of indigenous cultures in Australia. As a matter of principle, the State should generally not hold or exercise rights on behalf of indigenous communities in view of histories of States misappropriating benefits owing to indigenous people, such as the Stolen Wages cases in Australia. This raised the question of where there was no clear indigenous rights holder or beneficiary whether States should hold rights and benefits in trust for indigenous peoples.

112. The Delegation of the United States of America believed that the Committee would benefit from further study, informed by representatives from many stakeholder groups, including indigenous groups and tradition-bearers, of existing mechanisms to protect TCEs/EoF, with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve the sometimes competing claims of beneficiaries. This topic included complicated issues related to the web of interests of many stakeholders, including the roles of states and their nationals, immigrant communities, governmental authorities, indigenous peoples and traditional and other cultural communities, subject matter experts, and cultural institutions. The United States of America had listened very carefully to the helpful statement of the Saami Council suggesting that reaching a mutual understanding of this fundamental issue should be a high priority because of the interrelationship of this issue to other issues before the Committee. The United States of America noted that the inherent problem of defining beneficiaries of protection for TCEs/EoF was made all the more difficult in a world where individuals and groups readily crossed national borders and geographic boundaries. In the United States of America, for example, tradition-bearers from almost every cultural group in the world practiced their TCEs/EoF in their new homeland. Thus, The United States of America was acutely aware that TCEs/EoF traveled with each tradition-bearer and TCEs/EoF were often practiced well beyond their original geographic location. Many issues needed to be addressed, the Delegation stated. For example, what would constitute an identifiable group? Did an entire national population qualify? Did it need to be an ethnic group? The Delegation of Japan had in its written comments raised an interesting question regarding groups that were not ethnically or kinship based groups, such as certain religious groups. While it was agreed that a precise answer to these questions might be difficult to obtain, it did appear that the Committee should further define what constituted a traditional cultural group, even if this resulted in identifying groups that should be excluded from this definition.

113. The Delegation of Japan stated that it was unclear what social prerequisites were necessary for a group to be qualified as a “community” which would be the beneficiary of protection. Points that lacked clarity were: (i) community with regard to TCEs/EoF of indeterminable origin: there were many TCEs/EoF whose origin was indeterminable. There were cases where the community that should enforce its rights to receive benefits could not be

determined or where more than one community claimed to be the origin of a TCE; (ii) community with regard to “regional folklore”: it was unclear how to treat cases of “regional folklore”, where a community was spread across national borders; (iii) community with regard to “national folklore”: usually, the word “community” implied a certain level of actual communal living. However, when it was so interpreted that nationals of an entire country might be deemed a “community” and could claim ownership of a “national folklore”, the condition of actual communal living became so relaxed as to be non-existent. This was tantamount to saying that TCEs/EoF could be so broad as to include any expression related to a nation’s custom or tradition. There was a need to clarify the relationship between “community” and the conditions of “communal living” or the condition of “being handed down”; (iv) traditional communities that were not founded on kinship: it was not clear if the succession of TCEs/EoF over generations by such a community as a religious community, which was not founded on kinship, could be regarded as a beneficiary community. The Delegation could not see any justifiable grounds for an organization which was firmly united to not be deemed as a beneficiary just because the organization members were not biologically related while a loosely united community such as a country (as in the case of “national folklore”) was regarded as an eligible beneficiary. WIPO/GRTKF/IC/5/3 paragraph 42 (d) had read, “Is the creation of a *sui generis* IP regime for certain communities (such as indigenous or local peoples, as against all other “non-indigenous” or “non-local” persons) acceptable as a matter of policy?”. This question remained unanswered by the Committee; (v) contemporary communities: there were other forms of communities not founded on kinship such as Internet communities. Members of these communities did not live together. The communities had not lasted for more than one generation. The members of these communities gathered together for the same purpose or because of sharing the same idea. Certainly, these communities were not traditional communities and were not considered as beneficiary communities under the traditional definition. However, why these communities should be unfairly discriminated against in comparison with traditional communities was not clear; (vi) communities of immigrants: the question of how to treat TCEs/EoF of immigrants (as opposed to TCEs/EoFs of the indigenous people) had been occasionally raised. However this question remains unanswered. The Delegation then turned to the benefit-sharing mechanism, and stated that it seemed difficult for the mechanism to actually work: (i) There would be many cases where the community could not exercise its rights against outside parties even when it tried to do so, due to lack of a clear decision making mechanism or representative in the community. Especially in the case of “national folklore”, whose owner was the nationals of a whole country, it was unclear who held the right for authorization; (ii) Some had proposed that the State might exercise rights in proxy for internal communities. However, some groups of indigenous peoples were opposed to this and there was no consensus. When States were allowed to act as beneficiaries in proxy for indigenous peoples, there was a problem of whether the State would act to truly represent the welfare and benefit of the indigenous peoples; (iii) There was no clear idea of how the benefit would be shared within the community.

114. The Delegation of Canada acknowledged that many peoples and communities around the world created and sought to protect what they might consider as TCEs. TCEs might originate with a particular community or might be shared in whole or in part by a number of different communities. When common between communities, it would be important that the Committee clarify whether all or some communities should benefit from protection for their TCEs and the policy implications of such protection. Apart from communities as potential beneficiaries of protection of their TCEs, the Committee should address whether the protection of TCEs should extend to other beneficiaries. Indeed, there might be cases where a particular individual, family, clan or society might be acknowledged as the source of the

TCEs. Canada believed this Committee should have further discussions to clarify who were the appropriate potential beneficiaries and rights holders of protectable TCEs.

115. The Delegation of Brazil stated that the definition of the beneficiaries of protection was one of the most fundamental questions contained in the List of Issues. Brazil believed that in regard to the definition of the beneficiaries of protection of who should benefit from the protection of TCEs/EoF, it was possible to set out minimum standards at the international level and that a specific definition of eligibility should be left for national legislations. This Committee should address and should recognize the collective authorship and ownership of TCEs/EoF and Article 2 of the draft provided an adequate basis to discuss this issue. The Delegation agreed with the Delegation of Norway that local customs might also provide guidance when identifying the appropriate custodians and their representatives. No definition would be perfect but it was believed that a minimum definition was achievable and the Delegation was eager to cooperate with other delegations in trying to achieve a common denominator.

116. The Delegation of Indonesia stated that with regard to the definition of beneficiaries of TCE/EoF as mentioned in the WIPO/GRTKF/IC/11/4(c), Indonesia could go along with it. In order to make it more comprehensive, however, it was proposed that the definition should also include following elements: (i) other than traditional/indigenous communities as parties who maintained and developed TCE/EoF, governments also needed to play a role in facilitating TCE/EoF protection in case there were other communities who had potential benefits for the utilization of TCE/EoF; (ii) in case the owner of TCE/EoF could not be identified, the beneficiary of TCE/EoF protection should be the government, such as the local government, and the TCE/EoF would be used for the sake of community's interests; (iii) the owner of TCE/EoF eligible to benefit from the protection should be the TCE/EoF owner who had been identified by local government; (iv) regarding the individual's contribution to the development of TCE/EoF, it could be rewarded by the existing IP system; (v) a state could play a certain role in facilitating the protection of the community and it could be extended further as a right holder only if it benefited the communities.

117. The representative of the Hokotehi Moriori Trust supported Article 2 in WIPO/GRTKF/IC/11/4(c) and endorsed the statement of the Saami Council. In relation to paragraph (ii) of the definition, the representative recommended that the words "revive" be included after "maintain, revive, use or develop". Many indigenous or traditional peoples had through processes of colonization lost many of the TCEs and many, including his own people the Moriori, were reviving the use of those TCEs. A limitation to those TCEs that were maintained or existing would deny indigenous peoples the right to revive their cultural practices.

118. The Delegation of New Zealand stated that the rights holders and beneficiaries of any benefits flowing from the use or exploitation of TCEs should be the TCEs holders and creators themselves and their community or communities. Protection for individual creators as opposed to those of the community from which the TK and TCEs originated had to be fully analyzed and understood prior to determining what type of rights should be awarded, if any, or who the rights holders should be. TK was subject to customary laws and protocols and was often collectively "owned" or guarded, and some aspects might be sacred/secret or in the public domain. TK based innovations or expressions might be individual creations, to which communal responsibilities attached, and which might be subject to both formal and customary laws. The Delegation stated that the use of TK and TCEs might also benefit and contribute to the well-being of all New Zealanders as a nation and to humanity as a whole, and often

fostered innovation, creativity and growth on a much broader scale than simply the indigenous and local communities from which they originated. Recognition of contributions to innovation and creativity was important and in line with the objectives and principles underlying IP systems and, therefore, any attribution of rights or distribution of benefits generated from the use of TK or TCEs should fairly and equitably recognize those contributions, it was added. Acknowledgement of the sources of innovation and creativity or of the TCE holders' contributions was important, regardless of who was using the TCEs. Individuals and organizations consulted asserted that it was essential that *whakapapa*, which was a Maori term which could be translated into English as being the source or the genealogical essence/descendence of the TCE, had to be acknowledged. Further analysis was also needed in order to define what was meant by "benefit". There was a wide range of benefits that might flow from the use of TCEs. One was not simply dealing with potential economic benefits. Further analysis was needed if one was fully to consider the nature and extent of protection, if any, which should be afforded in the IP context, and what types of benefits should be attributed to IP owners and TCE holders.

119. The Delegation of Algeria, speaking on behalf of the African Group, was of the opinion that the ultimate objective of this process should be the development and adoption of legally binding international instruments for the protection of TCEs, TK and genetic resources. The African Group also believed that much work had been done towards the review of legal and policy options for the protection of TCEs which had built on extensive international, regional and national experiences. It was important to bear in mind that the answers to the Issues, to which the Group had provided comprehensive responses, were complementary to the work done by the Committee in establishing parameters for defining and clarifying issues related to Objectives and Principles for the protection of TCEs. In addition to this, the present statement was being made without prejudice to the establishment of a framework for the development and adoption of an instrument defining the scope, subject matter, rights conferred and related issues pertaining to the protection of TCEs. Consideration of the Issues on TCEs should be finalized at the current session so as to expedite deliberations in the Committee on substantive matters pertinent to the establishment of an international framework for the protection of TCEs. In relation to the Issues, and specifically on the question of definition, the African Group noted the incremental work that had been done in defining TCEs as contained in Article 1 of the substantive provisions in WIPO/GRTKF/IC/11/4(c), which had drawn from national and regional experiences as well as existing international instruments. The Group was therefore of the view that the definition in Article 1 provided a satisfactory basis for future work. On Issue Two, TCEs were held in trust as part of a community's heritage that was passed down from one generation to another and was, therefore, commonly owned by that community. In this context, the beneficiaries of the protection of TCEs should be: (i) the holders of TCEs in the form of the local and traditional communities, as well as recognized individuals within such communities who created, preserved, used and/or transmitted the knowledge in a traditional context, and, (ii) those upon whom rights had been conferred by the rights holders as defined above through prior informed consent, who might be individuals or legal entities including extractors of TCEs, researchers, collectors and extractors of information regarding TCEs and technical research and development institutions. The working definition contained in Article 2 of document WIPO/GRTKF/IC/10/4 (c) was a good basis for future work. By way of a general comment, the African Group was examining all the issues and had not found great differences between most of the proposals made by the different groups. It seemed that there were many very common positions on many questions and it would be very helpful if the Secretariat would provide a comprehensive matrix of all the different proposals, so one could compare the different proposals and draw conclusions based on them.



*Issue three: what objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?*

120. The Delegation of Saudi Arabia stated that the objectives of the protection of TCEs, as provided for in WIPO/GRTKF/IC/11/4 (c), were convincingly wide and comprehensive, ranging from moral to economic, and from intellectual, artistic and cultural to protectionist objectives. However, undeclared political objectives underpinned the provisions and the commentaries in the document. Such objectives were often complex and undistinguishable from one another: a moral objective could not be achieved, in some cases, without the corresponding economic objective, and *vice-versa*. Moreover, objectives could be viewed from different angles with varying degree of priority or significance. While acknowledging that economic objectives could be necessary to enable the achievement of other objectives provided for in the document and, more particularly, the protectionist ones, the Delegation was of the view that exaggerated emphasis could not always guarantee the safeguarding and protection of TCEs from distortion and misuse, but could rather be a main reason why prohibited acts, such as distortion, occurred, particularly where TCEs, reflecting a wide range of values and traditions, became mere products assimilated to any other material good circulating in the market. The Delegation hoped that the importance of the issue be scaled down as much as possible.

121. The Delegation of Portugal, speaking on behalf of the European Community and its Member States, considered that the Committee's work had enabled the broad and very complex problem of TCEs/EoF to be better explained and studied in greater depth. However, at the current stage of development, TCEs/EoF did not appear to be amenable to protection, at the international level, as a form of IP. The legal framework and appropriate protection of TCEs/EoF should, by means of specific legal measures, be the subject of more comprehensive work to devise appropriate policies and laws at the national level.

122. The Delegation of Norway stated that the main objectives of protection in regard of TCEs/EoF were to prevent misappropriation and preclude the granting of unauthorized IP rights. Any protection system for TCEs should seek to promote and protect cultural diversity and cultural heritage and encourage creativity. Furthermore, protection should seek to ensure prior informed consent and exchanges based on mutually agreed terms and promote equitable benefit-sharing. By providing protection, one also secured recognition and respect of the intrinsic value of TCE/EoF, as well as enhanced certainty, transparency and mutual confidence. The rationale behind Norway's view was further elaborated in WIPO/GRTKF/IC/9/12, in particular paragraphs 20-22 and 25.

123. The Delegation of the Russian Federation stated that since Issue 3, which related to the grant of protection, overlapped with previous questions, including Issue 2, the Russian Federation wished to add to the comments which it had already provided on the List of Issues. The question of defining rights holders was a key one, the Delegation stated. The problem of defining rights holders lay in the phenomenon of the interpenetration of cultures. TCEs could be the result of the creation of different indigenous communities. In that regard, the question arose as to the method used to define the community to which rights in such and such an object belonged, and on the basis of which criteria. For the Russian Federation, which was a federal, multinational State, that problem was extremely important. The phenomenon of the interwoven cultures of different peoples existed on the State territory. The representatives of cultural communities, for example, in the Russian Federation could live on the territory of different subjects of the Federation and also on the territory of other States, a fact which

should also be taken into account when defining rights holders. As known, a number of States already granted protection to TCEs and, in that regard, it was proposed that, in order for the Committee's work on that issue to move forward, an exchange and discussion of experiences of the grant of protection and, in particular, the definition of a rights holder at the national level, would be very useful. Based on what had been said in relation to the definition of a rights holder and irrespective of the approach to resolving that issue, the Delegation believed that the creation of protection could be aimed at preventing the appropriation of authorship and the derivation of some kind of benefit from such appropriation. It should be pointed out that currently the problem of preserving folklore and its development was also important, since many works of folklore could be lost forever.

124. The Delegation of India stated that the objective of according IP protection to TCEs was to prevent their misappropriation and to ensure economic returns to the communities who had been nurturing and developing them. Therefore, provision of both economic rights and moral rights was essential. Economic rights would contribute to capacity building and, thereby, conservation and positive development of the TCEs. Moral rights would pave the way for appropriate recognition and acknowledgement by others of the TCEs.

125. The Delegation of Algeria, on behalf of the African Group, stated that the objectives of according IP protection to TCEs should include the following: to prevent misappropriation; to confer upon knowledge holders the right to exploit their TCEs; to prohibit unauthorized exploitation and dissemination of protected TCEs without the prior informed consent of the knowledge holders; to regulate access to biological resources and associated TCEs; to promote equitable benefit sharing arising from the use of genetic resources and associated TCEs; to ensure that the IP system was compatible with the provisions of international instruments governing access to, and use, of TCEs especially in regards to prior informed consent, benefit sharing and disclosure of origin; to promote creativity and innovation based on TCEs and practices towards sustainable development; and, to develop databases, registries and other appropriate mechanisms for the collection, collation, storage, retrieval and appropriate use of TCEs.

126. The Delegation of Ethiopia stated that whereas the international recognition and protection of the rights of traditional communities to their cultural expressions had a direct economic and moral bearing, the objectives of the outcome sought by the Delegation in the Committee should not be limited to these considerations. The objective should be to recognize existing rights under international law and international human rights law. This objective had a direct correlation with other rights, such as the right to culture, the right to cultural self-determination and the right to development. This was not a regime of morality but of entitlements and rights. The basis of such protection should be neither moral nor economic, but was rather found in the realm of rights. The Delegation drew attention to General Comment No. 17 of the Committee on Economic, Social and Cultural Rights which recognized the rights of communities to benefit from the protection of moral and material interests resulting from the protection of the moral and material interests resulting from any scientific, literary or artistic production, and referred in particular to paragraph 15 of that General Comment. The Delegation stated that international protection for TCEs should give concrete realization to these human rights norms.

127. The Delegation of the United States of America believed that existing systems of IP protection might be used or adapted to address some of the actual needs of communities, including both economic and non-economic concerns, for qualifying expressions that were, or were related to, TCEs/EoF. Under such circumstances, the objectives of the IP protection

might apply equally to community-based and individual-based creativity. In the session's panel of indigenous and local communities, for example, the United States of America had listened very carefully to the presentation of the Arts Law Centre of Australia, which had provided Committee participants with helpful insights into their practical efforts to assist indigenous creators to make use of existing legal mechanisms to protect their works. The United States of America had also been very interested to learn of the recent efforts in Australia to adapt the copyright moral right doctrine to issues of communal creativity. The United States of America further believed that the Committee should continue to articulate and elaborate specific policy objectives for TCEs/EoF. Such policy objectives might include, among others, promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation. Over the last several sessions, with the strong support of the Secretariat, the Committee had made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TCEs/EoF. These included the importance of promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation. The United States of America believed that the framing of these policy objectives was not just a useful technique for facilitating discussion within the Committee, but rather that the Committee's work on the policy framework for the preservation, promotion and protection of TCEs/EoF was itself an extremely useful tool for policymakers at the national, regional, and international levels. The United States of America had noted that a number of WIPO Member States, informed by the work of the Committee, were taking steps to address specific issues and concerns related to the preservation, promotion and protection of TCEs/EoF. Nonetheless, more work remained at the international level. In the view of the United States of America, the Committee should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TCEs/EoF. The United States of America also believed that the Committee could make a significant contribution by reaching agreement on policy objectives and general guiding principles at the international level. This was an essential first step in reaching an outcome on these matters.

128. The Delegation of Japan stated that there was an opinion that IP protection should be extended to TCEs/EoF to acknowledge their commercial value. This opinion, however, did not clearly identify any justifiable reasons why TCEs/EoF should be eligible for such protection. If the purpose of the IP protection of TCEs/EoF was to correct inequities in economic development or to ensure sustainable development of certain communities by providing a new financial resource, a discussion should be conducted as to whether or not IP protection of TCEs/EoF was an appropriate way to achieve these purposes. Attention should also be paid to the fact that protection of TCEs/EoF was not simply a matter of economic policy and its ramifications in terms of impact on cultural development were quite large. Currently, the main purpose of an IP protection system was to give an incentive to creators by protecting their creations and to vitalize culture and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and the public interest. However, it might be problematic to enable only a certain generation to enjoy the benefits derived from TCEs/EoF that had long been passed down. Moreover, there would be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the TCEs/EoF. On the other hand, from the viewpoint of the public interest, it was also inappropriate to grant an IP right that would stay valid forever as it unfairly limited the scope of public domain. There was another opinion that TCEs/EoF should be protected, under moral rights, to protect values that had long been fostered in an

indigenous population or local community. If moral rights protection was made applicable to TCEs/EoF, right holders should be protected against any acts infringing their moral rights. However, which acts constituted such moral rights infringement had yet to be clearly defined. Use of TCEs/EoF that inflicted mental suffering upon a community should be refrained from, as a matter of morality in general, in the same way that derogatory expressions against a certain race, religion or sex should be refrained from. However, one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation of expression could harm freedom of speech or the development of culture. For serious moral right infringements, protection under the Civil Code or other general laws might be applicable even if no specific IP right protection was available.

129. The Delegation of Indonesia stated that the objectives sought to be achieved by according IP protection, without prejudice to the possibility of granting protection to TCE/EoF via *sui generis* systems, were both the moral and economic rights. Economic rights referred not only to cash money but also revenue in other forms that could generate prosperity for the communities. This should be facilitated by the existing IP system and in the spirit of respecting national law. Regarding the role of the State, it might also play a role as a facilitator in regulating the economic rights of the communities. In line with this, the Delegation was of the view that the objectives set out in WIPO/GRTKF/11/4 (c) were a good basis for discussion.

130. The Delegation of Mexico stated that a first objective was to promote and protect cultural diversity, as well as the tangible or intangible cultural heritage. TCEs had to be protected against any distortion, mutilation or other modification made with the purpose of causing damage thereto or harm to the reputation or image of the indigenous community or people to which such expressions belonged. Moreover, the right of indigenous peoples and communities to oppose the use of their TCEs should be recognized, if those representing such communities legally did not give “free prior informed consent”, including in cases where the communities did not have legal representation.

131. The Delegation of Canada stated that prior to determining whether additional IP protection or *sui generis* protection should be provided for TCEs and whether it should take the form of an economic or a moral-based right, Member States should agree on the objectives for according protection to TCEs. A consensus on the objectives might also inform a discussion on whether existing mechanisms could be used. In the meantime, it was important that maximum flexibility be maintained in order that the varying legal traditions of Member States were respected. The Delegation would support the suggestion made by the Delegation of the Russian Federation that an exchange of national level experiences would contribute to the discussions. Communities may have different objectives when seeking to “protect” their TCEs such as preservation, promoting diversity, and promoting creativity and innovation. In this context, there had been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. Canada shared in the concern regarding the prevention of “misappropriation” and misuse of TCEs. It also agreed that the term “misappropriation” was a complex term. At the same time, the manner in which this Committee defined its common objectives in the context of TCEs should take into account how such objectives might impact on users and the broader public interest, in particular, where IP may impact other important policy initiatives.

132. The Delegation of Brazil believed that international measures were necessary to prevent the misappropriation of TCEs/EoFs and that the international IP had to give an effective

response to the problem of misappropriation. As to the question under discussion, the objective sought was exactly preventing misappropriation of TCEs/EoFs and precluding the granting of unauthorized IP rights. Other objectives would also be achieved by setting up an adequate and effective protection at the international level. These included environmental protection, sustainable development, respect for the moral and spiritual values of traditional and indigenous communities, the prevention of the cultural extinction of those communities and the strengthening of an international market for environmentally-sustainable goods. Therefore, the establishment of an international instrument was necessary and indispensable to ensure communities the entitlement of collective rights over their cultural heritage and TCEs/EoFs. Such an international instrument must contain a requirement of prior and informed consent so as to ensure benefit-sharing and authorized access. The Committee should also look at other positive measures, without prejudice to the possibility that members may decide to accord protection to TCEs/EoFs via a “*sui generis*” systems. In this context, the draft objectives contained in WIPO/GRTKF/IC/10/4 (c) represented an adequate basis for discussion, particularly objective number (xii) aimed at precluding unauthorized IP rights.

133. The Delegation of Thailand stated that, on the question as to who should benefit from the protection of TCEs/EoF, the holders of the rights to the protected TCEs/EoF should naturally be the community that created, maintained, revived and/or recreated the TCEs and folklore. However, certain traditional expressions or folklore might be regarded as belonging to many levels of communities, local, regional or intercommunal, national or even cross-border, in which case the protection should benefit all levels of these communities. The source of the originator or the creator, be it collective or individual, had always to be given, and consultation with stakeholders should be made prior to the use of the TCEs/EoF outside the context of these traditional communities, the Delegation stated. Moreover, the Delegation agreed with a previous speaker who had stated that the benefit should include other aspects in addition to economic rights. For most traditional communities in Thailand, the moral and spiritual acknowledgment and the recognition and respect of the community’s right and dignity, as bearer of valuable traditions, were considered of equal importance. This should also be explicitly stated in the terms of the protection. On Issue 3, the Delegation believed the fundamental objective of protection was to defend TCEs against all kind of misuse, misappropriation, whether moral, spiritual or economic, and to preserve them. However, in some cases, the communities owning or holding the rights might not be adequately aware of their rights or the necessity to preserve their traditions, or the fact that their traditions were being misused or misappropriated and in such case, preventive protection should be the objective. For this purpose, the best preventive measure was capacity building and education to be provided to the members of the community in order to promote their awareness and to encourage the formulation of an appropriate code of conduct as an internal mechanism to protect their traditions against decline, misuse or misappropriation.

134. The Delegation of Australia was of the view that the key initial step in the development of any approach to the protection of TCE/EoF, as it intersected with IP, was to determine relevant policy objectives and general guiding principles. A wide range of policy tools might be needed to achieve the policy objectives arising out of the many contexts of TCE/EoF. Such an approach might be preferable to a ‘one-size-fits-all’ approach. Member States should be free to choose to implement those policy tools that were of particular relevance to their situations. It was generally recognized that the purpose of IP protection and its economic rights was to encourage and protect creativity. Australia recognized that existing IP regimes already played an important role in conserving and protecting some categories of TCE/EoF embodied in material form. The Delegation considered that the extent of the problem with misappropriation of TCEs be further explored so that it could be better understood. In light of

the extensive and very useful work of the Committee to date it might be beneficial to focus deliberation on areas of particular concern that were considered to have the most serious adverse impacts so that the full range of policy options to address those issues could be analyzed.

135. The Delegation of New Zealand considered that the objectives should be to: (i) prevent misappropriation, misuse, and misrepresentation of TCEs; (ii) foster and encourage more respectful practices by individuals and organizations who wish to use TCEs, in accordance with customary laws and protocols associated with TCEs; (iii) strengthen and recognize the application of customary laws and protocols in relation to TCEs; (iv) ensure proper attribution of IP through recognition of TCEs contributions to creative and innovative endeavors; (v) promote fair and equitable sharing of benefits (economic or otherwise) flowing from the use of TK and TCEs; (vi) recognize collective responsibilities associated with TK and TCEs. Some observers and Members States had indicated that a tension might exist between Western or European based models of law and world views, and indigenous laws, customs and world views. The commoditization of culture could be seen as an example of this perceived divergence. One principle to be followed in according protection for TCEs should consist of balancing the competing views and expectations in relation to the use of TCEs to the general satisfaction of all. This was also in line with the objectives to promote intellectual and artistic freedom, research and cultural exchange on equitable terms, and the objective to enhance certainty, transparency and mutual confidence. Other peripheral, but important, objectives would be to: (i) raise awareness, domestically and internationally, of issues at the interface between TCEs and IP (for example through education and best practice mechanisms); (ii) assist indigenous and local communities to preserve, develop, and promote their TCEs and support their traditional structures of creation, preservation and transmission; (iii) assist in the safeguard and promotion of cultural integrity and diversity; (iv) promote positive working relationships that enhanced or built mutual respect, trust and cooperation between stakeholders; (v) assure consistency with, and promote respect and adherence to, related international rights of indigenous and local communities; and (vi) promote respect and adherence to domestic rights of indigenous and local communities. The Delegation also supported Australia's comment that Committee Members must retain the flexibility necessary to adapt their system in accordance with domestic reality.

136. The Delegation of Sudan expressed full support for the statement made by the Delegation of Algeria on behalf of the African Group. Political and social support should be mobilized and traditional communities made aware of their rights with a view to enhancing creative cultural diversity and to enable indigenous communities to benefit from and make use of their cultural productions. The Delegation called for an exchange of experience, on the international level, on the means of protection.

137. The Delegation of the Islamic Republic of Iran stated that some aspects were necessary to be observed during the implementation of protection for TCEs. In this area, the legal binding instrument(s), inclusive of *sui generis* regimes, must contain: (i) strengthening of the innovations of right holders; (ii) respect for the spiritual and intellectual assets; (iii) preservation of moral and economic rights, particular of indigenous communities; (iv) prior consent should be respected; and (v) rights of access of people to the benefits of folklore.

138. The Delegation of Italy stated that, concerning the nature of rights to be accorded to TCEs, it supported what had been said by the Delegation of Portugal on behalf of the European Community and its Member States. The Delegation of Italy also wished to stress that national authorities should encourage the communities to protect their TCEs using

conventional IP protection when and if possible at a national level. Italy also thought that it was useful to recall what already existed in the international legal framework, especially article 6*bis* of the Berne Convention which protected the moral rights of every work, more specifically, works that were in the public domain. In respect of the economic rights related to such works, protection should be granted by national jurisdictions in a way that was efficient and affordable to each national level. The Delegation also referred to the protection granted to performances of expressions of folklore by the WIPO Performances and Phonograms Treaty (WPPT).

139. The Delegation of Yemen believed that importance must be attached to the local specificity of local communities so that they could draw benefits from their TCEs within the same State which would develop systems and laws to prevent misuse or misappropriation of their TCEs.

140. The Delegation of Morocco believed that traditional cultural heritage was human heritage relating to a large number of people concerned by the use of folkloric and artistic creations. Therefore, international standards to manage use of TCEs at international level were needed. One could not preserve or protect TCEs against illicit use unless there was recognition of that cultural heritage and recognition of the rights holders who had passed this heritage on from generation to generation. It was necessary to ensure that the rights holders could benefit because of the recognition of their economic rights which were the prime guarantee that it would be possible to move forward, disseminate the heritage and draw benefit from it. The Delegation supported the statement made by Algeria on behalf on the African Group, reaffirming that the protection of TCEs was needed in order legally to disseminate the TCEs at international level.

141. The representative of the Arts Law Centre of Australia stated that the objectives set out in WIPO/GRTKF/IC/11/4 (c) formed a useful basis for further discussions. Key objectives covered both economic and moral rights and included: (i) the need to preserve indigenous cultural heritage from damage and destruction, given that damage to TCEs caused harm to indigenous people themselves; (ii) recognizing the increased market value of TCEs put greater pressures on indigenous cultures and increased the likelihood of misappropriation; (iii) providing stronger protections would encourage best practice and should prevent misappropriation; (iv) indigenous communities should have control over management of TCEs. Third parties wanting to use TCEs should obtain the consent of the indigenous rights holders and any benefits should be shared by Indigenous communities; (v) there was a need to stop misappropriation of TCEs whether or not registered. A registration requirement should not be a condition of obtaining benefits or protection. Finally, the representative noted that while the Arts Law Centre, through its Artists in the Black service, was using the current legal framework available to provide some level of protection for TCEs, it had not been suggested that these provided adequate levels of protection for TCEs. In fact, there were serious limitations in the protection existing frameworks were able to provide.

*Issue four: what forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?*

142. The Delegation of Norway stated that the Committee's work had an international dimension, although it recognized that different communities and regions could need additional flexibility to develop appropriate solutions. In its opinion however, there were several common issues that probably needed an international response. As the Delegation had said before, the Committee would need a common understanding on what would constitute

misappropriation. This would be the only way it could obtain an adequate and effective protection against misappropriation and misuse, as well as unauthorized IP rights. At the very least there was a need to avoid all unauthorized exploitation for economic gain. In addition to this, there was a need to ensure that the source would be acknowledged in all uses, such as reproduction and communication to the public of the TCEs. The Committee should also find ways to prevent offensive uses of TCEs.

143. The Delegation of India stated that misappropriation of TCEs/EoF should be considered illegal and inappropriate, if acquired by theft, bribery, inducement, fraud, misrepresentation, deceit, or breach of confidence or fiduciary relationship. Acquisition of information, including recording for commercial use such as for broadcasting, telecasting, advertisement, without the PIC of the holders and traditional users of such TCEs/EoF, would amount to misappropriation. This would also include unauthorized disclosure of secret or spiritual TCEs. Commercialization of TCEs/EoF without just and appropriate compensation should also be considered an illegal and unacceptable act. Equitable compensation should be paid to the communities concerned. However, this would only be possible with a legally binding international instrument.

144. The Delegation of Indonesia was of the view that a provision containing any acquisition, appropriation or utilization of TCEs/EoF by unfair or illicit means constituting an act of misappropriation would be essential. Although it believed that Article 3 of WIPO/GRTKF/11/4 (c) was a good basis for negotiation, it also stressed some acts that were considered unacceptable or illegal, which include the utilization of TCEs/EoF: (1) without authorization from the community involved; (2) without having received any written agreement from the community concerned; (3) that would result in a negative impression towards the community concerned; (4) that could result in the community concerned feeling disgraced or disrespected. The Delegation stated that the measures mentioned in WIPO/GRTKF/11/4 (c) should also include any change of form of TCEs/EoF.

145. The Delegation of the United States of America believed that more work remained to be accomplished to identify specific forms of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities with respect to their TCEs/EoF. To advance a sustained, focused and robust discussion of these issues, the Committee should explore the broad range of behaviors regarded by indigenous peoples and traditional and other cultural communities as unacceptable or illegal, including many examples already identified in the Committee's documents. It had been noted, for example, that insulting, degrading and/or culturally and spiritually offensive use of TCEs/EoF was a form of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. The United States of America noted that such offensive behaviors were inextricably tied to specific cultural groups and communities and that more work was needed on a case-by-case basis to gain a deeper, mutual understanding of such offensive behaviors. Building on such a fact-based foundation, the United States of America encouraged the Committee to deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal, both IP and non-IP and non-legal measures, which were available to address these specific issues or concerns. The Committee would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns. Finally, the United States of America noted that Member States remained very far apart on fundamental issues related to the protection, promotion and preservation of TCEs/EoF. However, the United States of America remained firmly committed to engaging in the kind of robust and sustained discussion, informed by national experiences, needed to bridge these differences.



146. The Delegation of Canada noted that communities and individuals around the world had historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another. In some instances, these actions could be considered to be positive acts of “appropriation” for which individuals and communities would not express concern. However, there could be other cases where individuals and communities could view such acts in relation to TCEs as “misappropriation”. As Canada had stated earlier, “misappropriation” had been interpreted as a complex term, and as a number of Member States had pointed out, “misappropriation” could mean different things to different people. If “misappropriation” was to be the primary focus of the future work of the Committee, Canada was of the view that more work should be directed at achieving a consensus as to what specific forms of behavior in relation to TCEs would constitute “misappropriation”.

147. The Delegation of Japan reiterated that unacceptable/illegal acts could vary depending on the form of protection for TCEs/EoF. As it had mentioned under Issue 3, the Delegation was of the view that there was no clear justifiable reason why TCEs/EoF would be eligible for IP protection. Japan was greatly concerned on extending IP protection to TCEs/EoF. Any use of TCEs/EoF that could inflict mental suffering upon a community should be refrained from, as a matter of morality in general in the same way that derogatory expressions against a certain race, religion or sex should be refrained from. However, one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. Moreover, when defining unacceptable/illegal acts, a fact finding survey should be conducted to find out what damage was incurred by what kinds of acts.

148. The Delegation of Ethiopia stated that this item should not refer to “behaviors” as such but acts of certain character as accurately reflected under article 3 of WIPO/GRTKF/11/4 (c). It also had discomfort with the wording “unacceptable”, which was perceived as vague, relative and non-legal jargon. The Delegation considered the word “illegal” as an appropriate description. The trademark of some aspects of TCEs was their orality. Subjecting these to registration and notification, to be protected through the mechanism of PIC, could lead to their erosion and could often provide an excuse for their non-recognition.

149. On behalf of the European Community and its Member States, the Delegation of Portugal said that most TCEs/EoF were in the public domain and that the process of modern cultural creation required, on many occasions, the influence and even certain uses in good faith of said TCEs/EoF. In a communication society, cultural creation was based on reciprocal cultural exchanges and dialogues, and thought should be given to the negative forms of use. For that reason, in the current context the characterization of “misappropriation” appeared to require greater study.

150. The Delegation of Algeria, speaking on behalf of the African Group, held the view that behaviors considered unacceptable in relation to protectable TCEs should comprise the following: (i) misappropriation; (ii) unfair and abusive use; (iii) acts that could constitute denigration and disrespect; (iv) distortion; (v) acts contrary to existing national, regional and international legislations; (vi) suppression of the rights of knowledge holders in any form; (vii) withholding of results of researches based on GR derived from TCEs; (viii) violation of rules regarding the confidentiality and sacredness which governed practices and observance of TCEs; (ix) disclosure of protected information without the authorization of knowledge holders.

151. The Delegation of New Zealand supported the comment made by the Delegation of Canada on this issue. New Zealand's domestic experience to date indicated that forms of behavior in relation to TCEs that should be considered unacceptable should include: (i) use of TCEs without adequate consultation with or permission from the TCEs holders; (ii) unauthorized reproduction, adaptation and commercialization with no sharing of benefits, economic or otherwise, with the TCEs holders. However, more work would be required to define the term "adaptation" of TCEs and as the Delegation had stated under Issue 2 on what was intended by the term "benefit"; (iii) use of TCEs which would be contrary to or disrespectful of customary laws, protocols, and practices in relation to such TCEs; (iv) use of TCEs in a way that would be insulting, degrading, culturally or spiritually offensive; (v) manufacture, importation/exportation and/or sale of fake traditional souvenirs as 'indigenous' or 'authentic' and the misrepresentation of TCEs in terms of its integrity, or the attempt to associate and market products or services in a fashion that would lead consumers to reasonably assume that the TCEs holders supported or endorsed the product or service in question; (vi) unauthorized access to and disclosure of sacred-secret TCEs, such as burial sites, and objects of spiritual and cultural significance; (vii) failure to recognize and acknowledge the source of a tradition-based innovation or creation and the TCEs holders themselves; (viii) failure to recognize and acknowledge the contribution that TCEs would make to innovations and creative endeavors; (ix) the granting of erroneous or invalid IPRs over TCEs and adaptations thereof. The Delegation reiterated that the creation of works or inventions that were adaptations or derivatives of TCEs was a form of behavior that would require further analysis in order to determine what should be considered unacceptable.

152. The Delegation of China believed that the primary objective of according IP protection to TCEs was to prevent misuse and promote innovation. The Delegation supported the protection of TCEs through various effective means such as IP, customary law and competition law. In particular, the Delegation indicated that the following forms of behavior, as a minimum, should be considered unacceptable or illegal: (1) unauthorized reproduction, publication, adaptation, broadcasting, public performance, distribution, or rental of TCEs or their derivative forms; (2) use of TCEs without indicating their source; and (3) distortion, degrading, mutilation, denigration, insulting or other similar actions in relation to TCEs.

153. The Delegation of Brazil stated that the problem of misappropriation of TCEs/EoF required an adequate, effective and robust international response within the IP system. As to Issue 4, acts of misappropriation should be considered illegal and unacceptable, specifically those acts that were perpetrated by the use of IP mechanisms. Other acts should also be considered illegal and unacceptable such as derogative actions capable of offending spiritual and cultural values of the community. The Delegation understood that a requirement of PIC should figure as a central principle and mechanism in an international system for the protection of TCEs/EoF. Indeed, an effective way of evaluating whether an act would constitute misappropriation was by evaluating the existence of PIC. Therefore, it pointed out that the draft provision contained in Article 3 of WIPO/GRTKF/IC/11/4 (c) would be an adequate and mature basis for discussion, as long as the protection of TCEs/EoF would not be conditioned on registration or notification.

154. The Delegation of the United States of America recalled that previous documents had already distilled a broad range of behaviors regarded as unacceptable or illegal, including: unauthorized reproduction, adaptation and subsequent commercialization of TCEs/EoF, with no sharing of economic benefits; use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive; unauthorized access to and disclosure and use of sacred/secret materials; appropriation of traditional languages; unauthorized fixation of live

performances of TCEs/EoF and subsequent acts in relation to those fixations; appropriation of the reputation or distinctive character of TCEs/EoF in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and ‘style’; failure to acknowledge the traditional source of a tradition-based creation or innovation; and, granting of erroneous industrial property rights over TCEs/EoF and derivatives thereof. The Delegation noted that these had been discussed in the past, but perhaps not in the depth required, and therefore, building on this foundation, the Committee should deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal (both IPR and non-IPR) and non-legal measures, that were available to address these specific issues or concerns. The Committee would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns.

155. The Delegation of Mexico stated that any distortion, mutilation or other modification made with the purpose of causing damage to the TCEs/EoF developed and perpetuated in a community or indigenous people, or with the aim of causing harm to the reputation or image of the community, indigenous people or region to which such expressions belonged, should be considered illegal and unacceptable. The failure to mention the community, indigenous people or region to which the TCEs/EoF belonged in any fixation, representation, publication, communication or use in any form should be considered illegal and unacceptable. In addition, the Delegation joined those who have spoken in favor of how “free prior informed consent” should accompany the protection of TCEs/EoF.

156. The Delegation of Burkina Faso responded to the statement made by the Delegation of Portugal on behalf of the European Community and its Member States which had expressed the view that in Europe most TCE/EoF were often in the public domain and that their protection could constitute an obstacle to modern creation. The Delegation considered that the folklore situation was not the same in every country. Nevertheless, such differences should not prevent a compromise through a common text. Such compromise, within the framework of a legal instrument, could consist in setting aside cases where in a particular country a TCE/EoF would be in the public domain in accordance with the customs or practices of the community concerned.

157. The Delegation of Morocco focused on the need to protect the traditional nature of TCEs/EoF. It was for that reason that it considered any behavior departing from this customary framework towards commercialization unacceptable and illicit. This would include any behavior aimed at illegally disseminating, broadcasting, copying or translating of TCEs. All these types of behavior should require previous authorization, or else they would be “illicit exploitation”. It would also be fair that whenever TCEs were made public, the sources should be quoted by citing the name of the community and the region as these were perceived as the source of the knowledge and culture.

158. The representative of the Saami Council reiterated that Article 3 of WIPO/GRTKF/IC/11/4 (c) constituted a workable starting point for future discussions on this point. At the same time, he underlined that the requirement for TCEs to be registered for PIC to be applicable, could for cultural and other purposes be impractical. The Saami Council believed that the Delegation of Brazil had made a significant contribution to Article 3 of WIPO/GRTKF/IC/11/4 (c) through its comments on the List of Issues in WIPO/GRTKF/IC/11/4 (a). It could probably be the case, as indicated by interventions of most delegations, that moral rights – and in particular the right against misappropriations –

could play a greater role in the protection of TCEs compared with conventional IP rights. Nonetheless, any relevant protection of TCEs should not be void of economic rights, and should include, for instance, a protection designed for indigenous peoples to use certain elements of their culture for commercial purposes as well as a protection against commercial exploitation of TCEs by non-members, also if this would not infringe any moral rights as understood in an IP context. Further, the representative found that it was imperative that the terms “cultural significant” and “misappropriations” were understood from the perspective of the culture and people whose TCEs were being protected. As elaborated upon by the representative of the Hokotehi Moriori Trust, from an indigenous perspective, protection of TCEs were very much about defending the cultural identity of distinct peoples. Utilization of elements of their cultures that from a conventional IP-perspective could not come across as misappropriation, could nonetheless be harmful to their cultures. As an illustrative example, following colonization, the Saami people shared a large part of their traditional territories with the non-Saami population. To survive as distinct peoples, it was absolutely imperative for them to defend and preserve the cultural boundaries between them and the non-Saami peoples, by reserving their cultural denominators for Saami use exclusively. In the recent Miss World Competition, Miss Finland had chosen to wear a Saami traditional dress in the evening gown event. Such behavior would not necessarily come across as misappropriation from an IP perspective. However, such behavior was not only culturally offensive, but also served to dilute the borders between the Saami and Finnish cultures, and in the longer run, would contribute to the assimilation of the Saami peoples into the Finnish society. Such act should hence, in any relevant protection system for TCEs, be prohibited. This was how moral rights in the context of TCEs and collectives should be understood. The Saami Council aligned itself with the comments made earlier by the Delegation of Ethiopia, pointing out that protection of TCEs should be in conformity with human rights standards. In the same line, the Saami Council particularly encouraged participants of the Committee and the Secretariat to study Article 15 of the Covenant of Economic, Social and Cultural Rights and the General Comment on the same Article, which had underlined that the provision had, in addition to an individual dimension, a collective one, and hence stipulated that indigenous peoples and communities held human rights to their collective creativity. Any international instrument agreed on by the Committee should thus be in conformity with this provision.

159. The representative of the Arts Law Centre of Australia stated that the primary objective should be to provide a range of protections for behaviors falling under the broad heading of “misappropriation”. The rights and ability to access remedies should not be predicated upon TCEs being registered. Behaviors that should be addressed would include: (i) use of TCEs without the consent of the custodians, such as reproduction, adaptation, publication, performance, broadcasting, communication to the public; (ii) commercialization of TCEs without financial benefit sharing; (iii) derogatory treatment of TCEs; (iv) damage or destruction of TCEs; (v) no attribution, or incorrect attribution, of custodians of TCEs; (vi) disclosure of secret and sacred materials; and (vii) fixations of live performances and ceremonies without consent.

160. Supporting what had been stated by the representative of the Arts Law Centre from Australia, the representative of Amauta Yuyay noted that the huge number of tourists which visited the famous ornate ponchos square in Otavalo, Ecuador did so through multinational companies and only made quick visits to the age-old square, took thousands of photographs, made quick purchases and took advantage of discounts. In other words, the relationship was based solely on money. There was no human relationship, no sense of cultural commitment and the Amauta felt adversely affected, as an indigenous people, by such a relationship. The representative said that it was therefore necessary to create protection instruments to

safeguard the heritage in order to generate a more auspicious relationship between the parties that visited the area, were they tourists or multinational companies. The representative therefore proposed a relationship based on a new concept of tourism, EDUTOURISM, which would provide education through tourism.

161. The representative of the Hokotehi Moriori Trust supported the representative of the Saami Council in considering that Article 3 of WIPO/GRTKF/IC/11/4 (c) was an appropriate starting point for elaborating mechanisms for protection against misappropriation. A number of Member States had indicated that further work remained to be done and they were calling for examples of misappropriation of TCEs to be produced to the Committee. He urged those Member States to reread the fact-finding mission prepared by the Secretariat in 1998 and also urged those Member States who were still unclear about this to read the numerous submissions made by indigenous peoples' groups over the last seven years. He also urged those parties to read the various other documents that were available from the Secretariat which recorded in detail the various examples from around the world of misappropriation of TCEs that indigenous peoples were concerned with. The representative told of a woman on the Chatham Island who ran a tourist business and wished to produce a series of coffee mugs with an image of a Moriori human figure labeled onto the mugs. The representative argued that placing those images onto a coffee mug would be culturally offensive to the Moriori people. The representative considered his ancestors to be unique among Polynesian peoples for carving the images of a deceased person onto living trees as a communication to that person but also as a way of sending that person's spirit back to the ancient homeland. Thus, those human carved figures had great significance to the Moriori people. At present, these figures were available in the public domain. The representative also referred to another person who had gone to the Chathams in 1957 and sketched all of the 2000 figures available and published these in a book. From a legal point of view, there was nothing that could be done to prevent these acts. However, the Moriori people wished to insist that the images were their cultural and IP rights. These images still retained significant spiritual and cultural significance to the people for which anyone that would want to use those images or other images would require PIC. If there was to be any commercial benefit, should approval be given, then a royalty should be paid. These illustrations showed those Member States who were still uncertain about where indigenous peoples were coming from. He called for some kind of mechanism, not only domestic but international, that could give indigenous peoples some assurance that they could enforce compliance against any culturally inappropriate or misappropriation of their TCEs. The representative added that the Hokotehi Moriori Trust supported the development of a robust binding international instrument or instruments for the reason that, even if there was a domestic law in New Zealand preventing such breaches from occurring, the Moriori people could prevent misappropriation at the international level. Only a binding international instrument would give these people the tools to prevent these acts from occurring. The representative shared his personal experience in dealing with Lego International which had used Maori names on plastic toys. Initially Lego had responded that there was nothing legally the company was doing wrong. However, the representative had pointed out that it was morally, ethically and culturally inappropriate to use Maori names. Lego had then decided not to produce any further toys with Maori names on them without the peoples' PIC. The representative concluded that it was possible for mechanisms to be developed. However, there was a need for goodwill as the current IP regime did not seem to provide protections that were necessary to accommodate indigenous peoples' concerns.

162. The representative of the Ogiek Peoples Development Program (OPDP) stated that among the Ogiek Community misappropriation and misuse of TCEs were offensive and could have spiritual and physical repercussions in their cosmological system. The representative

suggested that to protect TCEs proper redress mechanisms should be in force, so that the parties/communities whom the TCEs belonged to would be compensated in cases of misuse. Furthermore, cultural mapping should be conducted to identify the extent to which TCEs were used that would initially require community consultation and participation.

163. The Delegation of Thailand stated that this Issue was a complex one, as traditions and sense of decorum differed from community to community. However, for international protection, the Committee should consider this question from two perspectives. From the IP perspective, the Delegation felt that the protection under the existing international instruments should be adapted so as to include unauthorized use, distortion and failure to share the benefit that should be due to the rights holders and to cover all forms of behaviors that, in the understanding of all concerned, were considered acts of illegality. The second perspective was more complicated, which entailed what acts should be unacceptable. Here, the aspect of moral and spiritual rights protection should be added as it should include any behavior that would imply disrespect, insult, mockery or insensitivity to the traditional community's code of conduct, or insensitive to the human rights and cultural dignity of the traditional community. The Delegation was of the view that traditional communities owning the rights to protection should be encouraged to formulate their own code of conduct or customary laws as a *sui generis* system of protection that would be recognized by the international instrument.

164. The representative of Tupaj Amaru related a story about his journey to the plateaus of Bolivia, Peru and the Chilean border region. He had traveled there with an elder of the Quechua tribe to visit the sacred site of this community. The people there seemed to be skeptical because of negative past experiences with anthropological researchers who had gone to these sacred sites to know about the community's traditions. Therefore, it seemed to be difficult to visit the place as the communities were trying to safeguard their heritage and their patrimony, and these would not be comparable to something that could be bought and sold. This was just one of the cases of the violation of the customary rights of indigenous peoples. The representative stated that anthropologists and researchers were responsible for trafficking in the sacred items of the indigenous peoples and local communities. Referring also to other examples from Mexico and the Aztecs, the representative called for action to be taken by the Committee on protecting the cultural and intellectual heritage of indigenous peoples as these objects seemed to constantly be pirated at all levels.

*Issue five: should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?*

165. The Delegation of New Zealand noted that items not resulting from intellectual activity and heritage in the broader sense, such as human remains and languages, in general, were excluded from the WIPO definition of TCEs. There could be situations where such elements of traditional culture would be misappropriated, misused, or misrepresented in the IP context, and, therefore, they should also form part of the analysis. The Delegation referred to its statement made under Issue 4 in which it had stated that the creation of works or inventions that were adaptations or derivatives of TCEs was a form of behavior that required further analysis in order to determine what should be considered unacceptable, and where exceptions or limitations could be established in the IP context. The current exceptions and limitations in the IP system provided that a significant amount of TCEs did not qualify for protection. New *sui generis* mechanisms and/or rights could be needed to address this gap in protection. Without in-depth analysis and discussion of this issue and its implications for Members States, indigenous peoples and local communities, it would be difficult to fully assess which exceptions or limitations should attach to mechanisms and/or rights for the protection of

TCEs. The Delegation considered that it would be inappropriate to solely refer to current IP types of exceptions and limitations in answering this question. The exceptions and limitations should also be informed by customary laws, protocols and practices associated with TCEs, as well as by broader humanitarian and environmental objectives and principles.

166. The Delegation of Algeria, speaking on behalf of the African Group, stated that this was one of the key questions. The African believed that any legal instrument should strike a balance taking into account the interest of all parties concerned. Some delegations had raised questions and concerns which were legitimate. The Delegation supported the statement made by the Delegation of Burkina Faso in its response to the statement made by the Delegation of Portugal on behalf of the European Community and its Member States. Along the same lines, the African Group suggested that in any international instrument there should be exceptions. However, it stated that there were other rights that should also be fully respected. The exceptions should be allowed with the view to creating a balance. The African Group believed that the protection of TCEs should not be prejudicial to the continued availability of TCEs for their practice, exchange, use and transmission by their holders within the traditional context. Another exemption should be the use of TCEs for benefit of the public. The African Group also acknowledged exemptions for non-commercial uses such as teaching, research, personal and private use, criticism or review, reporting of news or current events and the making of recordings and reproductions for inclusion in an archive or inventory exclusively for the purpose of safeguarding cultural heritage for as long as such exceptions were not offensive to and would not adversely affect the interest of the communities concerned.

167. The Delegation of the Russian Federation stated that provisions relating to limitations or exceptions could be precisely formulated after the provisions relating to the aims of protection for TCEs (Issue 3) and unlawful acts in relation to TCEs (Issue 4) had been clarified. The Delegation proposed that protection granted for TCEs should not limit the freedom of access to cultural values, cultural rights of citizens, based on the preservation and development of the cultural specificity of peoples, cultural exchange, study, research, and private use.

168. The Delegation of India stated that like with any other IP rights, there should be exceptions and limitations to the rights accorded to TCEs/EoF, since protection mechanisms were not to unduly restrict the use of TCEs/EoF. What were required were safeguards against misappropriation and misuse and the means to bring deserving economic returns to the preservers and developers of such TCEs/EoF. In this connection, the formulation proposed in article 5 of WIPO/GRTKF/IC/11/4 (c) formed an adequate basis for consideration.

169. The Delegation of Canada stated that it was premature to address the issue of exceptions or limitations to rights attaching to protectable TCEs at this juncture, given that their nature and scope would depend on a number of factors, such as the scope of protectable subject matter and the type of protection provided to TCEs. In addition, inappropriate, administratively inefficient or ineffective exceptions and limitations could end up stifling creativity and innovation. Consequently, the impact on creators, inventors, users and the broader public interest should be taken into account in the discussions.

170. The Delegation of Ethiopia expressed its full support for the statement made by the Delegation of Algeria on behalf of the African Group. Referring to Article 5(3) in WIPO/GRTKF/IC/11/4(c), the Delegation was of the view that criticism or review was a dependent enterprise or undertaking and that it was rather undertaken as a method of teaching and learning or research, be it commercial or non-commercial, or reporting or in the course of legal proceedings. For this reason, the Delegation considered its inclusion as an independent

ground for exceptions and limitations inappropriate. Having said that, it considered that article 5 was a solid foundation for future deliberations. It referred to the commentary to the first paragraph of article 5 which stated that “an overly strict protection could stifle innovation and cultural exchange”. The Delegation acknowledged that innovation and cultural exchange should be to the benefit of traditional communities themselves. There was a need to note that the premises for the protecting TCEs/EoF, on the one hand, and the promotions of innovation and cultural exchange, on the other, were different. Protection of TCEs emerged from the fact that traditional communities would have rights. Innovation and cultural exchange would have to be dealt with differently. In view of the Delegation, innovation and cultural exchange should not function as limitations to these rights, despite their importance. Regarding the makings of recordings and other reproductions of TCEs for the purpose of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes, the Delegation was of the view that the conservation of TCEs through the establishment of inventories or archival centres would give the primary responsibility to the State where these communities were located. It could not imagine a situation where such conservation measures could be taken at the international level without a multilateral commitment. However, the Delegation was of the view that it would also be very difficult to accept situations whereby an inventory, albeit for non-commercial purposes, was made outside the environment of the traditional cultural communities without their consent and the involvement of the State where they were located. Should this happen, there would be a proliferation of self-declared, non-commercial archival centres all over where access would become unaccountable to these communities. How could a local community protect its folklore in a library whose establishment was not based on the consent of the communities themselves and found in a distant corner of the world? The Delegation, therefore, recommended inventory, collection or any archival activities to be excluded from the list of limitations or exceptions.

171. The Delegation of Portugal, on behalf of the European Community and its Member States, considered that should an instrument for protecting TCEs/EoF with the creation of rights be produced, it was necessary to provide for exceptions and limitations.

172. The Delegation of the United States of America agreed with the Delegation of Canada that it was premature for the Committee to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TCEs/EoF.” It was of the view that, first, as currently framed, the issue could tilt in a particular policy direction that would not be warranted at this stage of the Committee’s deliberations since there was no consensus on a rights-based approach to address specific issues and concerns regarding TCEs/EoF. Second, such a discussion could have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the Committee. From a general perspective, the Committee should continue its work in identifying the extent of existing mechanisms to address specific issues and concerns that have been raised in the Committee and identifying any perceived gaps, including appropriate and applicable exceptions and limitations. Once existing mechanisms to address a specific issue and concern related to protectable TCEs/EoF had been identified, the Committee would then be in position to evaluate related limitations and exceptions.

173. The Delegation of the Islamic Republic of Iran stated that Article 5 of WIPO/GRTKF/IC/11/4 (c) was a good basis for the discussion. It was of the view that acts where no permission would be necessary should be clear. Examples of such acts could be teaching purposes, personal use, using of folklore to create a new work and partial use. Nonetheless, the protection should not provide a monopoly to the rights holders which would



prevent the public from having access to these TCEs/EoF. There was a need for balance in the binding instrument as in any other binding instruments. The Delegation generally aligned itself with the Delegation of Algeria speaking on behalf of the African Group.

174. The Delegation of Saudi Arabia queried who would have the right to decide on exceptions. What should the role be of the holders and the owners of the heritage concerned in this context? The Delegation believed that exceptions in the case of teaching could be used in a correct way but also in an incorrect way. The same thing would apply to certain other elements in the text, such as criticisms or evaluations. Consequently the Delegation stated that the Committee should find clearer and more precise measures to cover this area.

175. The Delegation of Brazil believed that the misappropriation of TCEs/EoF was a global problem that required a global response. That response should be satisfactory, effective and robust and should come from the international IP system. Brazil held the view that an international instrument for the protection of TCEs/EoF should contain provisions on limitations and exceptions. Those limitations and exceptions would allow for utilizations in cases of public interest, safeguarding cases of non-commercial and respectful use such as uses for the purpose of teaching and learning, for criticism or review. Brazil remained convinced that the protection of TCEs/EoF was an issue that enjoyed sufficient density and maturity and that this Committee could and should engage in a substantive discussion on the rights to be granted and relevant exceptions and limitations. It acknowledged that the Committee had been discussing the draft provision in WIPO/GRTKF/IC11/4 (c) for a few years already and that the draft was the result of efforts and substantive discussions held in the Committee. Therefore, Brazil believed that Article 5 of WIPO/GRTKF/IC/11/4 (c) constituted an adequate, solid and mature basis for discussion.

176. The Delegation of Indonesia stated that Article 5 in WIPO/GRTKF/11/4 (c) was a good basis for discussion. The Delegation suggested that exceptions or limitations also needed to include the following matters: (i) utilization of TCEs/EoF in the context of education, science and public health according to national law while ensuring that this utilization would not be for commercial purposes and would not affect the TCEs/EoF holder disadvantageously. This utilization should also mention the source of origin of the TCEs/EoF, and be respectful of the TCEs/EoF holder; (ii) in case of member(s) of the community, they could freely utilize or perform TCEs/EoF within their own community in their traditional or customary context; (iii) in case of domestic utilization within a national jurisdiction, the utilization should have authorization by the respective TCEs/EoF holder ; and (vi) individuals who have developed their TCEs/EoF within the customary context should be allowed to exploit their copyright. In this regard, the customary law or the State could require them to fulfill the conditions of PIC, disclosure of origin and the sharing of benefits with the community.

177. The Delegation of Japan expressed its support for the statements made by the Delegations of Canada and the United States of America. The Delegation reiterated its belief that that any justifiable reasons for IP protection for TCEs/EoF had not been clearly identified and sufficiently explained. In this respect, Japan had a serious concern. Japan was not in a position to enter into discussions based on rights or protection, but when discussing exceptions and limitations consideration should be given to the balance between the interests of rights holders and the public interest, although such a balance could vary according to the form of protection and the scope of illegal acts provided for.

178. The Delegation of Thailand expressed its satisfaction that exceptions to rights were being considered at this stage. Although it could be premature to go into details, the

Delegation found it useful to hear the views of various delegations. In principle, the Delegation felt that exceptions should be allowed in cases that could benefit the public interest as well as the interests of the traditional communities themselves. These exceptions should not be harmful to the communities' traditions, and could, for example, be for the purpose of education and transmission to the younger generations, or for scientific study and research, or in the case of a national inventory. However, as a general rule, consultations with the rights holders should always be made and, as far as possible, their consent should be obtained and their participation encouraged.

179. The representative of Tupaj Amaru stated that the interventions made by the Delegations of the United States of America, Portugal and Japan were a way of vetoing the discussion. In general, an internationally binding instrument would imply rights and obligations, which the western countries did not want. The representative supported the Delegation of Brazil which had stated that the protection of cultural heritage would require a global response in a globalized world. The representative called upon the Committee to study, approve and submit all these issues to the General Assembly of WIPO. He also agreed that there should be limitations and exceptions for non-profit and public interest reasons under the condition that they had the prior consent of the indigenous peoples.

180. The Delegation of Morocco expressed its support for the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation emphasized the importance of this subject and the need to provide protection. It acknowledged that a number of efforts had been made over the years and many proposals had been made which constituted a good foundation. All these efforts were embedded in WIPO/GRTKF/IC/11/4 (c). Exceptions for learning and quoting sources from a commercial context would help to achieve the necessary balance between, on the one hand, the recognition of rights holders' rights and, on the other, exceptions and limitations in order to facilitate access to this heritage.

181. The Delegation of China highlighted the need to provide for limitations or exceptions in a *sui generis* system for the protection of TCEs. The Delegation believed that the protection of TCEs should not affect cultural dissemination and innovation. The Delegation expressed its appreciation to the Secretariat for the constructive work it had done, and considered the relevant provisions in document WIPO/GRTKF/IC/11/4 (c) were a good basis for further deliberations. The Delegation considered that, in particular, limitations and exceptions should be established, provided that: (1) the protection of TCEs should not affect the use of TCEs by members of the communities according to their customary laws or practices; (2) subject to the required indication of source, exceptions be established in the following cases: (a) use for scientific research or education purposes; (b) use for personal study, research or appreciation; (c) use for reporting news or current events; (d) use by governmental organs for carrying out their duties; (e) use for archive or inventory purposes; and, (f) use for national security; and (3) non-voluntary licenses may be applied to the use of TCEs in the form of adaptation.

182. The Delegation of Nigeria supported the statement made by the Delegation of Algeria on behalf of the African Group. Nigeria was of the view that a determination of the limits of rights and the proper definition of the available exceptions had become a twin issue of great concern to holders and users of IP rights. The Delegation acknowledged that this recognition had not always played out in the most balanced manner in the case of classical IP. In fact, it had often been defined narrowly to increase the burden of the system upon user countries, many of which were among the developing and least developed countries. Notwithstanding this, the Delegation was convinced that for rights to truly serve the interests of society, they should not only work for the benefit of the right owners but should also, of necessity, be made

subject to the greater good of the wider community. TCEs were increasingly becoming raw materials for use in other fields of creative endeavors which included music, literature and other artistic expressions. Often the borrowers derived more commercial benefits from the derivative works than the original TCEs holders. While acknowledging that TCEs needed special treatment, the Delegation was of the view that exceptions and limitations should take cognizance of the very nature of TCEs, the manner in which they were used as part of the daily activities of the communities concerned and other interested parties. However, when defining the limitations and exceptions for TCEs, care should be taken not to erode the very TCEs sought to be protected as TCEs were a very fragile subject matter that had suffered from many years of neglect and abuses. For this reason, the Delegation fully supported the statement made by the Delegation of Algeria on behalf of the African Group which was in line with the formulation of Article 5 in WIPO/GRTKF/IC/11/4 (c). That formulation would provide a good basis for further discussion on this issue. The Delegation's understanding was that the list of exceptions was at this point intended to be closed. As had been the experience in other areas of IP, exceptions and limitations were always subject to further consideration as the society met new challenges. The Delegation did not see the discussions on the possible limitations and exceptions as premature in view of the fact that the Committee, even if in a question and answer format was already addressing the possibility of some kind of protection. However, in line with the view already expressed by the Delegation that Article 5 of WIPO/IGRTK/IC/11/4(c) formed a good basis for further discussion, the Delegation was prepared to engage in further deliberation with other delegations with a view to improving the text. Nigeria had legislation for the protection of TCEs/EoF which also provided for exceptions and limitations. Some of the exceptions included utilization for educational purposes and utilizations for illustration in an original copyright work and the borrowing TCEs/EoF for creating original works as well as incidental uses. The Delegation was of the view that special exceptions should be provided for use by nationals of a country especially where the TCEs concerned was considered to be part of the national patrimony. It was the view of the Delegation that where TCEs were used outside their traditional contexts, there should be adequate acknowledgement of their source.

183. The representative of the Arts Law Centre of Australia stated that article 5 of WIPO/GRTKF/IC/11/4(c) provided a useful starting point. From the perspective of the history of appropriation of TCEs by academics and cultural institutions, such as museums, galleries, and archives, the representative was of the view that there could be problems if exceptions were to be allowed for: (i) non-commercial research or study; and (ii) inclusion in archives, libraries, museums and galleries. There was a need for a requirement in which adequate controls by indigenous peoples would be in place before allowing these exceptions.

184. The Delegation of Sudan expressed its support for the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation also noted, however, the necessity of maintaining a balance in order to avoid excessive discussions on the need for protection. It pointed out that tourism-related promotion campaigns and beauty competitions depended to a large extent on cultural and folkloric expressions, and that indigenous peoples should share in the material and moral benefits derived from such activities.

185. The Delegation of Mexico considered that Article 5 in WIPO/GRTKF/IC/11/4(c) could be a basis for discussion of this subject.

186. The representative of Hokotehi Moriori Trust stated that: (1) PIC should be required in Article 5(a)(iii) because he believed that it would be better to have preventative measures than to wait for any offences to be caused to a "relevant community"; (2) the word "unrestricted"

should be deleted from article 5(b) and be replaced with “appropriate” use in accordance with custom and traditional practice. The representative commented on the statement made by the Delegation of Japan in which it had stated that it was not convinced of the need to protect TCEs using IP or any other means. The representative asked why after seven years Japan still asked this question. He wondered whether the Delegation had been listening to what indigenous peoples had been saying or not reading all the information in the Committee’s documents which had explained in great detail why TCEs needed protection. He stated that with greatest respect this could not be a credible position for the Delegation of Japan to maintain.

187. The Delegation of Ukraine said that when reference was made to the conventional rules of copyright and the lawful use of copyright subject matter, this also included the exceptions which provided for the means of free use of such subject matter. Taking into account the fact that the use of TCEs/EoF was a specific trend and that without the use of priceless national treasures the development of nations was impossible, it was necessary to pay very close attention to the question of the free use of such subject matter and free access to them when examining issues relating to the unlawful use of TCEs/EoF.

*Issue six: for how long should protection be accorded?*

188. The Delegation of Canada was of the view that it was also premature to address the issue of the term of protection at this juncture, given that it would depend on the type of protection provided to TCEs. The approach envisaged and the factors considered would differ whether the protection would be conferred by an active assertion of rights or by defensive measures. In addition, the appropriate term of protection could be influenced by a number of factors such as the goal of protection, the scope of subject matter to be protected, and the associated exceptions.

189. The Delegation of India stated that the duration of protection for TCEs/EoF should be unlimited like that of geographical indications. The protection should endure for as long as the TCEs/EoF continued to meet the criteria for protection.

190. The Delegation of New Zealand supported Canada’s view that it was premature to discuss this issue and also agreed with the elements enumerated by the Delegation of Canada, which would need to be considered in detail in order to fully determine this issue. New Zealand’s domestic discussions with stakeholders on this issue had indicated that the protection for TCEs should be accorded in perpetuity, or until there was no one who were *whakapapa* (genealogically connected) to the source of the TK or TCEs, or as long as there were *uri* (descendants) who wanted to assert the protection. Most existing IP rights had placed limits on how long the accorded protection should last. Māori stakeholders had clearly indicated that economic growth and/or innovation motivations should not constitute the only incentives for placing limits on the duration of protection for TCEs. Such economic and/or innovation motivations should be balanced with other cultural motivations such as the cultural needs and aspirations of the TCEs holders, in accordance with their customs and protocols. However, some stakeholders had indicated that the duration for any economic types of protection accorded in relation to TCEs could be shorter, but the moral types of protection should be perpetual as defined by the customary relationship to those TCEs.

191. The Delegation of the United States of America agreed with the Delegation of Canada that it was premature for the Committee to undertake a focused discussion of the duration of

possible rights with respect to the protection of TCEs/EoF. This question also appeared to presume a particular outcome, which was not helpful in advancing the work of the Committee. There were many mechanisms available for the protection, preservation and promotion of TCEs/EoF. Some mechanisms that could preserve and maintain TCEs/EoF could be indefinite in length of time, such as protection derived from traditional practice or moral obligations within a cultural group. On the other hand, many existing forms of IP protection were time-limited such as copyright. It reiterated its previous comments in which further discussion was needed on specific issues and concerns related to the protection, promotion, and preservation of TCEs/EoF, along with analysis of possible gaps in the existing measures to address these issues and concerns, before specific solutions could be identified.

192. The Delegation of South Africa, on behalf of the African Group, stated that Article 6 in WIPO/GRTKF/IC/11/4(c) provided an advisory beginning for further discussion. The African Group held the view that TCEs should be accorded protection in perpetuity. In view of the distinctive and intergenerational nature of TCEs, the moral and economic rights of the holders of TCEs should last in perpetuity for as long as the TCEs remained integral to their collective identity.

193. The Delegation of Japan supported the statements made by the United States of America and Canada. Any justifiable reasons why IP right protection should be extended to TCEs/EoF were not clearly explained. In this respect, Japan had a serious concern. Japan was not in a position to enter into discussions on the term of protection, but when discussing the term of protection of an IP right, consideration had to be given to the balance between the interests of right holders and public interests although such balance might vary by the form of protection and the scope of illegal acts.

194. The Delegation of Italy stated that it could be useful to make some distinctions on the merits of some previous interventions made by other delegations. In fact, if the Committee were to think of protection for moral rights, then no limit of time should be provided and the Delegation was here referring to Article *6bis* of the Berne Convention. On the other hand, if the work was not considered as public domain material, the Delegation believed that the term for protection should be fixed. In this direction, Italy referred once again to the terms of protection established by the Berne Convention as outlined in Articles 7 and *7bis* of that Convention. It believed that the terms defined in these articles could be applied to TCEs.

195. The Delegation of Burkina Faso pointed out that the rule contained in Article 6, paragraph (ii) of WIPO/GRTKF/IC/11/4 (c) was not appropriate. The draft provision terminated protection when expressions of folklore that had previously been secret ceased to be so. Since protection did not result from the secret nature, there was no reason to attach such consequence to disclosure.

196. The Delegation of Egypt confirmed the dynamic nature of TCEs, transmitted from one generation to another and from an individual to one or more individuals, while continuously subjected to such modifications, additions and deletions as would comply with the collective needs and practices of the holders. Without their dynamic character, TCEs would lose their value as such, hence the need for protection for as long as that dynamic character maintained TCEs in practice and circulation.

197. The Delegation of the Russian Federation proposed that the term of protection could be discussed in more detail only after provisions on the aims and scope of protection had been defined and clarified. In that regard, it pointed out that since TK and TCEs/EoF were based

on knowledge handed down from generation to generation, there was no point in discussing the term of protection which could not be defined. In cases where the rights of individual figures, such as performers of national songs, were referred to from among the representatives of indigenous peoples, the current legislation on related rights would be applicable and the term of protection for such performances would be limited and defined in accordance with that legislation.

198. The Delegation of Brazil remained convinced that the misappropriation of TCEs/EoF was a global problem that required a global response and that it was not too early or premature to try to provide that response. It recognized the tremendous efforts done by the Committee in discussing the issue of the protection for TCEs/EoF and stated that the Committee held all the elements necessary for negotiating an international instrument. The Delegation was of the view that protection should not be limited in time. Due to the specific characteristic of TCEs/EoF, protection should be available and should endure for as long as the TCEs/EoF remained in the tradition of the community. In this respect, the term of protection should only be dependent on the criteria for protection. Once a TCEs/EoF had met these criteria, protection should be accorded without need for any further requirement, such as previous registration. The draft provision contained in Article 6 of WIPO/GRTKF/IC/11/4(c) provided a sufficient basis for discussing the issue.

199. The Delegation of Indonesia was of the view that there should not be any limitations on the duration of protection for TCEs/EoF, as these were an important element of the cultural heritage of each nation, in particular the concerned community who had developed and preserved the TCEs/EoF. In respect of paragraph 1 of Article 6 in WIPO/GRTKF/IC/11/4 (c), where it was mentioned that protection “shall endure for so long as they remained registered or notified as referred in article 7”, the Delegation was of the view that there should not be any limitations on the term of protection for TCEs/EoF based on a registration system. I believed that protection should not be limited to either registration or notification, since the TCEs/EoF would have already existed a hundred years ago. Regarding paragraph 2 of Article 6, the Delegation was of the view that protection of secret TCEs/EoF should not be solely limited to the secrecy aspect but these should be protected for as long as the criteria of protection were fulfilled.

200. The Delegation of Nigeria wished to support the statement made by South Africa on behalf of the African Group on Issue 6. The Delegation stated that it would be begging the question if one were to say that it was premature to find answers to what was to be a clear question as formulated at the last session of the Committee. The very cause of TCE would make perpetual duration an appealing and more appropriate option. However, the Delegation had made the point at the 5<sup>th</sup> and 6<sup>th</sup> sessions that there was nothing inherently wrong or contradictory in defining TCEs within a timeframe of duration, especially those cases that were only of commercial importance or orientation. This could help to provide some balance in the competing interests of the originating communities and improve certainty. The Delegation was, therefore, prepared to engage further on the desirability or workability of a dual duration regime, particularly along the lines of economic/moral rights as suggested by New Zealand and Italy. Finally, the Delegation did not subscribe to the description of TCEs as being in the public domain since they had never enjoyed any formal protection.

201. The representative of the Ogiek Peoples Development Program (OPDP) stated that as long as the community still relied on its TCEs then the draft should opt for a longer period of protection. This would ensure that future generation would have adapted the TCEs for their livelihood.

202. The representative of Tupaj Amaru referred to the proposal made by the Delegation of Canada that it was premature to discuss the duration of protection. He wondered when after six or seven years of debate and general statements the time would come for substantive discussion of whether there should be limited duration or an unlimited duration. He welcomed the position of the Delegation of South Africa on why there should be no limit on the duration. He emphasized that indigenous peoples and local communities, the holders and guardians of TCEs/EoF, were eternal. He also commented on the applicability of the Berne Convention in defining the term of protection for TCEs, and wondered what would happen in 50 or 100 years time when the legal protection for TCEs/EoF would have expired. He stated that the holders and the guardians of TCEs would still be there and that it would, therefore, not be appropriate for these peoples to lose their rights as the TCEs/EoF were a part of their identities and their souls. He added that the protection of TCEs/EoF should not be perceived in mercantile terms, in terms of profit in the market economy logic, but rather in terms of the very existence of man, his memory and his soul.

203. The Delegation of Mexico stated that, as regards the duration of protection of TCEs/EoFs, although it supported the statement made by the Delegation of Brazil, as it was not possible to achieve a consensus, it wished to restate its position whereby the duration of protection, both for TK and for TCEs, should continue for as long as the indigenous people or community continued to exist, and not only while the expressions remained within the traditions of the people or indigenous community.

204. The Delegation of Thailand supported the position of the African Group. The Delegation believed that the protection of TCEs/EoF should not be limited in time. The draft provision in Article 6 of WIPO/GRTKF/IC/11/4 (c) should be used as basis for discussion. Particularly draft Article 6(ii) should be considered in consultation with traditional communities.

205. The representative of the Arts Law Centre of Australia stated that Article 6 provided an adequate starting point once the registration requirement was removed as it was inappropriate for many remote indigenous communities. Protection should be provided in perpetuity or as long as the communities existed to act as custodians of their TCEs.

206. The Delegation of China considered that, as long as a particular TCE remained a sign or a symbol representing a traditional or local community, and as long as there existed a linkage between them, no special time limit should be artificially imposed on the protection of the TCE. The Delegation associated itself with the comments made by the Delegation of Burkina Faso concerning draft Article 6(ii), and requested the Committee to make further clarification on the term of protection for secret TCEs. The Delegation considered Article 6 in WIPO/GRTKF/IC/11/4(c) a basis for further discussion.

207. The Delegation of Yemen expressed the view that, unlike patents or trademarks that constituted personal property, TCEs belonged to peoples and communities. It concluded that protection should not be limited in time, but should rather endure for as long as the TCEs continued to meet the criteria for protection and be transmitted from one generation to another.

208. The Delegation of Morocco supported the statement made by the Delegation of South Africa on behalf of the African Group. TCEs were different in nature from other cultural products because they were the result of being passed down from generation to generation and

were therefore perpetual. These communities were still alive and the protection should take these characteristics into account and be granted in perpetuity.

209. The representative of the Hokotehi Moriori Trust stated that unlike trademarks, patents and copyright, TCEs were not finite in duration. They continued to be integral to the maintenance of the culture and identities of the indigenous peoples concerned. He agreed with the African Group that protection should be in perpetuity. Protection should not be limited to those TCEs that had been registered because many indigenous peoples lived in remote communities. As part of the Wai 262 claim, Maori tribes had put forward a number of suggested options and models for how protection regimes could work in practice. The representative called upon those Member States who were unclear about the mechanisms of protection that indigenous peoples were seeking, to read the many materials and documents that had been prepared for the Committee and the relevant case studies that had been submitted by States and indigenous peoples over the past seven years. He also suggested that the Secretariat compile a list of documents and other information identifying the work that had been done to date by the Secretariat on these issues.

210. The representative of Amauta Yuyay said that the statement by the representative of the Tupaj Amaru made clear the need to protect the visions of indigenous peoples. The representative had listened to the experiences of the Inuit Women's Organization, including the references to how the women carried their children on their shoulders. The representative and his current family of seven children had always been carried by their mother. He belonged to generations with mothers that had also been carried, thereby helping to create an intimate relationship which honored the senior members of the family. Thus, protection should be perpetuated since it was the very essence of the life of their people.

*Issue seven: to what extent do existing IPRs already afford protection? What gaps need to be filled?*

211. The Delegation of Nigeria stated that it supported the statement to be made on behalf of the African Group. The Delegation wished to draw to the attention of the Committee the excellent report of the WIPO fact-finding missions, which showed clearly a gap between the goals of the classical IP system and the needs and expectations of the communities concerned. This proved convincingly that the present IP system was never designed for and did not adequately protect TCEs.

212. The Delegation of Japan stated that to date there was no IP system around the world which extended direct protection to TCEs/EoF. In certain limited cases, however, TCEs/EoF could be protected under such existing systems as copyright law, trademark law, or unfair competition law. Still, the following problems would remain. Under copyright law, in order to be protected by copyright, a certain level of originality was necessary. Also, the holder of right was basically presumed to be an individual, and although there were systems of joint ownership of copyright, or copyright owned by legal entities, it was not presumed that a community could directly become a copyright holder. Performances of TCEs/EoF could be subject to protection by neighboring rights, even if the performed TCEs/EoF itself did not qualify as a copyrighted work. The term of protection was limited both for copyright and neighboring rights. Under trademark law, a trademark right was aimed at protecting signs used for goods and services by entrepreneurs but not cultural expressions such as TCEs/EoF. Indirect protection of protection of TCEs/EoF under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of a group to which the TCEs/EoF belonged, a brand could be established using the mark of the group. In



addition, with regard to the protection of moral rights, copyright law could provide moral rights protection where the TCEs/EoF qualified as a copyrighted work, and civil codes or other general laws might also provide protection in cases of serious moral right infringements. In conclusion, the Delegation stated that a fair balance had been kept between the protection of TCEs/EoF and the protection of the public domain under the IP system and other laws. At this stage there was no perceivable gap between the current system and the necessary forms and levels of protection desired.

213. The Delegation of India stated that traditional IP laws like copyright or design laws were not applicable to TCEs since it was difficult to establish the conditions of originality and novelty requirements. What was needed was a new group of IPRs which encompassed all such forms of traditional wisdom.

214. The Delegation of South Africa, speaking on behalf of the African Group, stated that much progress had been made in narrowing differences and opinions on various issues. The emerging convergence of opinion was an encouraging sign of the emerging consensus. On Issue 7, the African Group held the view that the current IP system did not offer adequate protection of TCEs. However, in some specific cases, elements of TCEs might be protected under the existing IP system. Any viable system of protection had to take into account the communal, holistic and intergenerational nature of TCEs. The gaps which need to be addressed were: (i) the existing IP system did not recognize community and intergenerational ownership; (ii) the principle of duration was adverse to the intergenerational and evolutionary nature of TCEs; (iii) the present IP system did not have a provision for the sacred/secret, spiritual and ritualistic elements of TCEs.

215. The Delegation of the United States of America believed that the Committee should continue its work in identifying and analyzing the use of existing IPRs to address specific issues and concerns related to the protection of TCEs/EoF. Successful experiences at the national, regional, and local levels might provide a basis for identifying “best practices” and models for other Member States and cultural groups. Such a fact-rich approach held great promise in facilitating consensus around achievable goals. In particular, the United States of America suggested that the Committee might wish to consider activities and programs, including regional programs and tool kits, designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local, national or regional issues and concerns related to TCEs/EoF, drawing upon, where appropriate, the best practices of cultural institutions. The United States of America believed that discussion of selected principles and doctrines of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issues or concerns, would advance the work of the Committee. For example, the Committee might wish to consider more closely examining the use of unfair competition law (and related unfair advertising and labeling laws) by WIPO Member States to address specific issues related to TCEs/EoF. The United States of America believed that many other principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which were provided for under the Berne Convention, could be adapted to address specific non-economic issues and concerns related to TCE/EoF. Member States could share national experiences on attempts to integrate moral rights concepts with customary law. In addressing specific issues of actual communities, the relationship of existing IPR principles and doctrines to customary law was a topic that required further discussion within the Committee.

216. The Delegation of Burkina Faso made a general observation on the capacity of IP legislation to manage the protection of TCEs correctly, and recalled, firstly, that the protection

of TCEs had been an issue that had arisen during the first African meeting on copyright held in Brazzaville in 1963. Since then, the issue had continued to be the subject of discussion. For example, during the revision of the Berne Convention in 1967 the African countries had expressed a concern such that Article 15 of the Convention was drawn up. It was not right to imply that the issue was a new problem and that it was too early to tackle it with concrete proposals. For the Delegation of Burkina Faso, the difficulty was connected to the fundamental issue of the form of intellectual creation: a traditional creation form and a modern creation form. When copyright had appeared in Europe there was also traditional creation, but copyright was conceived to take care of “scholarly” creation while putting popular creation to one side. The criterion of originality was cited as an example. Such criterion was an individualistic criterion. In traditional creation, the creator did not necessarily seek to acquire an identity of his own. He had above all to remain authentic. It was not necessary to review the gaps and shortcomings of IP as if it could today be transformed to take traditional creation into account. It was better to intensify the ongoing search for *sui generis* solutions to manage traditional creation.

217. The Delegation of Canada was of the view that both IP and non-IP laws and policies could, depending on the objective, protect TCEs. It had been noted that concerns had been expressed that there were “gaps” in IP law. Therefore, Canada was of the view that an identification and analysis of potential gaps in the current system would advance the work of the Committee to the benefit of all Member States and observers.

218. The Delegation of Italy stated that some modifications to the Berne Convention in order to better specify the beneficiaries of protection could perhaps bring the protection of TCEs to an adequate level. Italy wished to draw the attention of the Committee to Article 15.4 of the Berne Convention, which granted protection to unpublished works of unknown, anonymous authorship, and to Article 7*bis* of the same Convention, which provided protection to joint authorship. It could perhaps be possible to grant protection to local communities as joint anonymous authorship. In so doing, it would be possible to grant to TCEs an adequate level of protection against misappropriation and other violations. It was the opinion of Italy that it would be useful to adopt some common guidelines that could help national legislation to adopt more focused rules on the protection of TCEs.

219. The Delegation of Brazil stated that traditional IPRs were neither targeted nor suitable for TCE/EoF. Traditional IP rights, such as those foreseen by the Berne Convention or the TRIPS agreement, did not adequately address the issue of the protection of TCEs/EoFs and did not meet the concerns of traditional and local communities. The multidimensional nature and specifics of TCE/EoF indicated that there was an urgent need for an international instrument to secure the rights of local, indigenous and traditional communities. It was the view of Brazil that the misappropriation of TCEs/EoFs was a global problem that required a global solution. That solution had to be pursued within the IP system by the establishment of a new international instrument. This Committee had made considerable progress in discussing the issue and the Delegation was eager to engage in a substantive discussion.

220. The Delegation of New Zealand stated that IP mechanisms were not designed with the protection of TCEs in mind. New Zealand was, therefore, giving thought to the possible development of *sui generis* models of protection for cultural and intellectual property of Māori, beyond existing IP rights systems. New Zealand was mindful that IP protection was only one aspect of a broader set of concerns relating to the protection of TCEs and cultural heritage. For New Zealand, this meant that alternative means of providing protection, additional to that which could be accommodated under the existing

IP regime, was being explored at the national level. New Zealand supported further work by the Committee on *sui generis* systems to protect elements of TK not covered by existing IP rights systems. The issue as to what extent did the current IP system afford protection for TCEs arose in the context of the Treaty of Waitangi claim WAI 262 in New Zealand. The Waitangi Tribunal was a statutorily created commission of inquiry mandated to look into and report on claims of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora Claim, had raised concerns in relation to IP and the protection of *mātauranga Māori*. That was not to say that the IPR system did not provide some form of protection for Māori. There had been many examples given in evidence where Māori had used trademarks and copyright to protect the commercial aspects of their works. The key issue for the claimants was that the IP system was limited to the protection of economic and commercial rights. It was not designed to protect cultural values and identity associated with *mātauranga Māori*. Some aspects of existing IP could be used to protect TK. For example, the assertion of copyright (including moral rights) over artistic and literary works, which met the criteria under copyright law, might be possible. However, the resources (financial and otherwise) required for TK and TCEs holders to effectively monitor and enforce their IP domestically and internationally might be beyond the means of many indigenous and local communities. Certain exceptions and criteria in current IP law, such as novelty/prior art and inventiveness/non-obviousness, contrary to morality (such as scandalousness or offensiveness), might also provide grounds upon which indigenous and local communities might object to the granting of IP to third parties wishing to inappropriately exploit their TK and TCEs. Again, an issue arose in terms of the capacity for indigenous and local communities to undertake such objections. It was possible to register collective patents, if the traditional knowledge-based innovation or creation met the criteria for registration. TK that was passed on from generation to generation would in most instances constitute prior art, unless it had been kept secret, and therefore it would most often not be patentable. It was also possible for TCEs holders to register trade marks, marks of authenticity (e.g. Toi Iho – Māori Made Mark) and designs for certain types of TCEs that were intended to be used in the context of trade. However the protection accorded only related to and was conditional to the use of those TCEs in an economic trade context, which might not be spiritually or culturally acceptable for all TCEs. Conversely, certain elements of TCEs had become part of main stream culture to the point where they could no longer be said to be sufficiently distinctive to distinguish the goods or services of one trade from those of another. In both circumstances, current trade marks law did not fully take account of the realities associated with the protection of TK and TCEs. The review of the Trade Marks Act 1953, in New Zealand, had introduced a series of measures to address concerns of Māori over inappropriate registration of Māori text and imagery as trade marks. These took the form of provisions to prevent individuals and enterprises from registering trade marks that were likely to be offensive to a significant portion of the population, including Māori. Subsection 17(c) of the Trade Marks Act 2002 prescribed that the Commissioner of Trade Marks “must not register as a Trade Mark or part of a Trade Mark any matter, the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.” In relation to any trade marks registered under the former Act, which might today be considered offensive, the 2002 Act provided that any person (including a person who was culturally aggrieved) may seek a declaration of invalidity under the Act. This meant that the Commissioner of Trade Marks or the Courts had the ability to declare a trade mark invalid if it would not have been registrable under the current 2002 Act. The Trade Marks Act 2002 also provided for the establishment of an Advisory Committee to

the Commissioner of Trade Marks. The function of this Committee as prescribed under the Act was to advise the Commissioner whether the proposed use or registration of a trade mark that was, or appeared to be, derivative of a Māori sign, including text and imagery, was, or was likely to be offensive to Māori. Some elements of protection could also be found in the common law principle of passing-off, in legal provisions relating to competition and fair trading, and in the law of contracts (e.g. confidentiality agreements, ABS agreements, trade secrets, breach of confidence). However, none of these possible mechanisms of protection had been designed with the primary objective to protect TK and TCEs, hence they often did not fully address the concerns and needs of TK and TCEs holders, and often required a trade-off or compromise on the part of the TK and TCEs holders. For example, many IP experts had praised the merits of the law on trade secrets as a possible option for TK and TCEs holders who wished to protect sacred TK and TCEs from misappropriation and misuse. The compromise might be that the indigenous peoples and local communities that were trying to protect those sacred elements of TK and TCEs, by using such a legal mechanism, were restricted in their ability and liberty to transmit and promote those sacred elements of TK and TCEs within their communities. Those sacred elements might get locked up and kept away from the people and the community. This might have some significant ramifications in terms of the survival, vitality, and integrity of the culture. In order for trade secrets instruments to be efficient in protecting TK and TCEs, the provisions in such instruments should be in accordance with customary laws and practices, and allow for controlled dissemination of the TK and TCEs within the indigenous and local communities, without the risk of them falling into the public domain. It might be difficult, the Delegation continued, for indigenous and local communities to control the dissemination of TK and TCEs in such a way, given the social context and the prevalence of modern information-sharing technologies such as the internet. The protection context was different from secret-knowledge held by businesses or corporate entities. For all of these reasons, the Delegation supported the continuation of the work of the Committee on *sui generis* systems.

221. The representative of the American Folklore Society (AFS) recalled that the AFS had been founded in 1888 for the study, documentation, and preservation of folklore. Its members worked in a broad array of settings, including academic institutions, public arts and culture agencies, museums, and social service agencies. Given the considerable discussion of issues related to TCEs and the opportunities stakeholders had had to comment on those issues, the AFS suggested that it would behoove WIPO to establish expert working committees charged with refining definitions and clarifying issues, and then bringing specific recommendations to the Committee. Other international agencies had used this method successfully, and the AFS believed that there was considerable expert knowledge available to WIPO. AFS would certainly be pleased to participate in such committees, the representative stated. He also pointed out that expert knowledge was available from traditional communities as well as more institutional locations, and that there was considerable expert precedent available from other international initiatives at UNESCO, CBD, and elsewhere. It was therefore suggested that following the 11<sup>th</sup> session's discussion of the ten issues, WIPO convene expert working groups. Using the records of the Committee's discussions and the previous fact-finding and case-study materials prepared by the Secretariat, those expert committees should be charged with finding points of agreement, adding professional perspective, expanding concepts when mandated, and otherwise making specific recommendations. The results of the working group's efforts should be presented to the 12<sup>th</sup> session of the Committee for discussion, refinement, and further action.

222. The Delegation of Australia stated that Australia had not carried out a systematic analysis of the extent to which IP already afforded protection for TCE/EoF and what gaps needed to be filled. In general terms, copyright, trade practices, confidential information and unfair competition laws all had roles to play. More general legal concepts such as contract law, unfair enrichment, fraud and unconscionable conduct might also be applicable. By applying existing IP laws and general legal principles, the Australian courts had dealt with matters involving the unauthorized reproduction of traditional Aboriginal art. Examples were included in Australia's written comments, available in the addendum to WIPO/GRTKF/IC/11/4(a). Acknowledging that no outcome was excluded from the work of the Committee, Australia supported a flexible approach to the protection of TCE/EoF. Australia's current approach to protecting Indigenous culture included measures which sought to ensure that indigenous communities and their members were better placed to access and benefit from the protection of existing systems. A flexible approach also ensured that appropriate mechanisms were available to suit the range of needs of indigenous communities. This flexibility should extend to respect for the diversity of legal systems amongst Member States. The Australian Government had undertaken to introduce legislation to give indigenous communities legal standing in certain circumstances to safeguard the integrity of creative works that embodied traditional community knowledge. Work was currently being progressed on that legislation. There were also a number of Australian government programs which provided support for the preservation of indigenous culture. They included: (i) The National Arts and Crafts Industry Support program which provided direct funding support to indigenous art centres and supported organizations to promote professional arts practice and provided pathways to economic independence; (ii) The Indigenous Culture Support program which provided funding support to preserve, develop and promote Indigenous art and culture within Indigenous communities; and (iii) An indigenous visual arts special initiative, which provided for the training of young and emerging indigenous artists and art centre workers, upgrading facilities, and funding of specific marketing initiatives. The Australian Cultural Ministers Council was also giving priority to indigenous intellectual property issues. The key objectives for the Council in this area were: promoting greater links between business and Indigenous communities about indigenous intellectual property to enhance greater economic independence; raising awareness in indigenous communities, consumers and commercial operators of the need to protect indigenous intellectual property; and, enhancing coordination of existing networks of indigenous and non-indigenous organizations working in the area of indigenous intellectual property. An Indigenous Intellectual Property Toolkit was currently being finalized to progress these objectives. The Australian Government had welcomed, and was now considering, a Parliamentary Report from a Senate inquiry into Australia's Indigenous visual arts and craft sector. The report had been released on 21 June 2007. The report contained a comprehensive set of recommendations for strengthening the indigenous visual arts and craft sector and protecting indigenous cultural and intellectual property rights. Australia supported and encouraged discussion of non-legislative measures by the Committee so that other members could share their experiences of these policy tools.

223. The Delegation of Indonesia stated that the existing IP system might not be the right one for the protection of TCE/EoF. One of the reasons was that TCE/EoF were the result of an impersonal, sustainable and gradual process of creativity exercised in a given community by consecutive imitation, while the existing IP regime was based on individuality. The fact that the protection provided by the existing IP regime was available only for individuals and that in many cases the utilization of TCE/EoF was without consent and authorization from the community concerned, showed the gaps necessary to be filled. The establishment of an international treaty system of *sui generis* protection of TCE/EoF was the main alternative.

Finally, the Delegation believed that a mere *sui generis* system at the national level was not adequate to ensure comprehensive protection of TCE/EoF.

224. The Delegation of Thailand stated that existing IPRs were not adequate to protect TCEs/EoF. However, existing international instruments should be analyzed, and gaps identified so that they could be adapted and further added upon, so that specific needs for the protection of TCEs/EoF could be covered. Understandably, that might be considerable work, but this could be the focus in the next phase of the Committee's work. In addition, the Delegation believed that national laws and/or community-based codes of conduct or customary laws should be promoted as part of capacity building to ensure the preventive protection of TCEs at those levels. It was important, however, that those levels of protection be recognized and made to form a part of international protection.

225. The representative of the Arts Law Centre of Australia stated that the gaps that existed in Australia and the laws of many other Member States had previously been set out in the Committee's working documents. These included: (i) Community or collective ownership of TCEs; (ii) Limited duration of IPRs whereas TCEs needed protection in perpetuity; (iii) Many types of TCEs were oral or performance traditions and not fixed in material form; (iv) TCEs were shared knowledge and handed down from generation to generation rather than individually owned; (v) Some TCEs did not fall within categories of material that had IPR protection e.g. ceremonies. In Australia, the Government had been considering the introduction of Indigenous Communal Moral Rights which could provide some protection to communities where TCEs were embodied in a work or subject matter other than a work protected under copyright laws. To date, no legislation had been tabled in Parliament, despite this legislation having been discussed for over three years. If useful legislation was introduced, it would be an encouraging first step but hardly a comprehensive solution to the significant gaps in protection that existed.

226. The representative of the Hokotehi Moriori Trust stated that gaps had been identified in the WIPO FFM Report and many other submissions made to the Committee over the years. The representative supported the Delegation of New Zealand's written comment in WIPO/GRTKF/IC/11/4(a) which quoted from legal submissions made in the Waitangi Tribunal 262 claim that the IP system did not and was not intended to protect the values and identity underlying the TCEs of indigenous cultures. There was a need for *sui generis* systems to be developed to fill these gaps because the IPR system did not provide protection for the values underlying TCEs. IPRs could only protect some economic aspects of TCEs but not the values and integrity of the culture which, to indigenous peoples, was the more important.

227. The Delegation of Mexico stated that in Mexico, IP rights included authorship rights in the Federal Copyright Law, which provided for the protection of the moral rights of popular cultures or TCEs exclusively, as well as intellectual and industrial property rights. Although indigenous peoples and communities and individuals had used some of those, they had not been sufficient to cover the needs for protection of their TK and TCEs as a result of their cultural diversity and because they did not correspond to their world vision or to the form in which they valued them. The Delegation considered that these were some of the gaps which the Committee should take into account.

*Issue eight: what sanctions or penalties should apply to behavior or acts considered unacceptable/illegal?*

228. The Delegation of Canada was of the view that it was also premature to address the issue of sanctions or penalties. However, should there be sanctions or penalties, they should be proportional to the harm caused and consistent with a Member State's international legal obligations, the Delegation stated.

229. The Delegation of Algeria, on behalf of the African Group, supported Article 8 of WIPO/GRTKF/IC/11/4 (c). The Group believed that this was an excellent basis to work on and that the sanctions proposed in that Article could be a useful basis for punishing any infringement of the rights granted to the holders of TK and TCEs/EoF. Appropriate civil and criminal sanctions/penalties should be applied to behavior or acts considered to be unacceptable/illegal.

230. The Delegation of Australia considered that any sanction or penalties should be designed to meet the objectives of the measures put in place and be proportionate and appropriate to the harm caused. A consideration of whether sanctions/penalties under existing laws could be applied should occur before any exploration of other mechanisms, if considered necessary, was undertaken. Introduction of measures without proper evaluation of their enforceability, proportionality to the likely harm, their impact and role was likely to cause uncertainty and not meet the desired objectives. Where measures for the protection of TCEs/EoF were adopted nationally, appropriate enforcement mechanisms should be developed, consistent with international law and national laws and policies, permitting effective action against misappropriation of TCEs/EoF.

231. On behalf of the European Community and its Member States, the Delegation of Portugal observed that a framework of sanctions in this area should be within the competence and under the responsibility of each Member State, in particular if consideration was given to a "soft law" type instrument which, in that case, might be an appropriate solution.

232. The Delegation of India stated that accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for TCEs/EoF. Customary laws and processes and alternative dispute resolution should be used, as far as possible, in enforcement procedures. An agency could be constituted for the management of the rights of the community concerned, which could be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

233. The Delegation of New Zealand stated that it might be too early in the process to fully assess this issue. The Delegation considered that it would be important to first build an ethical foundation and behavioral practices which were consistent with the needs and aspirations of indigenous and local communities before determining what types of sanctions or penalties might be most effective to foster adherence to those practices and deter unacceptable appropriation and use of TCEs. The Ministry of Economic Development of New Zealand had hosted a workshop on the protection of TK and TCEs in March 2007 to discuss with Māori and other domestic stakeholders the key issues that emerged from the Tenth Session of the Committee. A report on the workshop had been produced in consultation with the participants, which was attached to New Zealand's written comments in

WIPO/GRTKF/IC/11/4(a), as Appendix A. The participants at the workshop had been of the view that there was a need for a formalized framework or “bottom line”, and that penalties should effectively enforce compliance. One group of participants had been in support of economic sanctions, as a possible effective means of deterring businesses from misappropriating, misusing, or misrepresenting TCEs in the context of trade. This was consistent with sanctions that applied to infringements of existing IP rights, which generally provided that infringers should pay some form of compensation to the rights holder. For existing IP rights, infringement was usually a civil matter rather than criminal, although criminal penalties could apply to some forms of copyright infringement. This meant that IP rights holders should take action against infringers. This would not be the most desirable and effective way of enforcing potential IP protection or rights in relation to TCEs, if the holders of those rights had limited resources and capacity to monitor their rights and take action against infringers. Criminal penalties and appropriate resourcing of enforcing agencies, or a combination of both criminal and civil remedies, could be more appropriate. The need for strong legal sanctions, whether economic or otherwise, had been expressed in most of the submissions received by the New Zealand Government. Education and awareness-raising were also seen as important for compliance and enforcement. The New Zealand Government had not made any decisions regarding this issue and was still working through the potential implications for all stakeholders. The Delegation concluded by stating that New Zealand was discussing its domestic experience as a means of informing further analysis of this issue.

234. The Delegation of Japan stated that sanctions/penalties against unacceptable/illegal acts could vary depending on the level of protection for TCEs/EoF and the level of illegality. It recalled its statement made on Issue 3 in which it had stated that there was no clear justifiable reason why TCEs/EoF should be eligible for IP protection. Japan was greatly concerned by extending IP protection to TCEs/EoF. A fair balance had already been kept between the protection of TCEs/EoF and the protection of the public domain under the existing IP system and other laws. Japan was not convinced that there was a need to introduce any other sanctions/ penalties than those that have already been adopted under the existing systems. Japan did not believe that such a discussion would be unnecessary, but when discussing what sanctions/penalties should be introduced, consideration should be given to the form of protection for TCEs/EoF and the scope of illegal acts. Discussion based on factual information about what damage had been caused by what illegal acts would be essential.

235. The Delegation of Yemen desired sanctions that could prevent any distortion, mutilation or other modification of, or other derogatory action in relation to, a TCE/EoF, by third parties. While acknowledging the competence of countries in drafting their own legal provisions for protection, it suggested that the content of WIPO/GRTKF/IC/11/4 (c) prepared by the Secretariat be used as a basis for such sanctions.

236. The Delegation of Brazil remained convinced that a robust mechanism at the international level was necessary to prevent the misappropriation of TCEs/EoF. Such a mechanism would provide for defensive and positive measures for the protection of the rights of indigenous and traditional communities, particularly the requirements of PIC and access and benefit sharing. As to Issue 8, the Delegation believed that it was neither early, nor premature to address such an important, fundamental and simple question. As a general rule, appropriate and effective sanctions should be provided and should apply in cases of misappropriation. The Delegation stated that the mere existence of this question on the list of issues indicated the maturity of the discussions held in the Committee and recognized the substantial progress made by the Committee. The draft provision of Article 8 (a) in the



Annex of WIPO/GRTKF/IC/11/4 (c) represented an adequate and mature basis to discuss the issue.

237. The Delegation of the United States of America aligned itself with other delegations in believing that a discussion on “sanctions and penalties” would not advance the work of the Committee at this time. However, as it noted in earlier statements, the United States of America believed that the Committee should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. Once the Committee could reach a more informed understanding of the specific harms at issue, the Committee would be in a better position to canvas remedies under existing law – including copyright, trademark, patent, unfair competition, trade secret, criminal, and customary law – to determine whether there were gaps in the existing remedial schemes of WIPO Member States.

238. The representative of the Arts Law Centre of Australia stated that Article 8 of WIPO/GRTKF/IC/11/4 (c) provided a good basis for further discussion on sanctions. A range of civil and criminal sanctions should be available, with criminal sanctions applying to most serious illegal acts. From an indigenous perspective, the most important thing to emphasize was that sanctions should be accessible and enforceable by indigenous peoples.

239. The Delegation of the Islamic Republic of Iran stated that sanctions and enforcement measures were necessary. They could be civil and criminal remedies and other effective means to protect the rights of the stakeholders. In this area, the criteria in other related international documents could be useful. In general terms, the Delegation aligned itself with the Delegation of Brazil.

240. The representative of the Hokotehi Moriori Trust stated that it was not premature to develop sanctions and penalties as suggested by some Member States. He stated that Article 8 of WIPO/GRTKF/IC/11/4 (c) was a starting point for developing sanctions but needed more work. There was a need to look at developing both “soft” and “hard” law options such as codes of ethics, guidelines, and educational materials. There was also a need for hard law to ensure that if soft law was not working then it could be backed up with sanctions to encourage compliance.

241. The Delegation of China noted that at present there were countries with existing sanctions against illegal behavior. These measures included domestic laws, customary laws and other measures. The Delegation therefore believed that it was necessary to carry out studies on these measures in relation to the behaviors that were TCE misappropriations and considered that countries should think of sanctions in terms of civil and administrative measures, and even in criminal terms. Apart from the national legislation in this regard, the measures should comply with the customs of the indigenous peoples. The Delegation believed that the sanctions such as these would be effective and necessary for protecting TCEs.

242. The Delegation of Uganda supported the position of the African Group as articulated by the Delegation of Algeria on providing for sanctions and penalties to protect right holders of TCEs. If rights were conferred, it should be anticipated that they were likely to be breached. In this regard, it was relevant to have a provision on sanctions and penalties. The Delegation was, therefore, of the view that it was not premature to discuss and provide for sanctions.

243. The Delegation of Indonesia was of the view that Article 8 of WIPO/GRTKF/IC/11/4 (c) was a good basis for discussion. On the other hand, it was also important to consider the role of national law, which would play an important role in ensuring effective protection of TCEs/EoF. In addition, the Delegation believed that although national laws would play an important role, it was still insufficient to rely solely on national laws since the misappropriation of TCEs could also occur at the international level.

244. The Delegation of Egypt supported the statement made by the Delegation of Algeria on behalf of the African Group. The proposed Article 8 in WIPO/GRTKF/IC/11/4(c) constituted a sound basis for work, bearing in mind that sanctions provided for under existing IP systems were inadequate because they addressed infringers of personal rights, while, in the vast majority of cases, infringements of TCEs/EoF affected community rights. The infringed interest, in such cases, was viewed more as a public interest than a private one, and the corresponding sanctions should be those that were applicable to potential infringements of public interests as a result of infringing community-owned expressions. Furthermore, such sanctions should include civil and criminal remedies, to be provided for under an international binding instrument.

245. The representative of Amauta Yuyay stated that the damage caused by the appropriation and violation of the rights of indigenous peoples had been a historical process, and more than 500 years had passed during which such peoples had been mere witnesses to those violations. The failings were historical and a moral debt existed, which should be paid. As to how to do that was left to the conscience of the now “globalized” world.

246. The Delegation of Turkey believed that the Article in WIPO/GRTKF/IC/11/4 (c) on sanctions, remedies and exercise of rights could be applicable at the international level. The Delegation found that to some extent national experiences and laws were relevant. However, after listening to the views of many delegations, the Delegation felt that this Article could be perceived as a new norm that would be applicable to third parties outside the national systems, and that these parties would be able to enjoy these rights outside their national systems. From this perspective, the Delegation found that the Article could be applied at the international level.

247. The Delegation of Nigeria supported the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation of Nigeria was of the view that any right, in order to be meaningful, should have adequate remedies in cases of breach and should be adaptable to effective enforcement. Informed by the immense documentation of various national experiences that were available to the Committee, the Delegation was convinced that there should be appropriate civil and criminal and administrative provisions to address those acts that could be considered unacceptable and illegal. In doing this, the formulation should draw from similar provisions in other fields. Existing national experiences and mechanisms did not adequately cater for the concerns of local communities and the international dimension of the subject of the discussions. Whatever formulation that would be agreed upon should be effective and adaptable to the needs of the local communities whom they were intended to benefit and should sufficiently permit the application of the customary laws of those communities. As a starting point, the Delegation was convinced that Article 8 of WIPO/GRTKF/IC/11/4(c) was a sufficient basis for further work. The Delegation was in agreement with those other delegations that had called for the exact formulation of this article to be considered further and did not think that it was premature to start doing so.

*Issue nine: which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?*

248. The Delegation of Ethiopia supported the statement to be made by the Delegation of Algeria speaking on behalf of the African Group. The inclusion of international protection in the texts before the Committee was remarkable yet the provisions needed to take into account a number of elements. First, Article 14 of WIPO/GRTKF/IC/11/5(c), for example, did not mention the division of labor that should exist between the international regime and the national or domestic system. Second, this Article made reference to what it called “international standards” yet it did not define the nature and component of these standards. The commentary in relation to that Article stated that “an essential element of addressing this dimension was to establish standards of treatment which would apply to foreign nationals in respect of the protection of TK”. The Delegation held the view that the protection and treatment of foreign nationals was just one element of the international dimension of the outcome it wished to see emerge from the Committee’s work. It believed that issues such as national treatment, assimilation and fair and equitable treatment should form part of an international regime. However, the same text the Committee was discussing could form part of the international regime that the Delegation wished to see. Governments, through their national laws, should work toward greater attention being paid to the preservation, conservation, documentation, development and legal protection of TK and TCEs/EoF. The quest for an international regime had a long pedigree. WIPO’s General Assembly had instructed the Committee in 2003 to accelerate its work and to focus on the international dimension. The Committee had to clarify the boundary between the national and international dimensions of its work. The Delegation recalled WIPO’s and UNESCO’s joint groups of experts on the international protection of EoF through the international IP system in 1984. At that time, a few said that the time was not ripe for an international instrument. Ethiopia and hundreds of communities it represented noted that more than 20 years later there were still some who felt that the time was not ripe. The Delegation challenged those who said this to tell the Committee when the time would be ripe. The Delegation encouraged the participation of other international organizations. It concluded by quoting the Special Rapporteur of the Working Group on Indigenous Populations, Dr. Erica-Irene Daes, who had said in 1996 that “at present supplementary reports made clear parallel efforts to reach an international governmental consensus on protection of the heritage of indigenous people were underway in several different United Nations organs and specialized agencies. There was an obvious, urgent need for communication and coordination to ensure consistent and mutually reinforcing results”.

249. The Delegation of Saudi Arabia stated that the regional dimension, in addition to the national and international dimension, with respect to the protection of TCEs should be added to the Article related to this issue because many of these expressions belonged to neighboring States, especially States that were geographically close together. Therefore, the Delegation believed that these legal problems should be dealt with internationally but with respect to documentation of TCEs and their protection. Hence, use of such expressions should be dealt with at both national and regional levels.

250. The Delegation of New Zealand felt that it was important to note that any protection that was provided in New Zealand for TCEs did not extend to other States, unless provided for in international bilateral or multilateral instruments. The New Zealand experience had shown that numerous incidents of misappropriation, misuse, and misrepresentation of TCEs had occurred outside New Zealand and, for this reason, it was interested in exploring the international dimension of protection of TCEs. Obviously, there also had been concerns for

misappropriation domestically and it had a substantial domestic process underway to address this. New Zealand's experience had also shown that individuals and organizations from the international community who wished to use indigenous TCEs from New Zealand were often not aware of the customary laws and protocols applicable to such use. Some of those customary laws and protocols were common to a number of indigenous and local communities around the world. Domestically, New Zealand had experiences with the development of codes of ethics, guidelines and/or best practice mechanisms for users of TCEs and for policy makers as one way of ensuring a certain level of respect and appreciation for those customary laws and practices associated with the use of TK and TCEs. The Delegation expressed its willingness to share its experience with the Committee in the future if members felt that would be useful. The Delegation reiterated its comment from previous sessions that it was also important to retain flexibility for countries to develop solutions and mechanisms appropriate to their own unique characteristics and circumstances. While the development of *sui generis* systems at the international level was an objective that some States supported, this should not preclude the development of country or region-specific alternative approaches to protecting the knowledge and practices of indigenous communities. This was particularly important given the "culturally distinctive" nature of TCEs, and the possibility of other domestic legal sources of rights in relation to TCEs that could need to be taken into account such as, indigenous and human rights and the Treaty of Waitangi. However, the Delegation was still considering whether there was a need for measures, legal or otherwise, to achieve extra territorial protection of TCEs and their holders. An examination of facts and case studies would be important in this assessment. Part of New Zealand's domestic assessment included: (i) measures to prevent the misappropriation, misuse, and misrepresentation of TCEs accessed from the public domain, such as cross-state sources and the internet; (ii) measures to ensure that reasonable attempts were made to identify the origin of TCEs and their holders prior to using them; and (iii) measures to ensure proper attribution of IP rights in relation to TCEs, and recognition of the contribution that TCEs would make to innovation and creative endeavors; fair negotiation of access to TCEs and ownership of any IP rights that could emerge from their use; and equitable sharing of benefits flowing from the use of TCEs in the context of the IP system. The international concepts of reciprocity, national treatment, and most favored nation status were concepts that needed to be considered when analyzing international relationships relating to the use of TCEs across state borders.

251. The Delegation of India stated that the protection of TCEs/EoF needed to be tackled at the international level in order to be effective. This was why the Delegation believed that there was a need for a legally binding international instrument on the subject. The international regulation should address the scope, object and nature of protection of TCEs/EoF. These provisions could be structured flexibly so that the national regulations could take care of the diversity of the problems while implementing the international obligations. The manner in which the obligations were implemented should be left to the discretion of national regulation.

252. The Delegation of Indonesia believed that this question required the Committee to justify the need for an international legally binding instrument and to explore the relationship of national legislation with an international instrument. The national legislation could regulate the owners of TCEs/EoF and their utilization, but, in fact, national legislation could not address all the issues in a comprehensive manner, such as the issues of territoriality, globalization and the international commercialization of TCEs/EoF, as well as the appropriate recognition of foreign right holders. Therefore, it was necessary to have an international system for the protection of TCEs/EoF. The Delegation believed that the international system would also deal with disputes and enforcement, on one hand, and, on the other, the

international instrument would also offer positive protection, which was required to address cross boundary issues. In addition to this, regional instruments could also be an effective way of addressing those issues. Finally, it underlined that the international legally binding instrument should establish a minimum standard of protection which would not prohibit national legislation from having tighter protection.

253. The Delegation of Algeria, on behalf of the African Group, held the view that protection of TCEs was far from a purely national issue. According the Group, WIPO had the responsibility to develop an international framework of norms and standards leading to a legally binding international instrument. With respect of the multicultural and trans-national nature of TCEs, it was the Group's view that Member States would concurrently develop appropriate national legal frameworks to protect and promote TCEs.

254. The Delegation of Brazil believed that an international instrument was required to address the problem of the misappropriation of TCEs/EoF. The international instrument should afford the same treatment as nationals or treatment no less favorable. The draft provision in Article 11 of WIPO/GRTKF/IC/11/4 represented a mature and adequate basis for discussion. There was a need to provide for core elements and to set forth a minimum standard of protection. However, the Delegation understood that there was a need for setting aside some flexibility for national legislations. Accordingly, minimum rules should be set out at the international level, such as: (i) the requirement that use of TCEs/EoF should be conditional upon PIC; (ii) recognition of rights over TCEs/EoF to the communities they were related to; and (iii) ways and means to protect such rights. However, national legislations should be entitled to provide for, *inter alia*: (1) rules on benefit-sharing; (2) management of rights relating to TCEs/EoF; and (3) specific sanctions applying in cases of misappropriation. The Delegation stated that it was neither early nor premature to protect the rights of indigenous and traditional communities. Misappropriation was a pressing problem that required an urgent response. In fact, if nothing were to be done and if nothing were to be agreed on in the short term, the Delegation feared that it might be too late.

255. The Delegation of the United States of America stated that a focused discussion on the promotion, preservation and protection of TCEs/EoF required a careful consideration of both the national and international aspects of the complex issues before the Committee. As it had noted earlier, the United States of America believed that the draft provisions were useful as background in informing a sustained discussion of the issues before the Committee, including the national and international aspects of these issues. However, it also wished to underscore its view, and the views of many other delegations, that extensive discussion of the draft provisions would not advance the Committee's work and may have the unintended consequence of impeding the work. The United States of America further considered that discussion within the Committee should be informed by, not driven by, any particular possible outcome. The United States of America believed that, at this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the fundamental issues before it.

256. The Delegation of Canada, as it had previously noted, believed that how the Committee addressed the list of issues should be dependent in large measure on the policy objectives identified. Once the objectives were determined, the Committee would be in a position to assess what issues should be addressed at the international level and what issues should be addressed at the domestic level. However, this would be a complex task. Canada believed that the domestic legal framework and concerns of Member States should guide the shape and direct the Committee's discussions as to what issues, if any, should be addressed at the

international level. In addition, discussions on any potential form of protection at the international level should reflect the particularities of each country and be consistent with its international obligations.

257. The Delegation of Japan reiterated its statement made on Issue 3 that any justifiable reasons for IP protection being extended to TCEs/EoF had not been clearly identified and sufficiently explained. Japan had a serious concern about establishing a new type of IP right or a *sui-generis* right for the protection of TCEs/EoF as well as about creating a legally binding international instrument that would obligate Member States to establish such a regime. Before discussing ways of internationally addressing this issue, discussions should be conducted on what domestic solutions existed and where their limits lay, and the extent to which contracts and other issues were incapable of addressing this issue. Discussion based on factual information about what damage had been caused by what illegal acts was essential.

258. The Delegation of South Africa had joined other delegations in consistently calling on the Committee to work towards building a consensus on the necessity for developing an international legally binding instrument. It was convinced that the work of protecting indigenous knowledge went beyond national responsibility and, consequently, called for an international legally binding instrument. The Delegation noted that there was a growing consensus across many delegations concerning the need for appropriate, balanced and just measures for the protection of TCEs. It described the well-known case involving the song “The Lion Sleeps Tonight” to illustrate the need for national, regional and international protection of TCEs.

259. The Delegation of Nigeria supported the statement made by the Delegation of Algeria on behalf of the African Group, as well as the intervention by the Delegation of Ethiopia. The Delegation referred to paragraphs 22 and 23 of WIPO/GRTKF/IC/2/8. It considered WIPO/GRTKF/IC/2/8 to contain an accurate account of past efforts, 20 years ago, to extend the protection of folklore beyond the borders of the countries from which it was derived. The Delegation quoted paragraph 23 of WIPO/GRTKF/IC/2/8 in which it was stated that “the great majority of the participants considered that it was premature to establish an international treaty since there was not sufficient experience available as regard to the protection of EoF at the national level”. It reiterated the remark made by the Delegation of Burkina Faso in which the concerns of the African countries for the protection of TCEs predated the Stockholm revision of the Berne Convention. The African Working Group on Copyright had, in Brazzaville in 1963 (40 years ago), recommended that EoF be included in the list of works protected under the Berne Convention. Although Article 15.4 of the Berne Convention was supposed to respond to these concerns, it was clear that the revision failed to fully accommodate any of the concerns of TCEs holders. Therefore, the Delegation joined other delegations in asking when the issues would be considered mature for serious discussions beyond merely providing answers to a list of questions. There were various national laws for the protection of TCEs, but these did not adequately cover the concerns for cross-border uses and exploitations. Considering that global integration had created a global village in which matters of rights were now so common place, it observed that action was required, like in so many other areas, to protect TCEs and create a protection zone for the value and the originality of products whether they were modern or whether they came from traditional communities. For this reason, action was needed for the protection of TCEs at the international level.

260. The Delegation of Morocco expressed its support for the statement made by the Delegation of Algeria speaking on behalf of the African Group. The Delegation reiterated the

importance of the international dimension of protection for TCEs/EoF and expressed its concern for illegal use. The Delegation reiterated that there was a need for a binding international instrument for setting the rules and governing use of this cultural wealth. National rules were not enough as these did not go beyond the borders of the country concerned. Protecting such expressions at the national level was necessary, something the Moroccan Government had accomplished in the last few years. The country's legislation dealt with licenses for the use of TCEs/EoF, it set up a system of compensation in cases of violations and illegal use, and sanctions running from fines to imprisonments were in place. National legislation was, however, limited to the local regions. The use of TCEs could be found in audio-visual productions throughout the world. For example, it would be possible to see TCEs/EoF through satellite broadcasts, television broadcasts and in cinemas. The Delegation expressed its concerns for these uses and exploitations of TCEs/EoF and, therefore, it felt that the Committee should find suitable international means of protection, which would contain rules applicable at international level. The Committee should take into account the existing international standards with respect to national treatment and most favored nation status at the international level. The Delegation believed that there was a strong need for rules governing the protection of TCEs in a balanced and suitable way.

261. The Delegation of Nicaragua stated that the protection of TK in its broadest sense was crucial if one was to prevent misappropriation of these very vital pieces of knowledge. Such protection was not premature. The Delegation believed that it was crucial to have a binding instrument at international level and that illegal acts should be punished. It agreed with the Delegation of Brazil with respect to the flexibility in national legislation and the introduction of an element of PIC by the communities concerned. Finally, the Delegation felt that the current IP system contained only a commercial element and that it was, therefore, necessary to create a *sui generis* instrument with the view to effectively protect TCEs and TK.

262. The Delegation of Norway considered, without prejudice to the nature of any instrument, that there were core elements that should be dealt with on the international level, thus, providing a minimum standard. Nevertheless, the need for flexibility should also be recognized and appropriately addressed.

263. The Delegation of China stated that it had listened carefully to the previous speakers and reiterated that there were many acts of infringement of TCEs, especially cross-border. This fact was also mentioned by the Delegation of South Africa. The Delegation was of the view that it was clear that national legislation would not be enough. If these issues could be settled by national legislation, it would not be necessary for the Committee to meet. The Delegation fully supported the intervention by the Delegation of Algeria speaking on behalf of the African Group. As for the protection of TCEs, the Delegation believed that there were two approaches, the first one being "bottom-up." This referred to having national legislation first and, once the national legislation had become mature, the international dimension would then be considered. However, this approach would not be able to satisfy the needs at present since modern technology made cross-border infringement acts more prevalent. The other method was "top-down", which appealed to a lot of people. This referred to the wish to have an internationally binding instrument which could give guidance to the national legislations and, at the same time, settle questions at the international level. Therefore, the Delegation supported the different interventions made, which included that of the Delegation of Brazil. The Delegation expressed its hope that all sides would hold a positive and constructive attitude in the discussion. The Delegation shared a Chinese expression which was to seek common ground and put aside differences. It therefore hoped that the Committee would find its common ground.

264. The Delegation of Australia stated that, while noting that no outcome was excluded from the work of the Committee, it favored solutions to particular issues, if they were needed, to be in the form of non-binding mechanisms as this provided for greater flexibility and choice of implementation at the national level. Australia noted that consultation and cooperation with other international forums should inform the Committee's work. This was important to ensure that any approach adopted was consistent with relevant provisions of existing international instruments.

265. The Delegation of Libya supported the statement made by the Delegation of Algeria on behalf of the African Group as it believed that it already reflected all the concerns of the Group. The Delegation commented that: (1) the Committee had already held more than 10 sessions so far; (2) WIPO had deployed major efforts from the first session on; and (3) that the Member States had participated actively. It acknowledged the progress made by the Committee with respect to IP and the protection of TK and TCEs. The results the Committee had achieved were to reform the need to look at these matters in greater detail. Libya placed greater importance on TCEs as it believed that these were part of humanity's heritage. The Delegation felt that TCEs should faithfully be passed on to the next generation. It also felt that it was necessary to disseminate these TCEs. A national centre for TCEs had already been set up, which was one of the very few centres in the Arab world that protected and preserved non-tangible expressions. The Delegation felt that it should safeguard these since they were part of the very authenticity of peoples. Some countries did not have legislation and measures to protect their TCEs and the marketing thereof. For that reason, the Delegation felt that it was vital to have an international instrument and that there was a need to transmit local TCEs as to make them available to the rest of the world as part of the world's heritage. The Delegation believed that the Committee should look at all of these matters quite effectively. It concluded that a legally binding international instrument would require the Committee to be aware of the need for such an instrument in order to protect all IP rights. It believed that if countries were not aware of the need to protect IP, it would not be possible to achieve an international instrument which would enable the Member States to achieve their objectives and would not allow communities to achieve the necessary progress in this field.

266. The representative of Hokotehi Moriori Trust referred to the cigarette examples he had described before. One brand of cigarettes carried a label depicting a First Nations Chief in full feathered headdress and smoking a long peace pipe. Both the feathered headdress and peace pipe were classic TCEs of the First Nations people of the United States of America which explained the reference to "Natural American Spirit" on the packaging. The reference to "Spirit" was perhaps intended to evoke the sense of being associated with the "spirituality" experienced by First Nations people when they performed their peace pipe ceremonies. The pipe ceremony was yet another example of a TCE of these indigenous peoples that was being misappropriated. He offered the cigarettes as a contemporary case study of misappropriation of TCEs to the Delegation of the United States of America with the purpose that the Delegation might wish to discuss this matter with its indigenous First Nations peoples. The representative stated that it was not clear from the package that a trade mark or any other IP right was involved regarding the images used. The representative stated that unless there was some mechanism in place already to protect TCEs in this context, a process and appropriate mechanisms at both the national and international level would be necessary to deal with these situations which were increasing every year. This was clearly an area where a *sui generis* system, including legal and customary protocols, operating within the national country concerned to protect against this form of misappropriation, supported by cross border legal mechanisms and sanctions and an over arching international regime, would be necessary to



provide for issues of PIC, access and benefit sharing and appropriate sanctions where necessary. One further suggestion in this regard was that members countries could, in addition to a robust binding international regime, include protective clauses for TCEs in bilateral and multilateral trade agreements with each other. In FTAs with some Pacific Island countries, New Zealand had included provisions that preserved rights of Maori under the Treaty of Waitangi.

267. The representative of the Arts Law Centre of Australia stated that an international treaty which was binding on signatories should be a fundamental goal for the protection of TCEs. Providing the means of enforcement across States was important given that in Australia, for example, there was widespread infringement of the TCEs of indigenous Australians through extensive importation of “Aboriginal-style” arts and crafts which were sold on the tourist market without any involvement of, or benefit to, the indigenous peoples. As long as the work did not breach the Australian national consumer protection laws or copyright laws, there was no prohibition on such behavior. An international treaty would, therefore, provide a useful framework to develop an adequate system of national legislation.

268. The representative of the Creators’ Rights Alliance (CRA) advised that the Indigenous Peoples Caucus of the CRA had a membership of 14 Indigenous Artists Organizations which represented some 10,000 indigenous artists and people in Canada. He stated that in Canada indigenous jurisprudence, knowledge and heritage were uniquely constitutionally protected as an Aboriginal and/or treaty right in Section 35 of the Constitution Act, 1982 and Section 25 in the Charter of Rights. The Charter was said also to recognize the constitutional and legal rights to Aboriginal heritage (s. 27), languages (s. 22) and education (s. 29). The representative added that the federal, provincial and territorial governments of Canada had not clearly claimed jurisdiction or ownership over indigenous knowledge in any public statement, policy or legislation. It therefore appeared to be an implied recognition that indigenous peoples had control and management of their knowledge systems. However, a concise legal affirmation that indigenous knowledge was an Aboriginal right under section 35(1) of the Constitution Act, 1982, was still required. Canada had also approached indigenous knowledge from a self-government perspective, in which it had been willing to negotiate indigenous knowledge as an implicit subject matter of self-government negotiations. The situation in Canada was that legal interpretation of TK and TCE rights was required by the introduction of test cases. This could work in conjunction with or separate from any legislative initiatives which could be taken by Canada to protect and/or regulate TCEs and TK. Canada had been apathetic with regard to taking any significant TK and/or TCE initiatives, he stated. It therefore seemed that legal processes would be necessary to accelerate any progress, as in Australia and New Zealand. Two key points were essential in the Canadian legal context. First, indigenous knowledge was an incidental right of each constitutionally protected Aboriginal and treaty right, and, second, Aboriginal rights, and corresponding Aboriginal TK-based rights, were collective not individual in nature. Canadian Aboriginal groups would use their constitutional and legal leverage to take a rights-based approach to their ownership, management, control and continuation of their knowledge systems. In the case of Cote vs. The Queen (1998), the Supreme Court of Canada had affirmed this as “to ensure the continuity of Aboriginal practices, customs and traditions, a substantive Aboriginal right would include an incidental right to teach such a practice, custom and tradition to a younger generation”. The Supreme Court of Canada had also affirmed customary laws as part of Aboriginal rights as said in Cote, and had stated that “Aboriginal and treaty rights could not be defined in a manner which would accord with common law concepts. Rather, they were the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal

nations in particular territories”. Aboriginal rights were collective rights held by members of the particular Aboriginal nation. Thus, the Supreme Court of Canada had recognized that the assertion of Crown sovereignty did not prohibit a continuing co-existence with Aboriginal customary law. The courts had also held that customary law was neither abrogated nor derogated by provincial, territorial or federal law unless there was a “clear and plain” intention of the sovereign power by act of Parliament or legislature. More recently, the Haida case had affirmed Canada’s duty to consult Aboriginal peoples on matters affecting their rights. Nonetheless, there had been no meaningful consultation in Canada with indigenous peoples on matters of TK/TCEs. In the 11<sup>th</sup> session of the Committee, Canada had continued to make statements which the indigenous peoples in Canada would oppose. Examples were that “it was premature to discuss terms of protection and define TCEs.” In addition, three weeks before the Committee’s meeting the Delegation of Canada had announced to the indigenous representatives who had been attending the Committee that the Canadian Government was no longer providing funding for indigenous participation in the Committee’s process. The fact that misappropriations of TK/TCEs had continued in Canada showed that the *status quo* was far out of line with the legal reality. An example of misappropriation was the appropriated INUKSHUK symbol of the Vancouver 2010 Olympics Logo. Canada was also far behind the many countries mentioned in this forum who had taken steps to regulate and protect TK/TCEs. Canada had not expressed any policy on TK so far and had only made the following disjointed responses to the problem: (a) the introduction of the Igloo Trademark in the 1960s that had now fallen out of usage; (b) certain government agencies and departments had funded certain research projects related to TK; (c) the National Gatherings on Indigenous Knowledge conducted in 2004-2005 (the Report of which was thus far unpublished and awaiting approval at the Prime Minister’s Office since 2005); and (d) the establishment of an inter-departmental committee. These ineffective or otherwise inactive measures were not sufficient to address the complex, salient issues and problems that had been addressed in the Committee and other forums and nation states. Canada had also consistently been among a few countries that opposed the advancement of TK protection, indigenous participation, and indigenous rights in general in the CBD, the WIPO Committee, and other international forums. It was the Delegation of Canada who first spoke against, and was the strongest opposition to, the proposal for increased indigenous participation in the CBD Third ABS Working Group in 2005. Canada had also been one of the delegations that sought to delay consideration of customary law and *sui generis* regimes and continued to have problems with the current TK and TCE documents and other initiatives in the WIPO Committee. Canada was also a leading delegation together with the Russian Federation to oppose the passage of the UN Declaration of the Rights of Indigenous Peoples at the first meeting of the new UN Human Rights Council in June 2006. In 2006, the current Canadian Government announced that it would not honor the Kelowna Accord, a historic agreement between the previous government and indigenous peoples (which had been years in the making) addressing issues of indigenous poverty, poor health and education, and lack of recognition of rights. For this and other reasons, indigenous peoples throughout Canada had organized a series of protest actions across the country that had begun with several blockades of major highways the previous week.

269. The Delegation of Algeria had noted that some countries were not keen on having an international instrument in such an important area. An international instrument for the protection of TCEs would, however, help the Committee to draft legislation nationally and determine national procedures, reciprocity, penalties for illegal actions, and border measures, such as those called for by the WTO through TRIPS. On the other hand, the Delegation wondered that should only national legislation prevail, on what basis national countries would legislate? It also wondered how those issues should be dealt with at the international level

should particular problems concerning two or more countries occur? The Delegation acknowledged the provisions contained on this question in WIPO/GRTKF/IC/11/4 (c). It also acknowledged that country experiences were very valuable. However, as this was the eleventh session of the Committee, the Delegation felt that the Committee should speed up its work and reach a consensus so as to draft an international instrument and provisions for countries to develop their own national provisions.

270. The Delegation of Mexico considered it desirable that protection be granted to TCEs/EoF internationally to be in line with or directed towards the protection granted to such expressions at the national level. However, it was important to retain a degree of flexibility allowing the cultural diversity of these expressions to be taken into account.

*Issue ten: how should foreign rights holders/beneficiaries be treated?*

271. The Delegation of New Zealand referred to its response to Issue 9 as part of its response to Issue 10. As stated, it was still considering whether there was a need for measures (legal or otherwise) to achieve extra territorial protection of TCEs and their holders. It had not yet undertaken an in-depth analysis of the potential implications of this issue. The comments received by New Zealand to date from stakeholders indicated that if it were to provide protection for TCEs originating from New Zealand, the same protection should be extended to TCEs originating from other States, if they so chose. However, some obligations in relation to TCEs could originate from domestic non-IP sources of law, such as any recognized indigenous rights contained in the Treaty of Waitangi. Those unique and exclusive rights should not have to be reciprocal, unless agreed by Member States. From New Zealand's experience to date, the protection should apply to all foreign TCEs, not only those which came from countries that provided protection to New Zealand TCEs; and New Zealand rights holders should receive the same treatment in other countries. The Delegation concluded that the exercise of delving deeper into the substance of the key issues associated with the protection of TK and TCEs had been a constructive step on which the Committee should expand.

272. The Delegation of India believed that the rights and benefits arising from the protection of TCEs under national measures or laws, which would give effect to international agreements, should be available to all eligible beneficiaries who were nationals or habitual residents of a prescribed country as defined by international agreements. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who were nationals of the country of protection, as well as the rights and benefits specifically granted by the international instruments.

273. The Delegation of Canada stated that discussions on the treatment of foreign rights holders or beneficiaries should take place after the Committee had identified the objectives and the intended beneficiaries. Should future work of the Committee focus on foreign rights holders or beneficiaries, it should be guided by the overarching principle of consistency with international obligations of Member States.

274. The Delegation of Indonesia was of the view that the protection, benefits and advantages available to TCE holders under national legislations, that gave effects to these international standards, should be made available to all eligible TCE holders, whose nationals or habitual residence of a prescribed country was defined by international obligations or undertakings. Eligible foreign holders of TCE should enjoy benefits of protection at the same

level as TCE holders whose nationals were from the country of protection. In concluding, the Delegation believed that the national treatment principle with agreed mutual recognition was an acceptable principle and it believed that an international legally binding instrument was necessary to ensure the implementation of this national treatment principle.

275. The Delegation of Japan stated that no justifiable reasons why IP protection should be extended to folklore had been clearly identified and sufficiently explained. Japan had a serious concern as to establishing a new type of IP right or a *sui generis* right for the protection of TCEs, as well as on creating a legally binding international instrument that would obligate Member States to establish such a regime. Treatment of foreign rights holders and beneficiaries would therefore depend on the type of protection TCEs would be granted and the corresponding international regulations.

276. The Delegation of the United States of America believed that it would not be helpful at this time for the Committee to undertake a focused discussion of the treatment of foreign rights holders/beneficiaries. It noted, however, that one of the guiding principles extensively discussed within the Committee was respect for relevant international agreements. It understood this principle to include the fundamental principle of national treatment, or non-discrimination with respect to foreign rights holders. In its view, this bedrock principle of international IP law should continue to inform the spirit of discussions within the Committee.

277. The Delegation of Algeria, on behalf of the African Group, held the view that foreign right holders/beneficiaries should be treated in the same way as the local beneficiaries according to the principles of national treatment or reciprocity. In view of the special nature of TCEs, the Group was of the view that the application of the principle of national treatment for TCEs should be given further consideration. The Group also called upon the Secretariat to compile a comprehensive matrix that would identify areas of common ground and divergences in which this matrix could then form the basis for further deliberations on WIPO/GRTKF/IC/11/4 and WIPO/GRTKF/IC/11/5.

278. The Delegation of Australia believed that further work was needed to determine how foreign nationals should be treated. Principles such as the level of protection or criteria for protection needed to be determined before more specific issues concerning the rights of foreign holders/beneficiaries could be addressed. Australia also noted that one of the fundamental principles of existing international IP agreements was the principle of “national treatment”. It believed that consideration of this principle should be the basis for further discussion of this issue.

279. The Delegation of Namibia referred to its written statement submitted to the Secretariat. It wished to put on record its support for the statements made by the Delegations of Algeria and South Africa on behalf of the African Group. On all the 10 issues and the articles set out in WIPO/GRTKF/IC/11/4, the Delegation expressed its satisfaction that they contained adequate information which could form the basis for future work in terms of a desired conclusion, the international legally binding instrument.

280. The Delegation of Ethiopia supported the statement made by the Delegation of Algeria on behalf of the African Group. Its considered view was that the Group’s comments needed to be included in WIPO/GRTKF/IC/11/4 (c) to enrich the revised provisions for the protection of TCEs. The Delegation pointed out it was not simply answering questions but that it was attempting was to enrich these provisions.

281. The Delegation of Egypt supported the position of the African Group as expressed by the Delegation of Algeria. It reiterated that it believed that with respect to beneficiaries, it felt that there should be no difference between nationals and foreigners because it did not wish to be accused of chauvinism or of wishing to limit benefit. In other words, the Delegation was of the view that TCEs were part of humanity heritage and humanity as a whole should be able to benefit from the full heritage of the indigenous and local communities. The Delegation stated that these communities were the owners of TK, GR and TCEs. The communities were therefore entitled to benefit therefrom. However, as it stated earlier, these TCEs were part of the heritage of all humanity and all humanity should have the right to enjoy it. Therefore, the Delegation reiterated that the Committee should not distinguish between a national and a foreigner in this area.

282. The Delegation of Brazil believed that an international instrument was required to address the problems of misappropriation of TCEs. This international instrument should afford the same treatment to foreigners as nationals or treatment on no less favourable terms. Therefore, the Delegation wished to point out that draft Article 11 of WIPO/GRTKF/IC/11/4(c) was a mature and an adequate basis for discussion. In concluding the first list of issues, the Delegation wished to highlight that it had heard many interventions stating that the draft provisions outlined in WIPO/GRTKF/11/4 (c) were an excellent basis for discussion and that this was a proof of the mature nature of the discussions that the Committee was having and of the considerable progress that the Committee had made. It was neither early nor premature to protect the rights of indigenous and traditional communities. It was convinced that the Committee had a sufficient basis for discussion and that the Committee should engage into that discussion as soon as possible.

283. The Delegation of Mexico stated that in view of the fact that both the Federal Copyright Law of Mexico and the Berne Convention provided for the principle of national treatment, it was considered that foreign rights holders should enjoy the same rights as nationals. The Delegation therefore considered that Article 11 of document WIPO/GRTKF/IC/11/4(c) was a good basis for discussion.

284. The Delegation of Sudan supported the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation stated that indigenous peoples were entitled to protection under an international instrument that would recognize their rights as a historical heritage and a source of pride. It was only an objective moral duty that such rights were protected from mutilation and distortion, and the resulting material income to be used for monitoring, support and development purposes. The Delegation suggested that any exploitation of folkloric expressions be subject to indicating the geographical and human origin, and obtaining the prior consent of the initial right holder.

285. The Delegation of Nigeria supported the position as stated by the Delegation of Algeria on behalf of the African Group. It believed that the present formulation in Article 11 of WIPO/GRTKF/IC/11/4 (c) was a good starting point for the treatment of foreign right holders and beneficiaries. The Delegation was of the view that the provisions of the international instrument, which was the expected outcome of the work of the Committee, should as much as possible accord the same treatment to local and foreign right holders and beneficiaries without derogating from existing international instruments. The Delegation expressed its willingness to engage in further deliberations with a view to addressing any concerns that may be raised by any other Delegations without asserting that these discussions would at this point be premature.

286. The Delegation of Nicaragua aligned itself with the Delegation of Mexico in supporting the earlier statement by the Delegation of Brazil.

287. The Delegation of Yemen believed that foreigners should enjoy national treatment on basis of reciprocity.

288. The Chair stated that the Committee had had an extensive discussion and an interactive debate on the TCE List of Issues, which was very encouraging. He shared his preliminary assessment that the Committee could see both some convergent views and some divergent views. The Chair invited the Committee to build on this and believed that the Committee could move ahead with its endeavor. He expressed his gratitude by stating that all the statements of all participants on the TCE List of Issues had been very valuable and that they had narrowing positions. The Chair acknowledged the good faith and willingness to move ahead shown by the participants so as to have a robust discussion as part of the Committee's future work.

*Decision on agenda item 7: Traditional cultural expressions/expressions of folklore*

289. The Committee took note of documents WIPO/GRTKF/IC/11/4(a), WIPO/GRTKF/IC/11/4(a) Add., WIPO/GRTKF/IC/11/4(a) Add 2., WIPO/GRTKF/IC/11/4(b), WIPO/GRTKF/IC/11/4(c) and WIPO/GRTKF/IC/11/6. The composite decision taken by the Committee on future work on agenda items 7 and 8 is reported under agenda item 10.

AGENDA ITEM 8: TRADITIONAL KNOWLEDGE

290. The Chair introduced documents WIPO/GRTKF/IC/11/5 (a), WIPO/GRTKF/IC/11/5 (a) Add., WIPO/GRTKF/IC/11/5 (b), WIPO/GRTKF/IC/11/5 (c), and WIPO/GRTKF/IC/11/6.

These documents were summarized in WIPO/GRTKF/IC/11/INF/2 as follows :

*WIPO/GRTKF/IC/11/5(a)*

A collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a commentary process agreed by the Committee at its tenth session (the List of Issues is provided as Annex I of the present report);

*WIPO/GRTKF/IC/11/5(b)*

A compilation of comments on the draft Objectives and Principles, written comments provided between the ninth and tenth sessions, in line with a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

*WIPO/GRTKF/IC/11/5(c)*

The text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth and tenth sessions, but provided for ease of reference to assist in the reading of the present set of comments.

*WIPO/GRTKF/IC/11/6*

Provides background information on technical or practical aspects of these questions :

(i) *what* should be the *content* of the outcome – the question of substance, or what subject matter, focus and level of detail should the outcome have (including the substantial element of its international dimension);

(ii) *what* should be the *nature, format or status* of the outcome – the question of what the format or nature of an outcome should have, and what legal or political status and legal, political or ethical implication should the outcome have, including any international legal implications;

(iii) *how* should the Committee work towards the outcome – the question of what procedures or processes, and what forms of consultation, would help lead to understanding on the content and status of any proposed outcome; and what timelines or interim steps should apply.

It reviews the possible approaches concerning the format or status of an outcome as including: a binding international instrument or instruments; a non-binding statement or recommendation; guidelines or model provisions; authoritative or persuasive interpretations of existing legal instruments; and an international political declaration espousing core principles and establishing the needs and expectations of TCE/TK holders as a political priority.

*WIPO/GRTKF/IC/11/7*

At earlier sessions, the Committee approved an outline and structure for a set of recommendations for patent authorities on examination of TK related applications, and requested the Secretariat to prepare a full draft set of recommendations. This document contains a third revision of the draft recommendations for the Committee's consideration. It draws on past documents, national positions and reports that led to this work, and responses to a Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System (WIPO/GRTKF/IC/Q.5).

*Issue one: definition of traditional knowledge that should be protected.*

291. The Delegation of Canada stated that there were two parts to defining protectable TK: first, developing an appropriate definition of TK, and second, determining the full scope of the protectable subject matter. Both represented a challenge given the complexity of the issues and the particularities of all Member States. Achieving consensus on the objectives of protecting TK could help to define the subject matter that was to be protected and assist with terminological clarity

292. The Delegation of Kyrgyzstan said that, at present, the practice within traditional IP systems showed the need for further improving it, especially in areas such as TK. First, a legal basis for holders of TK should be guaranteed so as to preserve and develop their activities in various areas. On June 26 this year, the Parliament adopted a law on the protection of TK, which should have a positive effect on IP rights. In the view of experts TK should be protected through such laws, the patenting of TK and new types of know-how should also be protected under this law. Only some TK had been transmitted from one generation to another. It covered many different areas. It was not just an attribute that should be showed to tourists. These traditional technologies were heritage from their ancestors. There were different types of TK: extensive cattle breeding had led to a distinct body of knowledge in the high mountains. TK had been used and was used for making products related to cattle-breeding. The same could be said about medicine and the environment. Business in developed countries commercialized the TK of developing countries, generally speaking. At present, Kyrgyzstan had the objective of better protecting TK in the Republic and was drafting legislation on this. It had studies and programs where valuable help could be given by international organizations and NGOs. Countries with economies in transition needed help to strengthen the IP systems in this area. WIPO was a good forum for discussion of legal instruments for the protection of TK and was doing a great deal of work creating international standards or norms for the protection of IP in general and TK in particular. The Delegation called on all States to pay special attention to the protection of TK of indigenous peoples and contribute to the preservation of their spiritual and other values.

293. The Delegation of Ethiopia strongly supported the African Group position on this item. It was of the view that WIPO/GRTKF/IC/11/5(c) might be incomplete and deficient to some extent but believed this should be a document the Committee should use for future legal development or future legal instrument, especially after its mandate was renewed. Any discussion on WIPO/GRTKF/IC/11/7 should be considered within the context of the revised Provisions. Regarding the definition of TK, the Delegation's comment on this topic referred to article 3 and 4 of the Revised Provisions. It seemed that the document was under an enormous difficulty or burden to make a difference between TCEs and TK. Under the current definition, there were a number of tangible and intangible cultural assets of communities that may fall both under the definition of TCEs and TK. It suggested therefore that such clarity was maintained. One possible solution would be to define TK as covering issues excluding traditional EoF. There were different terminologies used to refer to holders of TK. Some of these terminologies included indigenous communities, people, local communities, nations, ethnic groups, minorities and so forth. Whereas article 3 used indigenous and local communities, article 4 introduced new description such as people and traditional communities. Ethiopia's national experience also indicated that there were indeed multiple identification or designation of groups. For example, the Constitution used the phrase "nations, nationalities and peoples". The Proclamation No. 482-2006 on Access to GR, Community Knowledge and Community Rights on the other hand used "local communities". The African Human Rights System had an enormous body of jurisprudence over the concept of peoples in the plural. The Delegation then raised some questions regarding the definition of TK. Do we intend to create hierarchies of rights among the above groups of people? Do we need definition to these concepts as a part of our definition to TK? It believed that all these groups enjoyed similar and equal rights to their TK. The draft text should in no way overly burden itself with the question since it was largely answered under public international law and national experiences. Moreover, it also reiterated its previous view that communities should be provided the opportunity to be involved in certain level of self definitional exercise. The reference to "codified knowledge system" under para. 2 of article 3 of the text. TK was essentially oral and therefore making reference to codified knowledge system effectively



excluded a great body of heritage. It was also not sure what was meant by TK systems as referred under the same paragraph. Were TK and traditional systems the same thing? It recommended the merging of article 3 and 4 under heading "Scope of Protection" and the inclusion of two paragraphs of the current article 4 as third paragraph of the current article 3. However, it expressed its satisfaction with the richness of article 4 in providing the Committee with modalities of definition of TK. There were two important elements to these criteria of defining TK, one was what was referred as "the minimal linkage" and the second was the intergenerational linkage. There were different standards used for TCEs for reasons not clear. TCEs were also intrinsically associated with the identity of their holders and were intergenerational. It, therefore, recommended that the content of article 4 be common article for both TCEs and TK, the merging of the last two paragraphs since they were talking of the same thing, namely the association of TK with the identity of their holders. Finally communities should enjoy certain space for determining what was important and vital for their identity. This could be achieved by allowing the application of customary law in determining what was TK and how it was related to their identity.

294. The Delegation of Switzerland reiterated that it considered a clear understanding of what was covered by the concept of TK to be a very fundamental issue that needed to be addressed at the outset of any discussion on IP and TK. The "list of issues" established at the 10th session of the Committee contained as the first issue the definition of TK that should be protected. A common understanding of TK was a prerequisite for any substantial progress in further discussions on the protection of TK. This was necessary to ensure reasonable legal certainty with regard to what was protected, and also what was not protected. Furthermore, the other nine issues contained in the list of issues depended on a common understanding of TK. Thus, finding this common understanding was in its view a prerequisite for successfully addressing the other issues of the "list of issues." Accordingly, this needed to be resolved at the outset of the discussions. In its work on TK, the Committee distinguished TK in the wide sense, TK in the narrow sense, and TCEs. This distinction was necessary to render the discussions on the complex issues arising more manageable. This notwithstanding, when developing a common understanding and clarifying terminology, the holistic nature of TK and TCEs needed to be taken into account. The discussions on TK primarily dealt with the TK of indigenous and local communities. TK, however, may also exist outside of such communities. This applied, for example, to some of the TK that could be found in Switzerland. As stated at previous sessions of the Committee, this fact should be taken into account when defining TK. The documents prepared by the Secretariat advanced working definitions of the terms TK *lato sensu*, TK *stricto sensu*, and TCEs. It considered these working definitions to be helpful to further discussions and the development of a common understanding. Accordingly, these working definitions should form the basis of further work on the protection of TK. These definitions needed to be discussed in greater detail to fully reflect the common understanding of TK.

295. The Delegation of India looked forward to having a binding international instrument on the protection of TK. Such an instrument was necessary to address issues of continued misappropriation of TK. The Committee had been discussing the issues for the last seven years. These detailed deliberations had brought out the shared concerns in this area and the Delegation hoped that the Committee would be able to move forward faster. Defining TK was a rather complex issue. It might be easier to define the elements that formed it. TK that needed to be protected should include practices, wisdom, knowledge and folklore. It must cover the knowledge generated, gained, preserved, evolved and inherited formally or informally through the tradition in the communities. This knowledge included, but was not

limited to, plants and animals for food and agriculture, traditional healing systems, handicrafts and rural industries in the given local, cultural and socio-economic environment. TK was the accumulated knowledge which was the result of intellectual activity and insight in a traditional context and included the know-how, skills, innovations, practices and learning that formed part of traditional wisdom embodied in the traditional lifestyle systems. It could contain the codified knowledge systems past between communities or people or other groups of persons identifying traditional culture between generations. Such was the case with the traditional medicine system, Ayurveda, of India. Such knowledge could also remain uncoded as was the case with folk medicine practiced by many communities. The knowledge could include any field of technology.

296. The Delegation of Japan welcomed the Committee fundamental list of issues. This kind of discussion was indispensable for forming necessary common denominator and moving towards a process. The Committee appeared to touch upon some portion of list of issues in the past. However, there still remained lots of issues to be deepened even for basic issues like what TK was or who held TK. The Committee should face the reality and should not avoid this kind of fundamental discussion. In response to the rest of issues, the Delegation raised an issue to be clarified with regard to the concept of TK that should be protected. These issues were not exhaustive but it stressed that it would not be able to move ahead this process unless these fundamental issues were sufficiently clarified. Major Organizations of users also demand that definition of TK should be sufficiently clarified before any progress can be made. It was not convinced of the argument that the clarification of TK was not necessary since the definition of invention did not exist in international instruments. Patent applications were filed around 1.6 million per year. These inventions were processed and examined in each patent office or interpreted and judged in each jurisprudence on a daily basis. Therefore, there was a common understanding as far inventions were concerned. On the other hand, regarding TK there was no common understanding on the fact of global basement or operational system. There should be legitimate consent over negative impact to society and abusive dedication in such uncertain concept of the substantive force in some way or another. The Delegation expressed the questions in three aspects which were: what was traditional, what was knowledge, what should be protected? Regarding comments submitted by Member States, regrettably it could not see these issues resolved sufficiently. For example, there were views that spirituality or religions should be included in TK, on the other hand there were views that TK should be restricted to technical knowledge linked with resources. There may be divergent views that TK could be passed down by individual entity or corrective entity and TK should be restricted to indigenous community.

297. The Delegation of Portugal, on behalf of the European Communities and their Member States, expressed its appreciation for the progress made by the Committee. It looked forward to deepening the discussion of these objectives and principles with a view to reaching the understanding of these complex questions. WIPO/GRTKF/IC/11/5(b) and (c) constituted a good basis for this future work. A constructive way forward was possible particularly on those areas of the discussions where a certain consensus had already been reached. In this regard, it supported a flexible approach and considered this essential in order to take into account the diverse options for the protection of TK which already existed and which had been presented to this Committee. It also acknowledged the work done by the Secretariat regarding the elaboration of a list of issues on TK, WIPO/GRTKF/IC/11/5(a), that the European Communities had already commented on. It represented a valuable contribution to the Committee's work to define common objectives and rich consensus on this issue. In this context, there were two crucial questions. What was the definition of TK and what objective was to be achieved? About the first question, the definition of TK contained in Article 3 of

WIPO/GRTKF/IC/11/5(c) constituted a suitable basis for a deeper discussion in the framework of this Committee. In what concerned the achievement of an appropriate balance between interests of right holders and third parties the concept of a public domain regarding TK must be well analyzed. Additionally, the implementation of instruments against misappropriation or related intangible rights should play a fundamental role. The Delegation recalled its preference for the implementation of *sui generis* models or other non bidding options for the legal protection of TK such as the ones already referred to in previous sections of this Committee and consequently it was engaged in participating constructively in the discussion of these issues. Moreover, and in line with our preference for internationally agreed *sui generis* models it reiterated that the final decision on the protection of TK should be left to the individual contracting party. Finally, it continued to support the constitution of prior art databases of TK to be used by patent examiners. Regarding question 1 of the list of issues on TK, it noted that there was no internationally adopted definition of TK. In order to achieve the necessary legal certainty TK should be defined so that it could be clearly identified and described. Also several definitions of TK had been already advanced, as for example, WIPO, CBD, UNESCO, the definition contained in Article 3 of WIPO/GRTKF/IC/11/5 was a good working definition and starting point for discussion. Despite the fact that a single exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK and the differences in existing national laws on TK, it would be in the interest of right holders as well as national legislators to set out as clear as possible the general concept. Therefore, further efforts should be made at developing, defining and qualifying further the present working definition. It welcomed a deeper discussion on TK definition and further clarification of its scope followed by the drafting of a new TK definition generally more acceptable for all WIPO Member States.

298. The Delegation of Burkina Faso considered the definition given in the draft provisions on protection of TK to be an excellent basis for work. However, having listened to certain Member State delegations, there was a need to set the record straight on one point: work was really being carried out from a point of view that had already been adopted during the first work led by UNESCO and WIPO during the 1970s. Such work had been carried out along two lines: the preservation of EoF and the IP aspects of the protection of folklore. While there was a desire to include beliefs, spirituality and values in the present definition of folklore, that would not be managed. With regard to belief, for example, if there was protection, it must involve the establishment of a freedom, a freedom of religious belief and practice. All constitutions had already established that freedom. It was also necessary to prevent the nature of transmission from generation to generation from taking on too much importance in the definition of TK. In fact, for developing countries, which still had traditional societies, as long as there were such societies, there would be contemporary traditional creations.

299. The Delegation of the United States of America considered, similarly as with other Delegations, that a definition of TK was important to ensure a common understanding of this debate among WIPO Members. There were many fundamental issues that needed to be more fully considered in the Committee in order to build upon the vast amount of study already done in the Committee and to facilitate convergences among members. In the responses compiled in WIPO/GRTKF/IC/11/5(a) as well as the comments heard that day, there appeared to be no common view on the definition of TK and many questions remained. Some Delegations had suggested that the Draft Substantive Provisions could be used as a basis for discussion on this item and indeed on other items on the list of issues. As noted with respect to the TCEs debate, while the Delegation appreciated this draft definitions and provisions could be helpful background information regarding the thoughts of the WIPO Secretariat on

some of the matters that had been discussed in the Committee up to this point, detailed discussions of these provisions do not appear to be helpful to advance our work. A more focused approach that could better assist the progress would be to consider the parameters that had been discussed in the Committee consistent with the views expressed by stakeholders on the topic of TK. Paragraph 58 of WIPO/GRTKF/IC/6/4 provided a list of parameters that had been raised in the Committee work when Members addressed TK and it was worth looking at those again. That list stated that TK was generated, preserved and transmitted in a traditional context, that it was distinctly associated with the traditional or indigenous culture or community which preserved and transmitted it between generations, that it was linked to a local or indigenous community through a sense of custodianship, guardianship or cultural responsibility, that it was knowledge in the sense that it originated from intellectual activity in a wide range of social cultural, environmental and technological context and that it was identified by the source community as being TK. These general characteristics were a helpful result of the discussions that the Committee had had. However, the discussions rather illustrated that many divergent views still existed among Committee members regarding the scope of these characteristics, whether there were even additional characteristics that may be more critical. Regarding the characteristics of TK, there were three types of issues: temporal issues, geographic issues and further issues related to objective criteria or appropriate characteristics to identify what was TK. When looking at these issues a number of questions arose. For example, when considering the TK context, did a traditional context imply particular timeframe? Would innovations taking place in a modern day ever be considered to fall within the definition of TK or for example would modern innovations after a certain date be excluded from the definition of TK? The sense was not clear. Would innovations be considered traditional if they were attributable to a particular individual and therefore perhaps not collective? If such individuals though were members of a particular community, would any innovation by that identifiable individual be considered traditional solely on the basis that that individual was also a member of the community? Further, it appeared that some knowledge which could be considered traditional may already be diffused widely throughout the world as either common knowledge or widely used knowledge and that at least some of this knowledge may be considered to have fallen into the public domain and certain jurisdiction and was thereby available for use by the public without restriction. Attempts to take existing public information and reassert a private ownership right retrospectively would appear to give right to several issues that would need to be considered by the Committee. On another note there seemed to be even differences in the term used within the Committee when describing TK. For example, some delegations used the word indigenous knowledge. It was not clear whether this was simply a choice of word that was meant to be coextensive or whether they may be a different meaning from the word TK and if so, what that differences intended to be? For example, did the use of the term indigenous limit this term in a manner that would exclude knowledge preserved by immigrant communities or other non indigenous groups. Clarification of these fundamental issues was critical to facilitating convergence among Committee members and bridging differences lead to progress in this Committee.

300. The Delegation of Australia stated that further discussion was required regarding defining TK for the purposes of protection, whether that protection was by legal, non-legal, national or international means. This was a key issue. Consistent with the Committee's mandate, which did not preclude any outcome from its work, it may be that one definition would not be suitable to all circumstances. For some purposes a broad definition or set of principles may be appropriate but for others a more targeted definition may be needed. This would depend on the objective/s the definition was supporting. For example, for the purposes of a resolution on the protection of TK or general discussion of the issue a set of broadly drafted principles may be appropriate, but a contract regarding an access and benefit sharing

arrangement for TK would probably require a different, more specific definition. This view was to some extent already evident in the Committee's work with the separate treatment of TK and TCEs. Definitions must enable clarity as to the subject matter of protection. This was crucial to both enable the objectives of TK protection to be met and to ensure that what lied in the public domain, was clearly identifiable. Defensive protection of TK, through recognition of its role as prior art or as trade secret, was important to Indigenous peoples and clear definitions played an essential role in this regard. In WIPO/GRTKF/IC/3/9, the Committee explored the complex issues surrounding a definition of TK. It highlighted the importance of clarifying the distinction between 'legal protection' and other forms of protection such as physical preservation and conservation so as to help determine the scope of TK that could be covered by IP-related protection. This document also suggested that consideration of the traditional context, the collective or communal context and inter-generational character of TK, and its preservation and transmission, would help focus discussions on the distinguishing characteristics of TK in such a way so as to avoid pre-determining the nature of any protection that could be available. As the Delegation from Burkina Faso had indicated the dynamic nature of TK also needed to be taken into account. In the discussion of definitions it was important to keep in mind the aspirations, expectations and needs of TK holders and the complex context of existing international and national laws and policies. When considering such aspirations and interests the consequential differences arising from whether TK was held within an oral or written tradition must be carefully considered. A position must be reached where all of those issues were treated in a consistent and mutually supporting manner.

301. The Delegation of Sudan emphasized that TK was not limited to a single field of arts or technology since human inventions were open ended and that was why mechanisms of TK in the field of medical treatments and agriculture were well known. Moreover there were other elements of TK such as dance, music, handicrafts which were related to given peoples and which must be protected for promotion and preservation purposes. TK must be protected for individuals and collectivities and this was important to all countries. TK did play a role in organizing the economy and the society of the country to permit national identity to occur and to promote participation of the developing countries in the world's economy. That was why IP was necessary in order to protect TK and preserve it.

302. The Delegation of Norway was of the opinion that the ordinary meaning of the term in light of the object and purpose, the discussions of the Committee, as well as the relevant parts of the documents provided for the Committee, provided an extensive basis for determining what constituted TK. Furthermore, it noted that a firm definition on the international level may prejudice the need for national flexibility.

303. The Delegation of Mexico stated that regarding the definition of TK it was important to continue discussion at international level in order to have a clear idea of what TK was so that independently of the diversity of definitions and legal systems which existed or may exist at a national, regional level, it would be possible to come up with an operative but also dynamic broad and flexible definition which would give possibility to continue work in the Committee. The final purposes of protection of these elements had to be determined. It was of the view to look at strategies which would make it possible to establish the minimum elements to be met if objects were considered as traditional. WIPO/GRTKF/IC/11/5(c) and particularly Article 3, paragraph 2 thereof, was a suitable basis for considering such minimum elements. In order to have certain elements for later analysis it suggested that the following could not be taken: TK should be taken to mean at least such knowledge, all such knowledge, created, conserved and transmitted from the culture of a given indigenous community; secondly, knowledge directly

linked to a people or an indigenous people or community or rural or urban community which may not be indigenous but which preserved such knowledge and transmitted knowledge from generation to generation other than on an individual or a collective basis. This definition should include knowledge, beliefs, thought processes, spiritualities, philosophies, in other words a world vision. This definition or these elements should be identified with the culture and identity of the indigenous so with a knowledge or awareness of being the guardians or having cultural responsibility to maintain and preserve them. Such knowledge were those arising from a creative dynamic process in the people, indigenous or local community. This was very important: such knowledge must be identified as TK by the Community or the members thereof and, finally, by the nature and characteristics of such knowledge. The knowledge must be able to be reproduced and transmitted in any means or form provided that PIC of the holders of such knowledge was taken into account.

304. The Delegation of Algeria, on behalf of the African Group, said that the ultimate objective of this process should be the development and adoption of a legally binding international instrument for the protection of TK, TCEs and GR. The answers to the 10 questions currently under discussion, and of which the Members of the African Group had provided comprehensive responses, were complementary to the work done by the Committee in establishing parameters for defining and clarifying issues related to Objectives and Principles for the protection of TK. As to point 1 concerning the definition of TK that should be protected, the African Group was of the view that TK should be defined to include knowledge systems generating from local indigenous or traditional communities that were the result of intellectual activities and inside a traditional context. Such knowledge systems shall consist of *inter alia* skills, know-how, innovation, practices and learning that were embodied in the traditional lifestyles of the community including the exploitation of knowledge associated with the resources. The African Group noted that WIPO/GRTKF/IC/11/5(c) did not contain a comprehensive definition for TK which was currently provided for under the general scope of protection in Article 3, subparagraph 2. The African Group was of the view that a more coherent definition was required and that the substantive provisions took also into consideration the provision within Article 4 in WIPO/GRTKF/IC/11/5(c). TK was contained in codified or written knowledge systems and was passed between generations. Hence, in Article 3, paragraph 2, the African Group recommended an inclusion that indigenous knowledge will be passed from generation to generation and between generations. It was not limited to any specific technical fields and may include agriculture, environmental and medicinal knowledge and knowledge associated with GR. Tradition-based reference to knowledge system, creation, innovation and culture expression which had generally been transmitted from generation to generation, were generally regarded as pertaining to a particular people or its territory and were constantly evolving in a response to the environment.

305. The Delegation of Thailand stressed that TK should be defined in a descriptive term in order to cover broad and diverse nature of content of knowledge resulting from intellectual activity of local or traditional communities in their traditional and customary context. The protection should not seek to limit to specific field of technology or knowledge. It should be broad enough to include agricultural, environmental or medical knowledge, and knowledge associated with GR. In this light, Article 3 and 4 in WIPO/GRTKF/IC/11/5(c) could serve as a basis for further discussion.

306. The Delegation of Brazil stated that misappropriation of TK held by indigenous and local communities was a global problem that required an effect and robust response at the international level. The best response to the misappropriation of TK would be the adoption of

an international instrument within the IP system. As to question N. 1, a satisfactory and working definition of TK was indeed achievable. TK should be understood as the knowledge held in the collective and inter generational environment which related to the identity and the social cultural integrity of a community. Therefore, the Delegation added its voice to China, Colombia, Mexico and the European Communities who had indicated that the definition proposed in Article 3.2 of WIPO/GRTKF/IC/11/5(c) represented an adequate basis for discussion. The definition contained in WIPO/GRTKF/IC/11/5(c) captured the essence of TK in a quite consistent manner. That definition was read clear, useful and concise. “TK refers to the content or substance of knowledge resulting from intellectual activity in a traditional context”. What should be pursued here was a satisfactory definition rather than an absolute one. Absolute and perfect definitions were not achievable. In the Bern or Paris Conventions, not all concepts therein had been exhausted. After more than one century many concepts in the Bern or Paris Convention needed either to be further understood or to be further clarified. In spite of that no one would deem those Conventions as useless, inadequate or premature. Some Delegations needed to show some flexibility and rather than attempting to achieve an absolute definition try to engage in a serious discussion towards a concise, satisfactory and working definition.

307. The Delegation of China noted that WIPO/GRTKF/IC/11/5(c) provided a very good basis for discussion. On the first issue, the definition of TK that should be protected, it believed that Articles 3 and 4 of WIPO/GRTKF/IC/11/5 could serve as the basis for discussion. In a traditional context the different countries would have different ways to preserve and transmit the TK. Diversity existed in this context. In addition to the Communities and inhabitants the minority ethnic groups could also possibly be included. For instance in China, Chinese Traditional Medicine was almost always preserved or concluded by one or more ethnical groups. For instance, in Article 4, paragraph 2 or 3, after the indigenous communities ethnic groups should be added. In addition, at present the Member States had reached consensus on issues to a certain extent and this could serve as a basis for the work of the Committee. At the same time the divergent or different point of views from the Member States were also the reasons for further in-depth discussion.

308. The Delegation of Egypt agreed with the statements of the African Group as well as Brazil and Thailand. There was a simple way of achieving a definition of TK that everyone could agree on and it was the definitions used by specialists i.e. an operational definition. There were two aspects to TK, one which was closely linked to cultural expressions and the cultural and spiritual aspects. These were more moral than material. The second aspect relating to TK related to practice such as for example agriculture, harvesting, breeding new plants and technical use made in fabric-making, songs, dance, writes, etc. These aspects brought together both the moral and spiritual aspects. These elements were sufficient to protect such practices, to ensure that such TK could be used by other holders. TK was also applicable to practices that were used. If speaking of TK or indigenous authentic knowledge it could not be assumed that Communities had lived in total isolation from one another in a closed context except in a very small, very restricted community. The cultural fusion and the mutual enreaching were well known to anyone who studied culture. The different shading factor was the practice, the application of the TK and that was why ownership of TK would be in the hands of those who used the TK for practice and handed on that knowledge from generation to generation within the Community.

309. The Delegation of New Zealand emphasized that a number of indigenous stakeholders in New Zealand had stressed that issues relating to TK and TCEs should be addressed as a whole, because TCEs could not be separated from its underlying TK. New Zealand had

therefore taken a more holistic approach by combining its responses to the two sets of key issues in the written comments. It would try to make additional comments relating to the Issues on TK when there were unique issues for TK that had not yet been covered in its responses relating to TCEs. It commented on the question from the United States of America regarding whether reference to indigenous knowledge excluded the analysis of TK from other local communities. In the case of New Zealand, the reference to indigenous knowledge, Mātauranga Māori, did not mean that the existence of TK of other local communities was not acknowledged. In fact the new provisions in the TM Act 2002 had been designed in order to take account of the fact that indigenous knowledge was not the only body of TK in New Zealand, and the legislation recognized the potential existence of TK originating from all local communities in New Zealand. However Māori TK constituted a significant body of TK in New Zealand. Regarding the definition of TK, it referred the Committee to its intervention on issue 1 on TCEs, particularly on the key characteristics and commonly understood facts about TK and TCEs; and to its initial question as to whether a formal or rigid definition was needed. There was currently no agreed formal definition of what was considered TK. TK had been generally defined in the context of the CBD as “knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation.” The WIPO working definition stated that TK was knowledge which was “generated, preserved and transmitted in a traditional context and between generations; distinctively associated with or linked to a traditional or indigenous culture or community (or communities) through a sense of custodianship or cultural responsibility; or identified by the source community as being TK.” TK was defined in general, indicative terms in Article 3 of WIPO/GRTKF/IC/11/5(c) as “the content or substance of knowledge resulting from intellectual activity in a traditional context, and is not limited to any specific field, extending to agricultural, environmental and medicinal knowledge, and knowledge associated with GR.” However, Article 4 of the revised policy objectives and principles suggested that to be eligible for specific protection against misuse or misappropriation, more precision was needed, and therefore TK should: (i) exist in a traditional and intergenerational context; (ii) be distinctively associated with a traditional or indigenous community or people which preserved and transmitted it between generations; and (iii) be integral to the cultural identity of an indigenous or local traditional community or people which was recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.” The individuals and organizations with whom it had consulted on this definition had said that they generally agreed with this definition, as it appeared to cover most areas of concern. However, a distinction had been drawn between: the ‘TK base’ (which included knowledge associated with cultural traditions and heritage, language, sacred sites, human remains, natural resources); and ‘TK based innovations and creations’ (which build upon or were inspired by the ‘TK base’). The ‘TK base’ was subject to customary laws and protocols. It was often collectively ‘owned’ or guarded, and may be sacred/secret or in the public domain. TK based innovations may be individual creations, to which communal responsibilities may attach, and which may be subject to both formal and customary laws. Conventional IPRs only protected innovations and creations based on TK, not the underlying TK itself. The problem arose because TK based innovations and creations could not be separated from the TK itself. The Delegation wished to explore this issue and its implications in more depth in the context of this Committee, and welcomed the views from other Member States and observers.

310. The Delegation of Peru informed the Committee that it had a law which laid out a regional protection for collective knowledge of indigenous peoples linked to biological



resources since August 2002. This Law continued definition of what was understood by collective knowledge and was the following: accumulated in trans-generational knowledge developed by indigenous peoples and communities with respect to properties, uses and characteristics of biological diversity. The definition in the Law was more limited than that contained in the revised provisions on protection of TK. The definition included in these revised provisions did suitably cover the elements that should be taken into account when defining TK. Having a perfect definition which would satisfy all Delegations one hundred percent was not possible. In line with what other Delegations had said a perfect definition was not needed but rather a definition which would enable the Committee to move towards the establishment of a binding international instrument for the protection of TK.

311. The Delegation of Indonesia stated that it basically went along with the definition. It however suggested to redefine TK as follows: TK referred to the content or substance of knowledge that resulted from intellectual activity including the know-how, skills, innovation, practices and learning that form part of TK systems and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge systems passed between generations and continuously developed following any change in the environment, geographical conditions and other factors. It was not limited to any specific technical field and may include agriculture, environmental and medicinal knowledge and knowledge associated with GR.

312. The Delegation of South Africa supported the statement of the Delegation of Algeria on behalf of the African Group on the issue relating to the definition of TK. It supported Delegations who had reiterated the importance of advancing the work of the Committee forward towards building consensus on an international legally binding instrument. It supported and appreciated the comment provided by the Delegation of New Zealand on the relationship between indigenous knowledge systems and TK. It was of the view that Article 3, subparagraph 2 and WIPO/GRTKF/IC/11/5, entitled scope of the subject matter provided a satisfactory basis for further work in the Committee. The Delegation proposed the combination of Article 3, subparagraph 2 and Article 4 to be used as a basis for further definition of TK. Previous work, studies and research undertaken had laid the foundation to working towards a comprehensive definition for TK. And in the spirit of consensus building it invited Member Countries to continue to further engage in the formulation of an acceptable definition for TK.

313. The Delegation of Nigeria commended the Secretariat for the immense work that had gone into the preparation of the various documents and the incremental improvement on the policy options, principles and possible substantive provisions all of which had enriched the work of this Committee. It adopted the statement of the Delegation of Algeria as presented on behalf of the African Group. It agreed with those delegations that had observed that there was no universally accepted definition of the term "TK". The term had been used differently at various fora. This was often a matter of context and did not necessarily suggest confusion or contradictions. For the purpose of the work of this Committee, it believed that the term "TK" should focus primarily on those creative endeavours that were clear, verifiable and observable without which the knowledge concerned may not yield to clear protection under any legal regime. While there may be no agreement on exact wordings, there was enough convergence on the elements that would constitute TK. Rather than seek a universally accepted definition of the term it should be sufficient to arrive at a satisfactory working definition. The Delegation was of the view that the present formulation in Article 3 of WIPO/GRTKF/IC/11/5(c) was a rough, but acceptable, starting point for the formulation of such a satisfactory definition. The elements provided in Article 4 of the same document

helped to fill the gaps in our search for a definition. Ambiguities did arise from the association of TK with TCEs and the wider subject of culture and spirituality. But as one would see by comparing the formulations in Articles 3 and 4 of WIPO/GRTKF/IC/11/5(c), on the one hand, and that in Article 1 of the WIPO/GRTKF/IC/11/4(c), on the other, TK would be more in the nature of the know-how, skills, innovations, practices, etc., whether codified or not, and its application could cover a wide range of activities: technical, agricultural, environmental and medicinal. In determining those TK that would be eligible for protection, the elements enumerated in Article 4 of WIPO/GRTKF/IC/11/5(c) should not be seen as exhaustive and may be the subject of further consideration. On the other hand, while TK had to be intergenerational in character and distinctively associated with a traditional or local community, it was not convinced that TK should be subject to the additional requirement of being integral to the cultural identity of the community concerned. Some aspects of TK may be transmitted and practised by sections or units in a community while some others are bound by secrecy which may therefore make it difficult for them to be viewed as being integral to the identity of the community or the section holding them. The formulation in WIPO/GRTKF/IC/11/5(c) was one of the most satisfactory that had so far been proposed. Discussion within the Committee should continue to improve on this definition taking into account the reservations already expressed by some delegations. It urged those delegations who found the definition inadequate to also engage constructively in with a view to advancing the work of this Committee. On the comparison between TK and other IP concepts such as “patentable invention”, it was unable to follow the argument that the definition of TK was less certain than other classical IP concepts. As had been noted by many other delegations there were many other concepts in the field of IP that were not defined in any international instrument. Certainly, the millions of practitioners who were engaged in TK-based practices had no confusion in recognising their TK. In determining the elements of TK such as generation, preservation or transmission of the knowledge, pre-eminence should be given to the customary laws, protocols and practices of the relevant communities.

314. The Delegation of Saudi Arabia believed the definition presented by the Committee was a suitable one and constituted a good basis for achieving an acceptable definition. It however suggested that TK should have a value for humanity and questioned about some of the TK which could be useful for some and useless to others.

315. The representative of the Ogiek Peoples Development Program (OPDP) indicated that the TK that had to be protected had to be on its own original means of creativity and or development of ideas by indigenous people and their use of such invented products for promoting sustainable lively good. The definition should permit the transmission process from older generation to the younger generation so as to protect it from the verge of extinction. In the case of the Ogiek, their culture center had been vital as it had been used over years by the herbal experts in growing indigenous trees extracting its product and using it for treatment of the Ogiek members and foreigners, while the Masai had been using it in treating animals. TK had always been holistic and important to this society. The community could not leave without it. For example in Tanzania and Botswana the communities such as the Bushmen of Botswana had been trying to isolate themselves from the public domain because there was a serious threat of TK by Western education researchers and scientists. As the Ogiek representative, it supported the definition that would promote the quality of life by users of TK among the indigenous people.

316. The representative of the International Indian Treaty Council (IITC), referring to the definition of TK, said it believed its TK was alive and had developed over time, collectively with its peoples. Many of its cultures were manifested in traditional and contemporary arts.

Its authenticity, quality and the cultural integrity of its TK and art forms had been maintained throughout the generations. TK was dynamic and could not be limited to a specific definition. The definition of the Council's TK should not be limited but should include details of the cultural landscape and particularly of places of major significance for indigenous peoples, knowledge of contemporary use, prior use and potential use of plants and species of animals, minerals, soil etc. For example, in the Kuna culture traditional medicine was produced using plants, minerals, animals, food products, small roots, non-edible fruits, and it was also practiced through therapeutic songs and orations. Thus, collective indigenous TK could be said to contain all the intellectual creations, their knowledge of use of the natural resources which indigenous peoples had used and produced, throughout their history, including their indigenous knowledge of the sustainable use of biodiversity in the field of medicine and food products, and other fields could be mentioned, in which indigenous peoples had their TK. The representative considered that TK was a concept that encompassed tangible and intangible creations, cultural manifestations, technologies, sciences, agricultural knowledge, designs, literatures, and visual and performance arts derived from oral and written traditions. TK was also connected to indigenous traditional territories, lands, natural and GR, and was transmitted from generation to generation.

317. The representative of the Saami Council said that Article 3 in the Substantive Provisions sufficiently defined the term "TK". It failed to see how this issue could be made so complicated. TK was knowledge developed in a traditional cultural context. For instance, in a reindeer herding Saami community, a reindeer herder's knowledge about reindeer husbandry will qualify as TK, since it will always have been developed in a cultural context, whereas his or her knowledge about how to brew the kind of coffee served outside this meeting room for example, will not be. Individual elements of TK can be developed by individuals or a group, but the knowledge was always collective in the sense that it built on previous knowledge developed by the people or community. From this it also followed that the time-frame had no relevance for the definition. The knowledge could have been developed today or thousands of years ago. The important thing was that it had been developed in a cultural context. Who was the holder of element of knowledge - the people in entirety, sub-groups there within, or individual members - could only be determined in accordance with the people's laws, customary or otherwise. Like the Delegation of Brazil and others, it encouraged those who called for a more concrete definition of TK to point at where international instruments protecting conventional IPRs provided a more specific generic definition of the subject matter protected. It would be helpful if the delegations arguing for a more detailed definition of TK explained how such knowledge differ from other forms of human creativity, in particular individual knowledge subject to patent protection, in this regard. The Saami Council found it ironic that the delegations that called for a more specific regulation were generally the same delegations that constantly underlined that whatever became the outcome of this exercise should not be a legally binding instrument. If your position is that what we were crafting were merely guidelines, why the need for exact definitions? The representative further found it puzzling that some of the states that repeatedly called for a more detailed definition of TK, at the same time apparently had never seen a similar need to define conventional knowledge, allowing their patent offices to grant patents on virtually anything.

318. The representative of Indian Movement Tupaj Amaru stated that one could see a parallel with the third Committee of the GA. There was an obstruction to the adoption for indigenous people saying they had first to define who indigenous peoples were. Now in this Committee the knowledge of these peoples had to be defined. It added the Committee was talking about something which was alive and not of something which was dead. In that

context how could the life, soul and spirituality of indigenous peoples be defined. If there was a definition, then as the Delegation of Algeria had said, it had to be defined within the framework of an international legal instrument not with a view to seeing what indigenous peoples or their knowledge was but with a view to providing legal protection for TK of indigenous peoples and communities. Secondly, Article 3, general scope of protection of WIPO/GRTKF/IC/11/5(c) in paragraph 2 gave us a basic element here. The Delegation of Brazil and other Delegations as well had said that this paragraph should serve to define what this Committee wanted to deal with. However, the paragraph said for the purpose of these principles only the term of TK referred to the content or substance of knowledge. TK was knowledge obviously but this was not a definition. What was being said was that TK was an essence, a living essence of an identity, the identity of the indigenous, individual or community, and it was necessary and many Delegations had said this that spiritual believes should be included. He had just participated in La Paz in Bolivia in the Working Group on the Rights of Indigenous Peoples organized by the OAS where they had talked about the spiritual dimension of indigenous peoples. Aside from this context, there were other concepts such as scientific knowledge. Did indigenous peoples have scientific knowledge or not? Yes of course they had because the materialistic view of the history of indigenous peoples was that they thought and believed that they were a product of nature, a product of the Earth. This was the philosophical view of indigenous peoples but scientific knowledge with respect to the Patchamama. Indigenous people believed they came from and would return to Patchamama which was Mother Earth. This was a belief that they had had for hundreds of years. What about ecological knowledge? Indigenous peoples were able to maintain the balance between man and nature. They were able to maintain that but modern civilization with its industrialization which was wild had contributed to the contamination, pollution of the environment today and had become a threat for Humanity in its entirety. This was contrary to what indigenous peoples had done in maintaining the balance for centuries. In the Inca civilization, for example, the ancestors knew how to maintain the so-called Peruas, the silos which were used to preserve food stuffs. Thanks to that there was no poverty, no hunger. Everyone worked according to its capacity but this balance had been broken and now they suffered from hunger and poverty. He finally mentioned medicinal plants as their ancestors had many medicinal plants. Quinine, for example, was discovered by the Peruvian indigenous but was patented by the major transnational companies. Now indigenous peoples did not even have an aspirin to cure their headache. It added that TK was sacred and that was important. TK was also the intrinsic value of a community and what marked it was the collective right of the indigenous peoples which they maintained. This was the collective right but IPR internationally would only respect the individual and not the collective right.

319. The representative of the Indian Council of South America (CISA) informed the Committee that it was a Member of the Aymara indigenous community. With respect to a register of TK and in particular music and dance, if there was to be effective protection, these expressions must also be recorded and be considered as a part of their TK. The communities themselves must discuss this scope, this protection because the communities themselves were the only ones who were fully aware of the entire ceremonial content. As a musician and a Member of a folkloric group who had traveled to many countries in the world, it had seen there was no protection against exploitation of indigenous music. The melodies of the Indian peoples had been collected, used and performed by people outside the communities and those peoples had benefited from their interpretation of what they called Andean music. Together with its community it had recorded the dances and music in order to have a database which proved that they were authors of these music and dances. This material was available to the public on the Internet. It added they did not have sufficient means to reproduce this material with a view to having income for the communities nor to broaden the archives to include

material from the entire region from neighboring groups as well. In 1992, CISA submitted a work to the Working Group on Indigenous Peoples on Item 9, study of the cultural art product of indigenous peoples called folklore. In the conclusion, it was mentioned that it was necessary to create an Indian Center for the protection of their cultural expressions. This would be composed of the various Indians groups of the three Americas with a view to store, promote, classify, study and protect the various cultural activities of Indian peoples. It hoped the Committee would manage effectively to defend the cultural expressions of the Indian peoples.

*Issue two: who should benefit from any such protection or who hold the rights to protectable traditional knowledge?*

320. The Delegation of Portugal, on behalf of the European Communities and their Member States, considering existing Human rights instruments, believed that protection of TK should benefit the communities who generated, preserved and transmitted the knowledge in a traditional and intergenerational context who were associated with it and who identified with it. Benefits from the protection should accord flow to the indigenous and traditional communities that owed TK in this manner as well as to recognize individuals within these communities and people. It could however be difficult in practice to delimit the sphere of groups entitled to the protection as a clear common understanding of what constituted such communities.

321. The Delegation of India underlined that protection of TK should benefit the communities who generated, preserved and transmitted the knowledge in a traditional and intergenerational context, who were associated with it and who identified with it. Protection should accordingly benefit the traditional communities themselves that held TK in this manner as well as recognized individual knowledge holders within these communities and peoples. It was also possible that holders of TK may not get identified at individual or community level. In such cases, benefit must be channeled to the particular discipline of knowledge through a national competent authority. Issues such as multiple ownership at individual, community or country level would need a mechanism for resolution and apportionment of benefits. Further, entitlement to the benefit of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.

322. The Delegation of South Africa, on behalf of the African Group, viewed that Article 5 of WIPO/GRTKF/IC/11/5(c) provided a good basis on identifying beneficiaries for further discussion with a view that TK was holding trust as part of the Community Heritage that was past down from one generation to another and therefore commonly owned by that community. In this context the beneficiaries of TK should include (a) the holders of TK in the form of the local and traditional communities as well as recognized individuals within such communities according to customary laws who created, preserved, used or transmitted the knowledge in a traditional context. Those upon whom rights had been conferred by the right holders as defined above through PIC or may be individuals or legal entities including instructors of TK, researchers, collectors and TK technicians and development institutions.

323. The Delegation of the United States of America said that, as with respect to TCEs, the Committee would benefit from further study informed by representatives from the many stakeholders groups including indigenous groups of existing mechanisms to protect TK. This

study should progress with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve sometimes competing claims of different potential beneficiary groups. This topic included complicated issues related to the Web adventures of many stakeholders including the role of States as custodians of TK, relationships relating to immigrant communities, governmental authorities and indigenous and other traditional or cultural communities. Many questions arose in this context. As mentioned with respect to the TCE debate, the Delegation of Japan had raised an interesting question regarding groups that were not ethnically groups such as certain religious groups, whether that would be considered to be an appropriate beneficiary group. The Delegation of Italy, in that discussion, raised the issue of many communities or cities or localities having their own folklore or TK. This raised questions regarding whether a political jurisdiction such as a city could be envisioned to be a traditional community. Certainly, life in many cities was culturally distinct from other cities and localities. Yet populations may be very tangent. Another question regarded identifiable groups of individuals, for example a group of inventors or a group of artistic creators and whether that could constitute a community in this context. Further, would Members of communities in diaspora in foreign countries from their homeland constitute rights for beneficiaries of TK that may be identified as being from their home countries? And this was just some of the questions that arose from this debate. Additionally, some of the law cited in the comments submitted to WIPO appeared to limit existing laws to “indigenous people” as defined in the national context. This appeared to perhaps exclude migrant communities or other non indigenous identifiable communities from that definition. It would be interesting to know whether other members had laws that were so limited or whether laws recognized any traditional communities other than indigenous peoples. In addition, further discussion as to whether those who were considered to be rightful holders of TK would be the same as those who would benefit from the TK and any benefits generated there from may also help to give some clarity to the terms and their intended scope in the discussions.

324. The Delegation of Brazil believed that the discussion about who should be the beneficiaries of TK protection should follow developments in other relevant fora such as in the CBD and in the WTO. Entitlement to the benefit of such protection should take account of the customary protocols, laws and practices of the communities and peoples where TK was produced and preserved. The provisions contained in Article 4 and 5 to the Annex of WIPO/GRTKF/IC/11/5(c) represented a good basis for future discussing this issue.

325. The Delegation of Indonesia stated that, with regard to the definition of beneficiaries of TK as mentioned in WIPO/GRTKF/IC/11/5(c) article 5, it believed that it was a good basis for discussion. In order to make it more comprehensive, it proposed the definition should also include the following elements: (i) Other than traditional/indigenous communities as parties who maintained and developed TK, governments also needed to play a role in facilitating TK protection in case there were other communities who had potential benefits for the utilization of TK; (ii) In case the owner of TK could not be identified, the beneficiary of TK protection should be the government, and it was used for the sake of community’s interests; (iii) The owner of TK eligible to benefit from the protection should be the TK owner who had been identified by government; (iv) Regarding the individual’s contribution to the development of TK, it could be rewarded by the existing IP system; (v) A state could play certain role in facilitating the protection of the community and it could be extended further as a right holder only if it benefited the communities.

326. The Delegation of Japan stated that who was the TK holder and who should be beneficiary was another important issue to be clarified as already mentioned for TCEs. First

what was community and what was indigenous group was not clearly identified. As mentioned in Item 1 it was said that TK could be passed on, for example from parents, child, families and relatives, communities, indigenous groups and countries. However, the scope of a community or an indigenous group and so on was not clear enough even in a normal classical sense for internationally common understanding. In relation to this, when TK was passed on over generations by a religious community, it was not clear whether such religious group could be recognized as a beneficiary community. Further, what about the modern type of communities such as Internet communities. Members of these communities did not even live together but formed communities in a virtual sense where members were united under a similar purpose, idea or preference. While these kinds of communities were not seen as communities in a classical sense it should be clarified how to handle these kinds of communities. Second, regarding beneficiaries, the following cases should be clarified as examples. When a TK was passed down within a limited circle in a community or indigenous group, etc., how was the beneficiary relationship between such a limited circle and a community at large. For instance: (a) the relationship between indigenous group X who had been maintaining, transmitting that TK and country A where X belonged; (b) the relationship between indigenous group X and the country A and country B where X extended in both country A and country B; (c) the relationship between indigenous group X and indigenous group Y who had respectively being maintaining, transmitting their TK and country A where both X and Y belonged; (d) The relationship between country A, country B, indigenous group X and indigenous group Y. Where X and Y extended in both country A and country B. These examples were also applicable to families and communities and so on. Third, as regards representatives, when a community was not able to claim its eligible benefit due to lack of decision making mechanisms or lack of representatives in the community, who could claim on their behalf? It was not necessarily clear whether a state where the community belonged to could legitimately represent the welfare and benefit of the community. Fourth, as regards the TK, in case where it existed in the past in certain indigenous group but ceased to be passed on or used today, how should such knowledge be treated and who could the beneficiary be if any? This program was linked with a basic issue of further maintenance and transmission in the present day, which was a precondition of TK. Fifth, as regards the modification of the TK, if Community X had been passing on TK A and Community Y had been passing on TK A+  $\alpha$ ? How should the relationship between Community X and Community Y be treated? Were there any differences in the treatment of the case where Community Y developed TK A+  $\alpha$ , based on TK A of Community X? On the case where Community Y developed TK A+  $\alpha$ , independently from Community X? This fundamental issue should be deepened in the discussions.

327. The Delegation of Ethiopia noted that the Provisions had been widely accepted by the Member states. Some Delegations had also expressed the view that additional studies were needed on the definition of beneficiaries since it was a very complex issue. It believed the Secretariat and the Committee had undertaken sufficient work in studying and analyzing national experiences elaborating the relevance of existing IP systems for the protection of TK and clarifying international dimension of the mandate of the Committee and including the definition and other aspects of TK. Sufficient work clarified the views on these issues. The Delegation held that there were different terminologies used to refer to beneficiaries of TK. Some of these terminologies included indigenous communities, peoples, local communities, nations, ethnic groups, minorities and even immigrant communities and so forth. Whereas Article 3 used indigenous and local communities, Article 4 of these provisions introduced new descriptions such as people and traditional communities. Its national experience indicated that there were even additional phrases used back home. It did not intend to create hierarchies of rights among these groups. All these groups in whatever designation and form

they come enjoy similar and equal rights as far as they held TK under the definition of the Provisions. There was largely a development of these concepts under national and international experiences. As suggested by the Delegation of Brazil, experiences in other fora should also be taken into account. It also believed that communities should be provided the opportunity to be involved in certain level of self-definition which meant that whenever the issue of beneficiaries was considered, communities based on their traditional laws should be the ones to define how they conceived themselves as beneficiaries of protection. The beneficiaries of such protection should be knowledge holders, whether traditional communities or other groups. It considered Article 5 as a solid foundation for the deliberations but cautioned the reference to recognized individuals as beneficiaries as it appeared in Article 5. Such determination should be left to customary laws and to communities themselves. Article 5 stated that entitlement to protection shall as far as possible take into account customary laws. The application of traditional law should be placed as an important element of such determination. This articulation of beneficiaries should not be interpreted to exclude the responsibility of the State to conserve and protect TK.

328. The Delegation of Mexico considered that the protection of TK should be to the benefit of the local communities or indigenous peoples who held this knowledge. Article 5 of WIPO/GRTKF/IC/11/5(c) was a good basis for the Committee's work. Other international instruments should also be considered particularly the UN Declaration on the Rights of Indigenous Peoples.

329. The Delegation of Thailand was of the view that protection of TK should be developed in two aspects, namely national and international ones. Certainly domestic registration should be introduced to protect, preserve and maintain TK in their local or traditional community. As TK was originated from such community, the Delegation viewed that the protection of TK should benefit the community who generated, preserved and transmitted the knowledge in a traditional context. However, certain TK may be regarded as belonging to different levels of communities, local, communal or national levels. In that case the protection should benefit all levels of the communities. However, given that internal code of conduct of registration was inadequate to ensure the international protection of the knowledge, it was a must to have an international instrument to enable the beneficiaries of the TK protection to deal with the problem of misuse or misappropriation of TK occurring abroad.

330. The Delegation of Nigeria stated that Article 5 of WIPO/GRTKF/IC/11/5(c) provided a good basis for further discussions on the issue. While the state understandably had an interest in ensuring that adequate protection was made available for its local communities the primary beneficiaries of such protection should as much as possible remain the local communities that had over the years generated, preserved and transmitted their particular body of TK as understood under the definition of the subject matter. This was consistent with the position of the African Group which had always been that the benefits of protection should avert to the TK holders. On the suggestion that recognized individuals should also benefit there was need for further clarification. If indeed the TK sought to be protected must comply with the eligibility requirements as laid out in Article 4 of WIPO/GRTKF/IC/11/5(c) that was generated, preserved and transmitted in a traditional and intergenerational context and, secondly, distinctively associated with the traditional or indigenous community or people which preserved and transmitted it between generations, then it was hard to see how such TK could belong to individuals. There was a need to draw a clear line between TK which had become intergenerational or distinctively associated with traditional or indigenous communities that was, that which was collectively or communally held on the one hand and those developed by individuals within traditional communities or traditional context but



which had not found their way into the communal pool. The former was the proper subject matter of protection in the context of the Committee mandate. The latter will remain individual knowledge in a traditional context until it met the criteria in Article 4. The intention was not to extend protection to individually owned or private TK if it could be so called. To that extent the extension of the beneficiaries of protection to recognize individuals to the extent that it suggested private benefits should be reconsidered. In no case should researchers, collectors and extractors of TK become beneficiaries under the protection as had been suggested in some of the comments received by the Secretariat and available in the documents of this Session. Suggesting emerging communities such as the so called Internet or virtual communities, as had been suggested in some other comments, should not lead to a dilution of TK. Contemporary communities had enough facilities already in classical IP regimes to protect their rights. Both positions should not be understood as derogating from the possibility of having, as background studies had shown, individual and institutional custodianship of TK within the context of communal or collective ownership. And one must always draw a thin line between ownership of benefits or benefiting as against custodianship. For instance the customary laws and practices of a community may recognize such individuals, thus the custodians as custodians of the body of knowledge, but even in those cases the benefits were hardly ever intended to be for the individuals alone but for the community or a recognized section thereof. In every case the starting point in determining who should benefit should be the applicable customary laws, protocols and practices of the communities concerned. Care should be taken to avoid the privatization of communal rights and the introduction of confusion between communally held rights and purely private rights over which individuals may assert their rights or IPR within a traditional context. As suggested in the response to the issue of definition TK should for the following reasons be defined more concisely in the context of communal holding and for that reason emphasis should be on communal ownership making this operation of the general scope of subject matter in Article 3, and eligibility of protection in Article 4 unnecessary. While the internal beneficiaries must be determined by the relevant customary rules and practices there should be enough flexibility in the instruments that allow States provide appropriate legal and administrative mechanisms to ensure that local communities were well represented and that any benefits occurring were fairly distributed with the active participation of representatives of the Communities concerned. States should however not, under these guides, arrogate to themselves the position of primary beneficiaries. In addressing the position of migrant communities a careful distinction may be made between the communal holders of the knowledge and individuals within the communities or the migrant communities who may legitimately use the knowledge in the permitted traditional context. Any commercialization of the knowledge beyond the traditional context should benefit the original source community. Finally, the possibility of joint benefits across communities may be explored further and in the case of dispersed TK where more than one community may lay claims or lay claim to the body of knowledge appropriate mechanisms for arbitration may assist in allocating the accruing benefits, priority being given to the immediate source community.

331. The Delegation of the Russian Federation agreed with those Delegations who had stated that national experience in this area should be taken into account in the Committee's documents. The concepts of indigenous peoples, local communities, ethnic groups, small groups, individuals representing local communities existed and there might be other expressions as well. It was then very important to take into account the experience of the State and the role of the State in drawing up mechanisms relating to who should benefit from protection of TK. The suggestions by Japan should be given attention to.

332. The Delegation of China considered that WIPO/GRTKF/IC/11/5(c) could be a basis for discussion on this issue. In addition, concerning its first view, in deciding about beneficiaries in this process, besides some specific subjects such as individuals, families and communities, minority groups could also be considered. The expression of TK should not affect the uniqueness of its origin. The first original creation should be respected and protected.

333. The Delegation of Yemen considered that the beneficiaries of these rights were in fact those who innovated and were the source of this TK which was transmitted from one generation to the next. Whether these be indigenous peoples or not, whether these be groups or individuals, whether they belong to a single national group or not. In fact, it believed therefore that they were the true beneficiaries who were part of this group and who should benefit from this protection.

334. The Delegation of Australia stated that, as it indicated regarding the definition of TK, it was important to first define the objectives of protection. Identification of who should be beneficiaries or hold the rights to protectable TK flowed from the objectives or outcomes to be achieved. Aside from the very broad statement that, in general terms, it was those who created the TK who should be the beneficiaries of that knowledge, it could not be determined, without more specific context, who would be the holders and/or beneficiaries of any protection. However, considerable issues arose regarding ownership or entitlements to TK and of developments in knowledge and technology arising from TK. For example, as other delegations had discussed, the issue of overlapping rights to TK across different nations, indigenous peoples, local communities and individuals must be addressed. This was particularly the case where different cultures had originated, or originated in part, from a common background or heritage. Furthermore, different emphases may be placed on particular elements of a common heritage by different indigenous people and local communities. Where did the potential user stand in relation to such issues? What implication would permission to use TK had on the group that withheld or did not give its permission or on the person who obtained approval from one group only? It was noted that geographical and political boundaries will not always be of assistance in defining who should benefit or who the right holder was. The Delegation would very much welcome further detailed discussion of national experiences of these issues, particularly from those member states that had put in place provisions for the protection of TK, so that members states can learn from that experience and how these complex issues had been addressed at the practical level.

335. The Delegation of the Islamic Republic of Iran believed that the right holders in this scope could be individual group, family, local community, tribes and nations. The rights of holders were considerable in this society. In this regard national legislation was important and of course should not be ignored. The rights holders, in particular the rights of local communities who were real owners and their consent should be observed. The existing IP system was not sufficient and adequate to provide the protection to their rights. The appropriate institution or mechanism should be created for the distribution of benefits from the commercialization of TK. It supported the Delegations of Brazil and Indonesia in general.

336. The Delegation of Morocco endorsed the statement made by the African Group on this matter and considered that TK holders were the first beneficiaries in fact. They were indigenous peoples and local communities. These were also individuals who had a recognized role in the context of these indigenous and local communities. Government had an essential role to play in maintaining, preserving and transmitting this TK. Article 5 of WIPO/GRTKF/IC/10/5 was essential and would enable the Committee to move forward in

the discussions and define the protection of TK which was transferred from one generation to another.

337. The representative of the Ogiek Peoples Development Program (OPDP) supported the proposal by the African Group as well as the Yemen suggestion. The beneficiaries should also be categorized into two: one was the direct beneficiary which was going to be the real inventor and the community that was using it because these were the *bona fide* parties who were holistic to this TK; and two the indirect beneficiaries who were going to be the foreign rights holders and the Government who can play the role of guardianship in protecting this TK.

338. The representative of the Russian Association of Indigenous Peoples of the North (RAIPON), in Siberia and Far East of the Russian Federation, thanked the Secretariat for preparing good documents. He also thanked WIPO for supporting the participation of indigenous peoples in the Committee sessions and for organizing a discussion panel on the first day of the session. At the same time, the representative proposed that in the future such a discussion should take place not only on the first day but also on the day before the subject of TK was examined. In that context, the participants who had appropriate relevant experience should be given the opportunity to speak. RAIPON had closely followed the discussion taking place and had not spoken, not because it had nothing to say but because it was experiencing certain difficulties, as it did not have the possibility to assess how good the text of certain articles was, as no documents were available in Russian. He had listened carefully to all the statements made in order to understand how the process of drafting a new international document to protect TK on the basis of the documents submitted worked. RAIPON did a lot of work to collect, catalog and classify information on the TK of indigenous peoples of the North, Siberia and Far East. The Association's possibilities and resources were limited and therefore such work was being done within the framework of different projects carried out by international donors on the lands of indigenous peoples. For example, the United Nations Development Programme/Global Environment Facility (UNDP/GEF) was currently carrying out projects to preserve biodiversity in Kamchatka and in the Altai-Sayansk eco-region. A similar project would also begin shortly in Taymyr. UNEP/GEF was carrying out another project on ecosystems and the stable use of biodiversity under the name "ECORA" in the North of Russia. As part of those projects, RAIPON offered projects relating to the TK of indigenous peoples, together with regional organizations of such peoples. RAIPON had particular experience in that field and in 2006 had issued a journal with the title *Traditional Knowledge of Indigenous Peoples*, in which it had collected the richest possible material. It organized and conducted seminars, including on the TK of indigenous peoples. Thus, on April 6, 2007 the Association had organized a circumpolar seminar in Salekhard, devoted to the results of an international project, carried out on the conservation value of sacred sites of indigenous peoples in the Arctic: a case study in Northern Russia. During the seminar the Association had once again noted the importance of TK relating to holy and sacred sites, and the religious worldviews of indigenous peoples, not only for the preservation of biodiversity but also the fact that the sacred sites of indigenous peoples played a major role in preserving cultural and linguistic diversity. It was therefore important to take effective measures to defend and protect both the most sacred sites and also the TK connected to the religious worldviews of indigenous peoples. The participants in the seminar noted that currently no effective measures existed to protect sacred sites at the national and international levels. Therefore, in their recommendations the participants in the seminar had recommended to the Committee the dissemination of the regime devised by WIPO to protect the TK of indigenous peoples relating to sacred and holy sites at the international level. RAIPON had forwarded to the Secretariat its alternative responses to the

questions raised. They had been published in WIPO/GRTKF/IC/11/5(a). As to the question discussed of who should benefit from any such protection or who should hold the rights in protectable TK, the representative wished to focus not on the material benefit from the use of TK but on the moral aspect of that benefit from TK protection. From the example of TK in relation to the religious worldviews and spiritual values of indigenous peoples, it could be understood that the benefit of the protection of such knowledge should accrue to both individual representatives and also groups (communities) of the holders of such knowledge. In the case of sacred sites, that was the family, relatives and community, but also individual elders, shamans and priests who passed on their knowledge to their close relatives or to those consecrated from generation to generation. However, in the following case, what was the best reaction? The representative had received information in Geneva that individuals from a number of indigenous peoples, European citizens, who had somehow received information on religious rituals and ceremonies from the spiritual leaders of the Indians of North or South America, were making announcements, when returning to Europe, about courses during which they promised to teach shamanism within a few days. The cost of such courses was about 3000 euros. Taking into account that interest in the cultures and way of life of indigenous peoples was constantly increasing, it was understandable that there would be no lack of people wishing to follow such courses. How would it be possible to prevent that kind of fraud by unscrupulous operators with the aid of the international agreement which the Committee was to devise? He supported the proposal to draft an international document to protect TK in a legally binding manner. In that regard, he drew the attention of members of the Committee to the lack of documents translated into Russian. How was it possible to participate in devising a new international standard by means of hearsay, without having a written translation of a text available for consultation? The representative said he was a legal expert and had experience of legislative activity at the federal level in the Russian Federation, and also of devising new international standards in the United Nations. For eleven years, he had participated in the work of the Special Open-Ended Working Group to Elaborate a Draft United Nations Declaration on the Rights of Indigenous Peoples, which was currently being approved by the United Nations General Assembly. He had also been involved for the past seven years in the work of the CBD. The Association was well aware of the value of each word and each comma in the text of a document discussed. In relation to the forthcoming WIPO GA session in September 2007, the representative called on all members of the Committee and of WIPO to take the necessary decisions to increase the budget for written translation in order to provide a Russian text of at least the final versions of the documents discussed.

339. The representative of the Hokotehi Moriori Trust stated he was encouraged to hear an emerging consensus among those enlightened Member States who were advocating for the benefit of protection for TK to be in the hands of the knowledge holders themselves. It was certainly the position that indigenous peoples and Hokotehi Moriori Trust supported, it was also the position that the Maori claims in the Waitangi tribunal supported. The two aspects of this question needed to be clear. Who should benefit from such protection and the second aspect was who held the right of protectable TK? In both cases there was certainly more strong submission that it was the knowledge holders themselves who were the traditional guardians of those traditions and those cultural expressions. If others wished to gain access to those rights it was a common sense thing to ask permission, to get the PIC. He fully supported the wording in Article 5 in WIPO/GRTKF/IC/11/5(c) as currently worded. Regarding migrant communities, this was an important question but it was not a question that should be spent too much time on because the rights in interested migrant communities could be distinguished from the rights and interests of traditional and indigenous communities who were living within their traditional territories. So for example if you took Maori tribes who

originally migrated from Central Polynesia and who were now living in NZ, Maori sought to have their TK and TCEs recognized and protected in NZ. However there was a lot of Maori who had moved to Australia and it might be that there Maori living in Australia were exercising the TCEs, singing songs, doing Haka, even establishing clubs in Australia. But one must distinguish that from those who were still living within their traditional communities. Maori could not go to Japan, the United States of America or Australia and assert their rights there as Maori. They could only do it within their traditional communities. So if there was to be a point made about migrant communities, one could look at developing some system but which was quite different and quite distinct from those peoples who were still living within the traditional territories albeit in most cases under the oath of colonization. Regarding the submission from the Delegation of Japan, he did not think that issue itself posed a problem. There were always going to be overlapping interests and gray areas. This was the nature of the world we were living in. This was the nature of the evolution of IP rights themselves. A hundred and fifty years ago when States were sitting around talking about the complexities of copyright, trademarks, etc. all these sorts of issues were emerging. That had not prevented human societies from developing mechanisms to recognize and protect them. These were also complex issues but the nature of the complexity should not prevent us from moving forward. On the issue of overlapping rights and who had contributed to what, there could be for example either a regional, national or international body, a clearing-house, that could determine those sorts of issues. It was a matter of practical application and developing appropriate mechanisms to deal with those sorts of issues. On the matter of the rights of Internet communities, if they wanted to have their rights recognized and protected then perhaps they should be advocating in some appropriate forum for that to happen. This was not that forum. If motorcycle gangs who lived in communities in New Zealand wished to have their rights as communities recognized they could do so but this was not the appropriate forum for that to happen. This forum was established specifically to look at the rights and protection for indigenous peoples and traditional communities. The Trade Related IP Rights Agreement was an international instrument based on minimum standards of IP rights. And whilst Maori had expressed concern about the TRIPS Agreement because it did not provide and nor was intended to provide protection for indigenous knowledge systems which were sourced in a different philosophy altogether. Nevertheless any system that this forum may develop could equally have been designed around what were minimum standards of protection for TCEs, for TK that would continue to evolve and develop over time. So the Committee could indeed look at general principles that had emerged out of Western knowledge systems, of IP rights systems, general principles that could equally be applied with appropriate adaptation to developing similar standards and principles for protecting TK.

340. The representative of the Saami Council had commented extensively on who was the holder of collective human creativity under agenda item 7: TCE. These comments applied to TK as well. He had outlined why the Saami Council believed that per definition – both from an IPR perspective and otherwise - the creators of TK must also be the holders of the same, as the knowledge not be passed on without their free PIC provided in accordance with relevant customary laws and protocols. Consequently, the Saami Council supported Article 5 of the Substantial Provisions as reproduced in WIPO/GRTKF/IC/11/5(c), Annex, page 24, as a sound starting point for further deliberations by the Committee. He supported the arguments provided in the commentary to the Article (Annex, page 25), with the exception of the final sentence. The Saami Council appreciated the efforts made by the delegations that convened in Bandung to speed up progress in the Committee. He had great appreciation for many of the positions taken in the Bandung Declaration. However, he noted with great concern paragraphs 5 and 6 in the Declaration, suggesting that TCEs and TK vest in the state, a position he could naturally not support. Consequently, he noted with great satisfaction that

most of the participants in Bandung that had taken the floor during the Committee, and/or submitted written comments as reproduced in WIPO/GRTKF/IC/11/5(a), had opened up for a different opinion, and had generally acknowledged the source of TK as the primary beneficiaries of protection. Based on such an understanding, the Saami Council was convinced that rapid progress in this body could be made. As a representative of indigenous people X, and he believed that he spoke also on behalf of indigenous peoples Y and Z, in response to the comments made by country A, as also supported by country B, to reiterate his belief that in most instances, it was self-evident what constituted a traditional community and culture and that that in turn defined what constituted TK; i.e. knowledge developed in a cultural context. That said, he did appreciate that there were borderline issues and also the question of joint TK that needed to be addressed. The comments made by the Delegations were very helpful in this regard, and for that he expressed his appreciation. However, it would benefit the work of the Committee greatly if it first addressed - and tried to reach an agreement on - the mainstream cases, which he did believe represented the absolute majority of the world's collective TK, before turning to the exceptions to the general rule.

341. The Delegation of Peru stated that the documents submitted for consideration to the Committee in all its sessions showed that there were sufficient elements with which to define who the beneficiaries of this protection should be and who should be considered right holders. What was mentioned in Article 5 of WIPO/GRTKF/IC/11/5(c) was a very good basis for the definition of beneficiaries in rights holders. In Peru there had been a lengthy discussion related to these issues and a conclusion which was very similar to what was reflected in Article 5 had been reached. There had also been a lengthy discussion as to which terms to use. The term of indigenous peoples in Law 27/11 was chosen because it was considered the appropriate term which reflected the real situation in Peru. However, in the case of the Committee, these terms must have been found in such a way that they be appropriate and adjusted to the different realities of the various countries as part of the WIPO. The Delegation agreed with what had been proposed in Article 5 mentioned earlier. The Committee could continue studying and discussing these issues but it had to be aware of the need to reach a consensus and an international solution as soon as possible.

342. The representative of Amauta Yuyay emphasized that the beneficiaries should be the indigenous communities in rights holders. Indigenous communities were those who transmitted from generation to another and which maintained this TK from one generation to the next. The indigenous communities would not be able to systematize these TK and present it in the various international and national *fora*. This would be a very extensive task nor should it be the Governments who would also then lead the collection of these benefits. We should take account of the indigenous communities to jointly carry out this exercise. It would be interesting in addition to crystallizing a legally binding international instrument to also bear in mind the Declaration of Indigenous Peoples' Rights and the Permanent Forum of the UN as well as to invoke certain questions which referred to Convention 169.

343. The representative of International Indian Treaty Council (IITC) considered that the UN documents could facilitate the understanding of who constituted indigenous peoples as the CBD, for example. The Declaration of the Rights of Indigenous Peoples might provide elements necessary for this discussion. Some of these documents might help delegations from Japan and the Russian Federation understanding who the indigenous peoples were and who the beneficiaries should be. He endorsed Article 5 of WIPO/GRTKF/IC/11/5(c) and its Annex. This was a good basis for progress.

344. The representative of Tupaj Amaru first commented on the statement made by the Delegation of Japan. It had pointed out that there was still no identification of what the indigenous community was. For some seven years the Committee had been talking about what indigenous communities were and local communities who were rights holders and custodians of TK. There was no doubt at all as to this issue. The second comment was that the Delegation of Japan, supported by the Russian Federation, wanted to bring this issue to a kind of mathematical analysis pointing out that in country B and in country X what would constitute the indigenous communities and what would be the rights of these beneficiaries. The Delegation of Japan supported by Russia were trying to postpone the basic discussion. The Committee was talking about legal concepts to promote protection, in other words an instrument which will have a legally binding nature for the protection of TK of indigenous communities. This was the central objective of the Committee. The Delegation of the United States of America said that the Committee should continue to study mechanisms of protection in order to identify the various groups. First of all the term group was not used in the language that the Committee had been using for five years. It talked about local communities and indigenous peoples which were holders of much TK which the medieval system of colonialism dislocated for more than five hundred years. He reasserted the fact that the true holders of this TK were the indigenous peoples, the survivors of colonization and alienation of their cultures, the local communities wherever they were. For example, the United States of America asked what would be a migrant community. Well, it depended on the state where the indigenous community lived. The Government of the United States of America could grant or not rights for the protection of their language, their customs and their way of life within the territory of the United States of America. The second question was how would an international instrument define protection of TK of these peoples whether they were migrant communities or not. Secondly, he agreed with the comments made by the representative of Hokotehi Moriori Trust that the only beneficiaries were indigenous communities and local communities. Whether they be States, governments, universities, public institutions, private institutions or multinational companies, they would have to obtain authorization to use TK for non profit purposes.

345. The representative of the FAO, speaking on behalf of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), which entered into force in April of last year after seven years of negotiations, underscored the importance of this Committee's work during the treaty negotiations, both on GR and on TK, and the complementarity that continued to exist between the two processes. Cooperation between WIPO and the FAO on the ITPGR had been good throughout the negotiations and the Treaty Secretariat looked forward to continuing this cooperation. He indicated that the ITPGR was the only legally binding instrument in force today which internationally recognized farmer's rights including subject to national legislation, the protection of relevant TK. The governing body of the treaty held its first session in June of last year in Madrid and decided, among other things, that work on that issue would be considered for future sessions of the governing body. As this Committee had noted in the past, farmers' rights under Article 9.2(a) of the Treaty included "the protection of TK relevant to plant GR for food and agriculture". This related to issue no. 2 of the list which was currently under consideration by the Committee entitled "Who should benefit from protection". He recalled that the Treaty recognized that it was local and indigenous communities and farmers of all regions of the world who had made enormous contributions to the conservation and development of plant GR. It further recognized that plant GR for food and agriculture today constituted the basis for food and agriculture production throughout the world and for food security. The list of issues being at the very early stage of its development, under issue no. 2 in WIPO/GRTKF/IC/11/5(a) and WIPO/GRTKF/IC/11/5(a) Add., did not at this point make explicit mention of farmers as

beneficiaries of protection. It might be worthwhile for the Committee to consider a reference to this as it was reflected in paragraphs 11, 15 and guiding principle G of WIPO/GRTKF/IC/11/5(c).

*Issue three: what objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?*

346. The Delegation of Canada stated that before determining whether additional protection in IP or *sui generis* should be granted to TK or if it should be an economic or moral right, Member States must agree on the objectives. Consensus on objectives might also help better whether recourse to existing tools exist. It was important to preserve maximum flexibility so as to respect the various legal traditions of Member States. Communities could pursue different objectives when they sought to protect their TK such as the preservation, promotion of diversity and the promotion of creativity and innovation. In this context, there had been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. The Delegation had stated that it shared in the concern regarding the prevention of “misappropriation” and misuse of TK. It also agreed that the term “misappropriation” was a complex term. At the same time, the manner in which this Committee defined its common objectives in the context of TK should take into account how such objectives may impact on users and the broader public interest, in particular, where IP may impact other important policy initiatives.

347. The Delegation of Portugal, on behalf of the European Communities and their Member States, considered that TK was not initially created in order to be exploited and so reach as broad the public as possible which could be said to be the *raison d'être* of copyright and other IP rights. TK was originally intended solely for the community from which it originated and whose traditions and beliefs it embodied. Some TK were even of a sacred nature transmitted from generation to generation through certain members of the community. Thus, any damage caused by exploitation of such knowledge against the will of the community was not necessary of an economic but could be rather of a moral nature. Therefore, at least at first sight, moral rights appear capable of assuring a satisfactory protection of these non economic interests. However, and contrary to the TCEs, the link between TK and biodiversity established under the CBD and the Bonn Guidelines indicated that economic rights objectives were also relevant. The EU believed that the objective of the protection of TK should be a means of securing the diversity of TK and maintaining it for future generations. It should be focused on the protection against misappropriation of TK. Existing international and national laws already contained rules against misappropriation or related intangible rights such as GI for example. In order to establish an appropriate balance between interests of TK holders and third parties, the function of the concept of a public domain in respect of TK needed to be well analyzed.

348. The Delegation of Ethiopia stated that its comment was based on WIPO/GRTKF/IC/11/5(c) and believed that these provisions dealt with objectives, core principles and substantive provisions. It did not think that the discussion on the objectives should be separated from the substantive elements of these provisions. As already mentioned for TCEs, whereas the international recognition and protection of the right of traditional communities to their TK as a direct economic and moral bearing the objectives of the outcome it would like to see merging from the Committee’s mandate should not be limited to these considerations. It had made reference to general comments of the International Committee on Social, Cultural and Economic Rights where it said that the rights under



international laws, especially the right to culture should be different from the rights found under international IP rights. It once again reiterated its view that the objective under such protection mechanism should be to recognize existing rights under international law and international human rights law. The Committee had stated that this right was also enjoyed by Communities (Para. 8). No outcome could invent new rights and entitlements to groups and individuals. Rather it could only recognize them as they already existed under international law and human rights laws. It noted with satisfaction the fact that recognition of rights was included as Objectives under section II of the draft text but suggested that complementarity with human rights system be an important element of these core principles.

349. The Delegation of Japan reiterated that it was not clear yet why IPR protection should be extended to TK as IP. In other words it was not convinced of the justification that TK was eligible for IP rights and had great concerns about that. IP system was supposed to strike a balance between protection on the one hand and public interest on the other hand. For example, prototype of balance of IP system was first to give protection, valid for limited period of time and, secondly, to encourage creative activities among society for further development. In case of TK however, it might be a problem that only certain generation can enjoy benefits direct from TK that had long been passed term if that term was limited. Moreover, there would be no financial incentive for the generations to maintain and pass down TK after the expiration of protection. On the other hand, it should be examined from the view point of public interest whether it was appropriate to protect TK that would stay valid forever. Anyway regarding TK a demand for protection had been overwhelmed so far and the study on social benefit in return was very insufficient. If TK protection was aimed to rectify inequities in economic developments or benefit sharing or to secure maintenance of TK in practice cautious discussion should be needed whether IP origin could respond to such objectives and other alternatives to address might be worth to explore. Again to address this question, more studies were needed on what objective was the demand for TK protection. And what social benefit was in return. In case of a moral right it was not clear either what kind of scope or act could be seen as infringement of moral right. Serious case could be addressed by civil code or other.

350. The Delegation of India reiterated that TK had for long been misappropriated and misused in various ways. Therefore, the first and foremost objective of the IP protection for TK was to prevent such misappropriation, whether it was for commercial or non-commercial activities. Conservation and preservation of TK should also be a major objective. Other objectives could be: (i) empowerment of the holders of TK; (ii) ensuring PIC by the holders before others are permitted use of the TK; (iii) promoting fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of TK; (iv) facilitating the continuing customary use, development, exchange and transmission of TK by and between TK holders; and (v) encouraging, rewarding and protecting tradition-based creativity and innovation. In fact, the whole TK could not be evaluated in monetary terms and most of the time TK holders wanted their moral rights to be acknowledged and not be infringed. Hence, it was both the economic and moral rights that were to be protected as a means of rewarding the holders of TK.

351. The Delegation of Switzerland stated that the Committee had considerably advanced its discussions on the issue of policy objectives and general guiding principles of the protection of TK at its past sessions. The result of this work was contained in WIPO/GRTKF/IC/11/5(c). These results should be drawn upon when discussing issue number 3 of the list of issues. The purpose of an IP right was to some extent to act as a right of defense. The right owner may prohibit third parties from using the protected property for

industrial purposes. Use could be understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes. The owner could also forbid third parties from participating in, promoting or facilitating illicit use. That did not mean that the owner may sell his protected property without condition, as there may be additional sale rules relating to the marketing of the product concerned. It may be useful to recall that existing IP rights were territorial rights, in the sense that they were limited geographically by the State which had granted the right of protection.

352. The Delegation of Algeria, on behalf of the African Group, said that Article 6 in WIPO/GRTKF/IC/11/5(c) was a good basis for discussion on the objectives of IP protection for TK and should also include the following: to prevent the misappropriation; to recognize and promote upon knowledge holders the right to exploit their TK; to prohibited unauthorized exploitation and dissemination of protected TK without the PIC of the knowledge holders; to regulate access to a biological resources and associated TK; to promote equitable benefit sharing arising from the use of GR and its associated TK; to ensure that the IP system was compatible with provisions of international instrument governing access to and use of TK especially in regards to PIC, access to benefit sharing and disclosure of origin and then to promote creativity and innovation based on TK and practice towards a sustainable development. Having said and having presented the African position the Delegation added that during the eleventh session, many delegations had presented enough arguments in favor of having protection of TK. TK beside the fact that it had been protected inside locality and which needed to be enhanced and reinforced at the international level, it was also usually a basis for innovation. TK had been always used as a basis of having some new elements that made this protection more evident than any time. If the Committee was going to stick to the very narrow definition of when there would be protection of IP there would not have been any protection for broadcasting, for the other holders of rights than the right of IP. Protection of TK had always been obvious and it wished that the language and arguments that had been presented before by many Delegations were still concrete arguments to the need and necessity of protecting the TK.

353. The Delegation of the United States of America said that the question as articulated specifically addressed matters relating to IP protection. In that context it must be said that the broadest over all objective of providing IP rights was to promote creativity and innovation. However, existing systems of IP protection may also be used or adapted to address specific concerns related to TK including both economic and non economic concerns to meet the actual needs of communities. Over the last several sessions the Committee had made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TK. The Delegation believed that the framing of these policy objectives and general guiding principles was not just a useful technique for facilitating discussion within the Committee. Rather the Committee's work on the policy framework for the protection, promotion and preservation of TK was itself an extremely useful tool for policy makers at the national, regional and international level. It noted that a number of WIPO Member States informed by the work of the Committee were taking steps to address specific issues and concerns related to the preservation, promotion and protection of TK. As noted in previous sessions, it believed that the Committee could make a significant contribution by reaching agreements on policy objectives and general guiding principles at the international level as a critical initial step to furthering the work.

354. The Delegation of Sudan stated that first of all it supported what was being said. It was in fact necessary to protect TK. A binding international instrument was needed as it was the best way of protecting and preserving the dignity of the holders of TK. TK was essential, it

led to the building of bridges between the holders of TK and new knowledge. Indigenous peoples were the very source of this TK and consequently these were people who were often marginalized or living in poverty and TK was very often used not to their benefit.

355. The Delegation of Brazil believed that considering WIPO's mandate this Committee must address its works towards the setting out of measures aimed at preventing and curbing the misappropriation of TK by the granting of IP rights. Particular attention should be given to the need to render the IP system compatible with the relevant provisions of other international instruments that govern access to TK such as the CBD. The Committee had possible positive measures that were necessary to ensure protection of TK under existing categories of IP rights respecting its specific features and without prejudice to the possibilities that the Members of this Committee may decide to accord protection via *sui generis* systems. So in respect of what objectives should be achieved, the Delegation considered that the draft objectives proposed in WIPO/GRTKF/IC/11/5(c), specially (xiv) the grant of improper IP rights to unauthorized parties and Articles 6 and 7 of the Annex to that document represented an adequate basis to discuss this issue.

356. The Delegation of Indonesia stated it was clear that the objectives which were sought to be achieved according to the IP Protection, without prejudice to the possibility of granting protection to TK via *sui generis* systems, was the realization of both moral and economic rights. When talking about economic rights in this particular subject, it was not limited to cash money, but the revenue could be in different form that would generate the prosperity of the communities. This should be facilitated by the existing IP regime and also in the spirit of respecting national law. Regarding the role of State, it believed that the State may also play a role as a facilitator in regulating the economic rights of the communities. In line with this, the Delegation was of the view that the objectives set out in WIPO/GRTKF/IC/11/5(c) were a good basis for discussion.

357. The Delegation of Italy endorsed what had been said by the representative of the EU. The lack of a definition of TK made it very difficult to imagine a uniform treaty at the international level. Except for determining the definition of general principles the most appropriate way for TK should remain at the national level. Two important aspects should be taken into account. First, the possibility which was offered by IP to already begin to protect TK. GI could protect a lot of techniques of TK such as the creation of artisans of products and crop growing. The importance of the public domain should also be taken into account. The public domain was very important for the transmission of TK throughout all the regions and countries of the world. At this time of globalization, the public domain played a very important role.

358. The Delegation of Norway was of the view that to prevent misappropriation and to preclude the granting of unauthorized IP rights were the main objectives of providing protection of TK. This was quite similar to what it considered the main objectives in regard of TCEs. Building on this, protection should seek to ensure PIC and promote equitable benefit sharing. Furthermore, protection should seek to promote conservation and sustainable use, and protect cultural heritage and diversity. By providing protection, recognition and respect of the intrinsic value of TK was, as it should be, secured.

359. The Delegation of Thailand was of the opinion that the objective of the protection of TK should contribute to the maintenance, conservation, preservation and safeguarding of TK as well as the acknowledgement and recognition of the TK holders. Legitimate rights, both economic and moral should be accorded to the beneficiaries of protection of TK. In case of

economic rights the access and the use of TK beyond traditional context required PIC from local or traditional community. In addition, the fair and equitable sharing of benefit for such access and use should be guaranteed for further conservation, preservation and transmission of TK by local or traditional community. Regarding moral rights the holders of TK should be duly recognized as originators or custodians for TK and they should have the right to prohibit any distortion or derogatory modification that would cause any damages or undermine the moral and human rights as regards the spiritual values of their TK.

360. The Delegation of Mexico associated itself with the opinions of the delegations who considered that the substantive provisions contained in WIPO/GRTKF/IC/11/5(c) were a good basis to continue the discussions within this Committee. It pointed out once again that PIC was a *sine qua non* for the access of TK providers. Leaving in a globalized world as in the world today, the definition of TK and the provisions for its protection should cross boundaries to be effective everywhere.

361. The Delegation of China said that IP should not be limited to the existing systems. As TK was a constantly changing knowledge, the IP system was also constantly evolving. Therefore granting rights according to IP protection should also take into account future IP systems. The objective of IP protection included the protection of economic rights but also moral rights. The policy objectives in WIPO/GRTKF/IC/11/5(c) could be a good basis for discussion.

362. The Delegation of Nigeria stated the primary objective, economic and moral, of the present effort was to better secure TK from misappropriation and misuse and to recognize the rights of local communities to control access to their TK. It was instructive to know that the Committee had since about the sixth session identified and discussed some of the objectives that may be addressed and indeed the discussions on this had been very detailed. These draft objectives had been enriched overtime and WIPO/GRTKF/IC/11/5(c) was a good basis for further work in this regard. It hoped that these objectives would not be discussed only for the sake of being objectives but would be able to reach some logical conclusion by going into the substantive provisions with a view to coming up with an appropriate international legal instrument on the protection of TK. The Delegation would be submitting a more detailed paper on the various objectives outlined.

363. The representative of the Saami Council believed the proposal made by the Delegation of Ethiopia that the language was added to the policy objective underscoring that any potential international instrument shall be complementary to promote and sort to implement rights established under the human rights system.

364. The representative of the Ogiek Peoples Development Program (OPDP) agreed with the policy objectives in WIPO/GRTKF/IC/11/5(b) and that the concrete objectives should safeguard the interest and values of the indigenous people. This should be borrowed from ILO convention 169 that encouraged the right to self-determination i.e. the right to use, control and manage the TK.

*Issue four: what forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?*

365. The Delegation of Portugal, on behalf of the European Communities and their Member States, believed that without prejudice to protection already available under current IP law,

TK should be protected against misappropriation which in general consisted of any acquisition, appropriation or utilization of TK by unfair or illicit means. It referred to Article 10bis of the Paris Convention where a certain number of acts which were regarded as acts of unfair competition were forbidden.

366. The Delegation of India was of the view that any act of misappropriation, including acquisition or use by unfair, dishonest, fraudulent or burglar means or any misappropriation or attempt made to create confusion as to the embodiment of TK, or its ownership, or its unauthorized transfer or use in violation of any relevant national or international law, which was in force for the time being, should be unacceptable and, therefore, rendered illegal. This was irrespective of any value addition. Acts of obtaining any kind of IPR outside the country from which the TK related to GR had been accessed, in contravention of the agreement with the appropriate authority of the state concerned, were also to be illegal and unacceptable acts. Commercialization or industrial utilization of TK without just and appropriate compensation was also to be illegal and unacceptable acts. Equitable compensation should be payable to the TK holders and creators if identifiable; otherwise it be paid to the State.

367. The Delegation of Japan reiterated that it was not convinced of the justification that TK was eligible for IP right and had serious concerns about that. As stated earlier IP protection must strike a balance between protection and public interest. In this context scope of unacceptable, illegal acts should be examined in reflection of public interest. In order to respond to this question properly, fact-finding was needed on what kinds of damage were incurred by what kinds of conduct. As regards so called erroneously granted patents, where patent right was granted erroneously for TK already publicly known, improvement of databases similar to GR could be extended to TK as the United States of America had pointed out in their submitted comments.

368. The Delegation of Algeria, on behalf of the African Group, said that behavior considered unacceptable and illegal in relation to all protectable TK should comprise of the following: first the misappropriation, the biopiracy, acts that constituted denigration and disrespect, distortion, acts existing in national, regional and international legislation, suppression of the right of knowledge holders in any form with holding of results of research based on GR derived from TK, violation of rules regarding the confidentiality and sacredness which governed practices and observance of TK and, lastly, the disclosure of protected information without the authorization of knowledge holders.

369. The Delegation of Ethiopia fully supported the African Group position. It reiterated its position that what was sought to be prohibited under the Revised Provisions should not be behaviors as such but concrete acts of misappropriation. In this context it welcomed the formulation of acts of misappropriation under article 1 of the Substantive Provisions. The following issues should be taken into account. The second paragraph of article 1 extrapolated actions which constituted acts of misappropriation. Then the Provisions went on under paragraph 3 to list acts which were prohibited under the law. It believed this list should not be considered exclusive. As referred under the second paragraph of page 14 (the Commentary), the list was not exhaustive. Article 1 served as an element of a future binding international instrument where acts of misappropriation could be legally prohibited. Based on such international prohibition countries could detail national laws providing robust and specific prohibitions. The list of acts enumerated under paragraph 3 of Article 1 should be reformulated in such a manner that they formed part of acts of misappropriation. As it currently appeared it clearly stated that legal means should be provided to prevent acts incorporated under the same paragraph. The text was not clear whether these acts constituted

acts of misappropriation or not. Clarity was needed on that regard. It was also stated that TK holders should be effectively protected against other acts of unfair competition including acts mentioned under Article 10 of the Paris Convention. The Delegation believed that the endeavor under the work of this Committee was towards formulating a stand-alone international instrument.

370. The Delegation of Norway referred to WIPO/GRTKF/IC/11/5(a) Add. 2 which included the answers from Norway. Protection should be given against misappropriation and unfair use. In order to arrive to a common understanding of acts that could be subsumed under these terms, national experiences were valuable. It supported any work beneficial in establishing such understanding. However at the core of this understanding it was material to ensure that the holders were empowered to ensure PIC, equitable benefit sharing, avoidance of confusion with regard to origin, in order to ensure that acts of an offensive nature were repressed. A body of national experiences would assist the international community in understanding what constituted acts of misappropriation and unfair use. The Delegation reminded the Committee about the draft recommendation in WIPO/GRTKF/IC/19/12, paragraph 38, which was a proposal going in this direction: “Recommendation regarding protection against misappropriation and unfair use of TK. (1) The members of the Paris Union for the Protection of IP and WIPO should assure nationals of member countries adequate and effective protection against misappropriation and unfair use of TK. (2) Any use of TK against honest practices in cultural, industrial or commercial matters should be considered as actions in breach of paragraph one. (3) TK holders should in particular be provided with effective means to ensure that: (i) the principle of PIC applies to access to TK; (ii) benefits arising from certain uses of TK are fair and equitably shared; (iii) all acts of such a nature as to create confusion by any means whatever with the origin of the TK are repressed, and; (iv) all acts of such a nature that would be offensive for the holder of the TK are repressed.” It did not exclude any outcome over the process of this Committee.

371. The Delegation of Australia stated that the Committee had concentrated on the concept of repression of misappropriated TK. This concept had developed out of the sharing of national experiences and it supported further sharing of experiences. As the Delegation noted in its comments on WIPO/GRTKF/IC/9/5 the term misappropriation could cover a broad scope of issues and it needed further discussion and analysis by Member States. How would such a concept interact with that of unfair competition under Article 10<sup>bis</sup> of the Paris Convention? It was important to have a set of clear and agreed objectives before delineating forms of behavior that might be considered to be unacceptable or illegal. Such delineation should take into account how the various forms of existing IP protection related to perceptions of misappropriation and which forms of behavior fell within forms of non-IP protection such as cultural, heritage and racial vilification laws.

372. The Delegation of the United States of America acknowledged that the Committee had made considerable progress in identifying specific forms of behavior that were regarded as unacceptable or illegal by various stakeholders including indigenous peoples and representatives of traditional and other cultural communities. As some delegations had suggested under this issue, as well as with respect to other issues, the draft substantive provisions of WIPO/GRTKF/IC/11/5(c) may be a good basis for discussion. As noted previously while these provisions may be helpful background information a detailed consideration of these provisions did not appear to be capable of advancing the work and may indeed have the unattended consequence of impeding progress. Instead, a more focused approach was warranted. Discussion in the Committee had identified a number of specific behaviors that were regarded as unacceptable or illegal and that sometimes were called by the

broad term misappropriation. However, there continued to be significant divergence between members about what types of activity or behavior was included within this term. Paragraph 18 of WIPO/GRTKF/IC/7/5 set forth a number of specific aspects of misappropriation that had been addressed previously by the Committee in the context of TK. And this included acquiring invalid IP rights over TK, acquiring TK in violation of PIC and acquiring or using TK contrary to honest practices or for inequitable benefits such as through failing to share benefits equitably. Building on the work already compiled by the IB in this matter, the Committee should deepen its understanding of these concerns by examining and discussing in detail existing mechanisms including legal, both IPR related and non IPR related, and non legally measures that were available to address these specific issues or concerns. The Committee would then be able to identify gaps if any, in existing mechanisms at the domestic or international levels to address the specific issues or concerns. For example, discussions in this context had included proposals relating to adoption of national systems that ensured appropriate access mechanisms in the context of TK and GR. That would also provide for equitable benefit sharing arising from the use of TK or GR. Similarly, improved patent databases such as that proposed in great detail by the Delegation of Japan in WIPO/GRTKF/IC/9/13 should be further considered with respect to the issue of granting of invalid IPR over TK. While the proposal by Japan had been made in the context of GR, and it hoped further work would be pursued on that basis in this meeting, it appeared that further investigation may be warranted as to whether that proposal would be appropriate or could be modified to be appropriate in the broader context of TK.

373. The Delegation of Thailand was of the view that TK holders should have the right to prohibit the exploitation of TK without PIC and fair an equitable sharing of benefit. Misuse and misappropriation which included distortion, mutilation or modification which undermined economic, moral, human and spiritual values of TK should be regarded as illegal. Misuse and misappropriation should also include acquisition and appropriation of TK by unfair or dishonest means and commercial and industrial exploitation outside a normal use by local or traditional community.

374. The Delegation of Brazil said that any act that impaired the recognition or exercise of the rights held by communities over that knowledge should be deemed illegal. An international instrument for the protection of TK negotiated within WIPO should seek to provide measures aimed at curbing acts of misappropriation specifically those perpetrated by the use of IP mechanisms. It insisted that, in the same way as TCEs, the requirement for PIC and access to fair and equitable benefit sharing should apply to all TK whether registered or not. In that sense, registration should not be a condition for the enforcement of rights by the communities in question. Brazil, as other delegations already had mentioned, considered that Article 1 of the Annex to WIPO/GRTKF/IC/11/5(c) represented an adequate and mature basis for further discussion on this matter.

375. The Delegation of Canada stated that, with respect to what form of behavior in relation to the protectable TCE that should be considered unacceptable and or illegal, communities and individuals around the world had historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another. In some instances these actions may be considered to be positive acts of “appropriation” for which individuals and communities did not express concerns. However, there may be other cases where individuals and communities may view such acts in relation to TK as “misappropriation”. As stated earlier, “misappropriation” was a complex term, and as a number of Member States had pointed out, “misappropriation” may mean different things to different people. If “misappropriation” was to be the primary focus of the future work of this Committee, more work should be directed at

achieving a consensus as to what specific forms of behavior in relation to TK constituted “misappropriation”.

376. The Delegation of China said that, like many other delegations, Article 1, part 3 of WIPO/GRTKF/IC/11/5 could serve as the basis of the discussion. TK had been acquired by third parties when they made use of it. Apart from the PIC and misappropriation the Committee should not disguise, distort or temper the origin of TK. It should be explained, according to the fact, in an appropriate way in order to demonstrate respect to the origin of the TK.

377. The Delegation of Indonesia was of the view that regarding the forms of behavior considered unacceptable or illegal the Provisions contained any acquisition, appropriation or utilization of TK by unfair or illicit means constituted an act of misappropriation was essential. Article 1 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion. In addition to that, measures mentioned in the document should also include any change of forms of TK which did not give any benefit to TK holders.

378. The Delegation of Mexico associated itself with the opinion expressed by numerous delegations that Article 1 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion. However, the list under paragraph 3 should not be regarded as exhaustive.

379. The representative of Amauta Yuyay stated that history could not be divided into eleven years after the beginning of the discussions of the Committee. Five hundred years before these discussions, there had been a systematic unacceptable and illicit attitude which had been against the indigenous peoples. He asked whether with issue No. 4, one was trying to repair injury caused by misappropriation of TK in past years or whether there was an attempt to put an end to these unacceptable behavior?

380. The Delegation of Switzerland acknowledged that several options were possible, depending on the aims and rights attached to TK. Use without authorization could be considered unacceptable or illegal. Use could be understood as manufacture, storage, supply, circulation, import, export, transit and possession for these purposes.

381. The representative of the Ogiek Peoples Development Program (OPDP) supported the comments from the Delegations of India and Thailand. Any behavior that exposed the TK to danger and disappearance due to misuse and misappropriation should be null and void. For instance in Ogiek cases, tourists visiting the forest had been trying to ask them to give them the names of trees they had been using to cure themselves. The Ogiek eventually found out that it was for patenting. This included expiration of traditional products and patenting of the knowledge which should all be offensive. Any act of use of the TK without consultation from the community that used it or the inventors should be considered as illegal. It supported any legal mechanism that would certify the TK as the rightful holders.

382. The representative of Hokotehi Moriori Trust agreed and supported Article 1 in WIPO/GRTKF/IC/11/5(c) as establishing a basis for protecting TK against misappropriation. He supported the Delegation of Brazil and its comment that the list in Paragraph 3 should not be an exhaustive one. He made specific recommendations in relation to Paragraph 3 (v) that the word willful at the commencement of (v) be deleted because any one seeking to invite a legal protection under this level of misappropriation would have to prove that the use was acted willfully or with the intent to cause offense. So it should be sufficient that the effect or consequence of the use was offensive rather than what was the intended consequence. This



was because many users of TK were often ignorant of the offence they had caused to the community concerned. That had certainly been his experience dealing with a number of bodies who had misappropriated or misused Moriori and Maori TK. They had claimed they did not know they were causing offense. It was not sufficient for it to be a willful intent but actually the consequence of the misappropriation caused offense. He recommended that for the same reasons the words particular and clearly also be deleted.

383. The Delegation of Nigeria was of the view that the objectives already considered should guide the Committee in formulating the prohibited acts particularly misappropriation and unfair use and any other acts that may be offensive to the holding communities. The formulation in Article 1 of WIPO/GRTKF/IC/11/5(c) was a good basis for further discussion on the question. It put forward these as some of the minimum that should be considered as acts reprehensible. One was the acquisition and appropriation of TK by unfair and illicit means, derivation of commercial benefits from TK that had been appropriated by unfair or unlawful means, breach of the principles of PIC for access to TK, breach of any defensive protection measures of TK, commercial or industrial use of TK without just and appropriate compensation to the holders of TK, willful and morally offensive uses of TK and finally forced claims of rights of TK and misleading representations that created confusion as to the source of TK. It joined other Delegations in hoping that this list should not be exhaustive but it should be the minimum threshold.

384. The Delegation of the Islamic Republic of Iran believed that regarding Article 1, Section 2 of WIPO/GRTKF/IC/11/5(c), that any acquisition, appropriation or utilization of TK by illicit means constituted an act of misappropriation. This may also include deriving commercial benefits from the acquisition, appropriation or utilization of TK by illicit means and other commercial activities contrary to honest practices among unfair competition.

385. The Delegation of Peru considered Article 1 of WIPO/GRTKF/IC/11/5(c) quite comprehensive. The structure of the Article was appropriate and it considered, contrary to other Delegations, that Paragraph 3 was not exhaustive, however, if it was, it would have no difficulty in amending the drafting of this Article in such a way that it made it clear that it was not an exhaustive listing.

*Issue five: should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?*

386. The Delegation of Portugal, on behalf of the European Communities and their Member States, believed that exceptions and limitations to TK rights could only be determined once it had become clear what kind of protection could be afforded to TK. The application and implementation of protection of TK should not adversely affect the continuous availability of TK for the customary practice, exchange, use and transmission of TK by TK holders. As an example it referred to the use of traditional medicine for household or experimental purposes or the use for public health purposes.

387. The Delegation of India stated that a legally binding international instrument on protection of TK was a matter of urgency in view of the continuing misappropriation of TK in different parts of the globe. Such an instrument naturally should have exceptions and limitations. However, the exceptions or limitations to rights attaching to protectable TK could not be in any way different from the exceptions and limitations applicable to modern knowledge systems under IPRs. In fact, rights of TK holders should have lesser limitations

and exceptions than in the case of other IPRs and, in any case, should not exceed limitations and exceptions available to other IPRs. Limitations should be attached to ensure that customary exchange and non commercial use, including household and traditional medicinal uses for public health system and transmission of TK by the holder community was not adversely affected. Limitations should also be attached to prevent the offensive use of any sacred TK.

388. The Delegation of Japan reiterated that it was not convinced that TK was eligible for IPR therefore it could not go in detail into the issue of exceptions and limitations. This kind of issue should take public interest into account. In a specific case where certain existing IP system protection was applicable to a specific TK, exceptions and limitations as provided in such existing IP regime would also be applicable to such a specific case.

389. The Delegation of Algeria held the view that Article 8 of WIPO/GRTKF/IC/11/5(c) was a good basis in providing that the protection of TK shall not be prejudicial to the availability of TK for the practice, exchange, use and transmission of such knowledge by its holders within the traditional context. The African Group was of the view that Article 8 should be further expanded and that the exceptions were in fact provisions that had to create balance between the rights of holders and the interest of the public domain.

390. The Delegation of the United States of America believed it was premature for the Committee to undertake a focused discussion of exceptions and limitations attaching to rights to protectable TK. First as the issue was currently framed this question appeared to take a particular policy direction that was not useful in advancing the work of the Committee at this time and instead making tribute to polarizing the discussion thereby impeding rather than advancing the work of the Committee. As a general matter the Committee should continue its work in identifying the extent of the existing mechanisms to address concerns that had been raised in the Committee and identifying any perceived gaps in these mechanisms. In that light, with specific regard to issues of limitations and exceptions if the Committee provided recommendations at some point that may endorse the use of particular existing mechanisms for example to protect TK then the exceptions that applied under that system would presumably apply as well to TK. For example, if certain expressions of TK would be eligible for copyright protection, the exceptions or limitations provided for in copyright would presumably apply.

391. The Delegation of Australia stated that given that important questions about objectives and how those objectives might be met were yet to be agreed, it was too early in the discussions to determine what could be considered an exception or limitation. However this issue was very important with respect to delineating carefully the public domain in respect of TK.

392. The Delegation of Ethiopia supported the African Group statement on this item. It considered Article 8 to be a sufficient basis for future negotiation within the context of the international dimension of the mandate of this Committee. It noted the considerable view supported within the Committee that time was right to discuss on all issues identified so far including the one on limitations and exceptions. Any collection of TK for the purpose of inclusion in archive or inventory, even for non commercial purpose within the context of cultural heritage safeguarding purposes, shall be included as an act of misappropriation if it was done without the consent of the TK holders themselves. The use of TK for public purposes shall be allowed at all time but such public purposes or public use shall only be limited to the territorial jurisdiction in which TK holders found themselves. Illegibility for

protection of TK against acts of misappropriation did not require any formality as clearly stated under article 11 of the Draft Provisions.

393. The Delegation of Canada said it was premature to address the issue of exceptions or limitations to rights attaching to protectable TK at this juncture, given that their nature and scope would depend on a number of factors, such as the scope of protectable subject matter and the type of protection provided to TK. In addition, inappropriate, administratively inefficient or ineffective exceptions and limitations may end up stifling creativity and innovation. Consequently, the impact on creators, inventors, users and the broader public interest should be taken into account in the discussions.

394. The Delegation of Brazil did not believe it was premature to discuss an international instrument to protect those who had been expropriated of their rights for so long. A provision on exceptions and limitations could be considered as to allow uses of public interest. Measures should be adopted to ensure the availability of TK to their holders. The use of TK by third parties should not entail negative environmental, cultural or economic impacts to the community. In that view Article 8, subparagraph 1 in WIPO/GRTKF/IC/11/5(c) represented another good basis for discussion towards an international instrument within WIPO.

395. The Delegation of Thailand considered it was appropriate to provide exceptions or limitation rights attached to protectable TK in certain specific cases particularly to the use of TK by its holders within traditional context. The protection of TK should be allowed for household purposes and should not be prejudicial to the continued availability, customary practices, exchange, use or transmission of TK by TK holders.

396. The Delegation of Nigeria stated that the impression it got when the ten issues had been formulated was that there would be a discussion with a view to advancing the work of the Committee. In view of this, it engaged positively hoping that the work of the Committee would reach some logical conclusion. It therefore endorsed the statement made on behalf of the African Group by the Delegation of Algeria. It also joined other Delegations in the view that TK was indeed a proper subject of the protection and was ripe for discussion at this point in time. There should be a balance between the rights of local communities and knowledge holders against all the rights of the public. In this regard, it considered Article 8 of WIPO/GRTKF/IC/11/5(c) as a good basis for further discussion on this question. It highlighted some of the exceptions and limitations it thought should be considered. One was the availability of TK for the customary practice, exchange and use, including transmission of TK by their holders. The use of TK for domestic purposes and of course subject to fair and adequate compensation use in the interest of public health.

397. The Delegation of Indonesia also shared the view mentioned by the Delegation of Brazil that the discussion regarding Article 8, exceptions and limitations was not premature. Article 8 in WIPO/GRTKF/IC/11/5(c) was a good basis for future discussion. In this regard, it suggested that exceptions or limitations as mentioned in Article 8 needed to include the following paragraph which read as followed “Utilization of TK in the context of education, science and public health, according to national law, while ensuring that this utilization is not for commercial purposes and does not affect the advantage of TK holder”. This utilization should also mention the source of origin of TK and it should remain with respect to the TK holder.

398. The Delegation of China acknowledged that protection of TK should be given some exceptions and limitations that were to ensure that in a traditional environment the TK could

be used fairly and reasonably. TK should also be developed in a reasonable manner. Article 8 could serve as a good basis for discussion.

399. The Delegation of Mexico stated that, as was the case for every law, standard and treaty etc., some exceptions and limitations must be considered. In this regard, Article 8 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion of this question. It should be added that free PIC should be considered in particular in relation to point (ii) of the first paragraph.

400. The Delegation of Burkina Faso, following the statement made by the Delegation of Algeria on behalf of the African Group, added that there should be more of a parallel between exceptions under TCEs and TK. This would enable the Committee to add to Article 8 a certain number of exceptions which were obvious: the use of TK for example in the context of teaching or education and use in the context, use for non commercial research, archiving and safeguarding TK.

401. The representative of Hokotehi Moriori Trust also supported the statements made by a number of Member States that it was not premature to be developing exceptions and limitations. Article 8 of WIPO/GRTKF/IC/11/5(c) represented a useful starting point however he commented on Article 8, specifically Article 1 (ii) that provided an exception for uses of TK for traditional medicine for household purposes, use in government hospitals, etc., another health purpose, all of which were quite worthy causes and purposes. However PIC of the holders of the knowledge should still be sought as a bare minimum consultation. In regards to Article 8, Paragraph 2, it was particularly concerned with the wording of that clause insofar as it excluded from the principle of PIC knowledge which was already in the public domain. This raised the issue that Maori had raised in New Zealand with the Waitangi Tribunal and indigenous peoples had raised in this forum, as well, that it was not often the fault of indigenous peoples that their knowledge was found in the public domain. It would not be sufficient to address any use of that knowledge simply by paying them out some equitable compensation. For example, referring to the American Natural Spirit cigarettes, knowledge of the peace pipe ceremonies was in the public domain. The spiritual beliefs of the First Nations people of the United States of America were in the public domain. That TK was being used by a company to manufacture and sell these cigarettes by association with the traditional customary practices of the First Nations people of the United States of America. If the Maori would have been in that situation it would not be acceptable simply for a company to say "we will share equitably the benefits from that misappropriation to compensate you for something that is culturally offensive". PIC of indigenous peoples should be required in situation where cultural offense will be the result.

402. The representative of the Ogiek Peoples Development Program (OPDP) gave an example in Tanzania where some herbalists had been allowed to treat patients in government hospitals while fake ones had been trying to travel to other East African region to treat people because they were not acknowledged or recognized in whatever they did. So as long as dubious and fake or duplicate frauds were still in the current market, then there had to be limitation to the use of TK. In Kenya, the Kiondo, which were creativity of Kenyans, long time ago were taken and pirated and now were registered in Japan. If there had been limitations the Japanese could not have taken away the ideas of Kenyans and registered them in their own country.

403. The Delegation of Peru agreed in principle with what was expressed in Article 8 of WIPO/GRTKF/IC/11/5(c). However, if the Committee considered the inclusion of

exceptions or limitations, such as some that had been mentioned by other delegations, one would have to look to see whether these cases should be accepted entirely by the regime established, just for benefit sharing but not for PIC. In the case of Peruvian Law for example, the use of TK for scientific purposes was subject to PIC but not just to infer benefit sharing.

*Issue six: for how long should protection be accorded*

404. The Delegation of Nigeria emphasized that the protection of TK should last for as long as the TK concerned fulfilled the requirement of eligibility as laid out in Article 4, for instance, of WIPO/GRTKF/IC/11/5(c). The present formulation in Article 9 of that document was a good basis for further development of this issue.

405. The Delegation of India indicated that TK was dynamic in nature. In fact, knowledge which was being created based on empirical observations on current TK could become TK in future. Therefore, rights on TK had to be necessarily perpetual in nature. Another reason for these rights to be perpetual was that TK would belong to individuals only in rare circumstances. It was knowledge where holders were either communities, regions or countries. Therefore, providing rights for a limited period to reward the creativity of individual would not be applicable in the case of TK.

406. The Delegation of Ethiopia stated that Article 9 of the Draft Provisions were a sufficient basis for future negotiation and deliberation. TK should be protected for perpetuity and Article 9, subparagraph 1, stated that protection of TK against misappropriation should last as long as TK fulfilled the criteria of eligibility for protection according to Article 4. This raised a number of questions. From the wording of this paragraph it seemed that TK had transitory nature. Second, were TK subject to evaluation from time to time to see if they continued to meet the criteria under Article 4? If so, who determined whether protectable TK continued to meet these criteria? National authorities should not be given the discretion to specify the duration of protection as provided for under this sub article. There was a permanent and unchanging association between traditional communities with their knowledge otherwise the right to culture, as solidly elaborated under international human rights system, would have been transitory and time bound. Therefore, it strongly suggested that TK should be protected for perpetuity.

407. The Delegation of Algeria believed that Article 9 in WIPO/GRTKF/IC/11/5(c) was a good basis in that TK should be accorded protection in perpetuity. In view of the distinctive and inter-generational nature of TK, the moral and economic rights of the holders of such knowledge should be protected in perpetuity for as long as the knowledge remained integral to their collective identity.

408. The Delegation of the United States of America considered it was premature for the Committee to undertake a detailed discussion with respect to duration of protection issues. This question appeared to presume a particular outcome which may be inconsistent with the mandate but certainly should be avoided at this stage of the Committee's work. As a more general matter it recognized that there were many mechanisms available for the promotion, preservation and protection of TK. As the Committee continued to consider this various mechanisms it noted that some mechanisms that preserved and maintained TK may be indefinite in link of time. On the other hand, many existing forms of IP protection for example were time limited. These types of general principles could help and form the Committee's work in this area.

409. The Delegation of Japan recalled that since it was not convinced that TK was eligible for IPR, it was not able to go in detail into the issue of protection term which was based on the assumption that TK was protected as IP right. In case TK protection could be recognized as an incentive for economic development to society, protection term should be limited for public utilization after the term, but in that case, certain generations only could benefit from it. But in any case it may vary depending on the form of protection and public interest should be taken into account.

410. The Delegation of Portugal, on behalf of the European Communities and their Member States, had no objections to protection limited in time. However, the nature of the subject matters suggested that TK protection was not comparable to those IP titles which granted a time limited exclusive property right for example a patent or a design. Therefore, it believed that it was necessary to have a discussion whether the duration of protection should last as long as that association between the beneficiaries of protection and the protected subject matter remained intact which was, as long as the knowledge was maintained by TK holders and remained integral to the collective identity.

411. The Delegation of Italy supported what had just been said by the Delegation of Portugal in this regard. The reason for protection of knowledge through IP was in fact to recognize that the creator of the knowledge should have protection for a limited and defined period. After that period every one should be able to benefit from the knowledge that had been acquired by the creator. In other words, protection should be limited in time.

412. The Delegation of Canada believed that it was also premature to address the issue of the term of protection at this juncture, given it would depend on the type of protection provided to TK. Indeed, the approach envisaged and the factors considered would differ whether the protection would be conferred by an active assertion of rights or by defensive measures. In addition, the appropriate term of protection could be influenced by a number of factors such as the goal of protection, the scope of subject matter to be protected and the associated exceptions.

413. The Delegation of Thailand considered it was not premature to discuss the term of protection for TK and supported the view that TK should be protected with no limit in time due to its trans-generational nature. The rationale behind the protection of TK was derived from traditional and spiritual value accumulated from generation to generation. Since the trans-generational measure of TK was one of the determining factors of protection as long as TK fulfilled the protection criteria, protection should be continuously accorded.

414. The Delegation of Brazil stated that considering its intergenerational character and the dynamics of creation of TK, there should be no limitation in time for the protection of TK. And for that matter, along side with other many delegations, it considered Article 9, subparagraph 1, of the Annex to WIPO/GRTKF/IC/11/5(c) and quoted "protection of TK against misappropriation should last as long as the TK fulfills the criteria of eligibility for protection." This Article represented an adequate basis for discussing this issue in the Committee. The misappropriation of TK was a global problem and required a global response and it was not too early or premature to engage on the provisions for that.

415. The Delegation of Sudan supported the statement made by the African Group. Protection should be protection that was afforded without a term in order to ensure this

protection from any kind of distortion. This was a right for all generations who should be able to receive that knowledge.

416. The Delegation of Indonesia said that there should be no limitation for the duration of the protection of TK since it was an important element of the cultural heritage of each nation that had been developed in the past and still existed today. Article 9 in WIPO/GRTKF/IC/11/5(c) was a good basis to discuss the duration of protection.

417. The Delegation of Peru believed that the solution proposed in Article 9 of WIPO/GRTKF/IC/11/5(c) did take account of the particular features of TK and in this way it seemed reasonable and would support it.

418. The Delegation of Australia stated that the length of any protection must depend on what was being protected and the objectives being pursued. As there was no consensus on these important first principles it was difficult to make anything but very general statements regarding length of protection.

419. The representative of the Ogiek Peoples Development Program (OPDP) stated that TK was vital to the indigenous people in sustaining their livelihood and keeping themselves on daily events. Indigenous people were believed to be about three hundred to fifty million in this world, as per one of the ILO document. In his view, there should be no limit in the protection of TK.

420. The representative of Mbororo Social Cultural Development Association (MBOSCUA) believed Article 9 of WIPO/GRTKF/IC/11/5(c) was a good basis for the advancement of this discussion. The protection of TK should last for an indefinite period. He supported the statements made by previous indigenous representatives in the Committee and the African Group.

421. The Delegation of Mexico joined other delegations in suggesting that Article 9 of WIPO/GRTKF/IC/11/5(c) was a suitable basis for future deliberations of this Committee.

422. The representative of Amauta Yuyay informed that they wanted to ask the seniors and elders as to how long this protection could last. This world was developing very fast. This was a very sensitive issue to determine in the framework of visions and divisions of indigenous peoples.

423. The Delegation of the Russian Federation indicated that when talking about duration of protection something could be done in more accurate terms once the Committee had actually defined the scope of protection and the object to be protected. Thinking about the very definition of TK itself which was where the Committee had to start with, then clearly once the Committee had decided on that then it would be possible to move on to determine the duration of protection.

424. The Delegation of China stated that Article 9 could serve as a basis for discussion on this issue. It believed that the Committee should not place any limitation in a preemptive way on the duration of protection.

425. The representative of Hokotehi Moriori Trust supported generally Article 9 set out in WIPO/GRTKF/IC/11/5(c) and supported the protection of TK in perpetuity because the knowledge was integral to the maintenance and integrity of the cultures and the identities of

indigenous peoples. Just turning to Article 4 which was the eligibility for protection provision as submitted by Hokotehi Moriori Trust, he requested that the word “revives” be added to (ii) of Article 4 so that it would read distinctively associated with a traditional or indigenous community or people which revives, preserves, maintains and transmits it between generations. He repeated the reason why “reviving TK” was important was that many indigenous communities, indigenous peoples, including Moriori, were in the process of reviving the TK systems which had been dismantled and disseminated by decades of colonization. One final point was an implied suggestion that indigenous peoples were not prepared to share their knowledge and they wanted to protect it for themselves. That could not be further from the truth because indigenous peoples had always shared what they had. In many instances the TK of indigenous peoples was all that remained, so they wanted to ensure that there were appropriate mechanisms that recognized and respected that knowledge including seeking PIC before it would be shared beyond a broader spectrum than themselves because of the history of the abuse, oppression and suppression of indigenous knowledge in the past. It was not sufficient now in contemporary days society to assert that just because TK had a commercial value that was recognized beyond the traditional community that it could be accessed and used by anyone and everyone. It was often difficult to articulate these issues within a paradigm that created a separation between TK and TCEs because it was a distinction that was not recognized by indigenous communities themselves. An elder who was given evidence for the Y262 Claim in New Zealand told the tribunal that her knowledge was in the public domain and she still had an obligation to respect the sacredness of that knowledge. That obligation was transmitted from one generation to another. As in the case of TCEs where it was proposed to have a three layered protection mechanism for knowledge that was registered, unregistered and sacred knowledge. The Committee could consider regarding the protection of categories of knowledge that were more significant than others. It was something maybe worth while exploring given the expression by some Delegates that not all knowledge should be protected.

426. The representative of the Congolese Association of Young Chefs supported the statement of the African Group as well as others who had spoken in favor of the fact that duration of protection should be in perpetuity, in other words without restriction. This was something that was held as the heritage of the whole Community, it was part of the cultural heritage, it was not something owned by any single individual. It was something that had to be transmitted to future generations.

427. The Delegation of Nigeria pointed out that looking at the formulation of Article 9 might be misleading to understand that it subscribed to perpetual or unlimited duration. Rather, the duration should be subject to the eligibility requirements under Article 4. TK was often attached to the community and intrinsically rooted in a local context. For as long as it was connected to that particular community it should enjoy the benefit of protection. But the moment it moved away from the community then the duration would certainly come to an end. What we had here was not different from what was available for GI under the present regime.

428. The Delegation of Ukraine stated that bearing in mind the specific nature of TK, it supported the opinion that had been expressed by other delegations through the fact that TK could and should not be something that had a duration or term of protection.



*Issue seven: to what extent do existing IPRs already afford protection?  
What gaps need to be filled?*

429. The Delegation of Portugal, on behalf of the European Communities and their Member States, believed that virtually all branches of traditional IP law could play a part in the protection of TK directly or indirectly as TK was protectable subject matter as long as the application criteria were met. Under patent law TK was patentable when the general conditions of novelty, inventive steps and industrial applicability were met. While patent law seemed more or less capable of appropriately protecting TK derived in inventions, it was normally not applicable to the TK stock itself because it was limited to inventions adding an inventive step to the state of the art thus deliberately not protecting the existing state of the art but only new products. Protection of trade secrets and confidential information could represent both a protection instrument for spiritually, valuable TK against any commercial exploitation and a flexible framework for fair contextual know how license in the TK field. It was also capable of covering the TK stocks itself as long as they were not freely available outside the range of the respective indigenous groups. The role of copyright law would remain substantially limited to folklore protection rather than in the protection of the remaining practical TK. Some concepts of copyright law could however deliver valuable examples of how to manage collectively held TK stocks effectively. Also copyright law lately tended to go beyond its classic static subject matter and had been extended to modern creations, namely computer programmes and data bases. The European Communities database, for example, had established a mechanism to evaluate and protect the continuous updating of databases and mechanism which conserved *mutatis mutandis* as a model for the evaluation of continuously developing TK. To a certain extent trademarks could ensure the protection of TK indeed by protecting through a trademark products manufactured according to traditional methods when capitalized on the accumulated know-how. In the case of know-how belonging to a group the collective trademark could be used. A simple collective trademark was a mark which belonged to a producer group and which made it possible to Members of this group to promote the products under this trademark. The collective mark of certification will be used to indicate and guarantee that the products to which it was applied showed certain particular characteristics for example the nature, properties or quality of the products in particular. The protection of GI also made it possible to indirectly protect local and TK products. Indeed the reputation of a geographical name in connection with given products was generally related to the particular know-how of the manufacturers and the corresponding place. The protection of these geographical names against counterfeits did contribute to the protection of this know-how. The label of origin gave a reinforced protection to products whose characteristics were related to human elements but also natural factors. The protection of indications of source and labels of origin could be a tool for safeguarding cultural inheritance. By developing and protecting geographical names, local traditions and know-how were thereby safeguarded. Finally, and in order to obtain the better framework in the scope of existing IPR, a deeper analysis of this question was necessary.

430. The Delegation of India indicated that TK could be protected to a limited extent only through existing IP laws like patents, trademarks, GI, trade secrets, copyright, industrial designs, plant variety protection, etc. Many of these laws in India had provisions which had scope for protection against misappropriation and misuse of TK. However, most of these except GI were defensive protection against misappropriation and misuse of TK. Therefore a *sui generis* mechanism legally protecting TK as a whole should be developed. Such a protection system had to be on a global basis to be effective.

431. The Delegation of Algeria stated that the African countries and some African Delegations had submitted a lengthy answer to that issue and came to details on how they saw that the present or current IPR did not cover the protection of TK. The African Group held the view that the current IP system did not offer protection to the stock of TK owing to the holistic and expensive nature of the knowledge. However, in some specific cases element of TK may be protected under the existing IP system. Any viable system of protection must meet the criteria for PIC, access to equitable benefit sharing, disclosure of origin and other element of protection. It was essential that, in protecting TK systems, the right of communities shall precede and supersede individual rights and codify oral knowledge for example, and sacred knowledge shall be appropriately protected by the *sui generis* system.

432. The Delegation of Canada noted that both IP and non- IP laws and policies could, depending on the objective, protect TK. Concerns had been expressed that there were “gaps” in IP law. Therefore, it believed that an identification and analysis of potential gaps in the current system would advance the work of the Committee to the benefit of all Member States and observers.

433. The Delegation of Japan stated that while TK was not protected as IPR as such, in certain limited cases TK could be protected under existing systems like patent law, trademark law or unfair competition law, etc. To seek protection under such systems TK must meet certain requirements prescribed in its system. In such a case, the following issues really existed as illustration. Regarding protection under patent law, certain TK had already been in the public domain. Thus such a TK was not regarded as having novelty. To satisfy the novelty requirement TK at least should be maintained and passed on by persons who had a duty to keep that TK confidential. Second, entity to seek protection. In case of TK, it might be difficult to specify who was eligible to seek a patent because TK was maintained and transmitted over generations in indigenous groups or communities and so on. As mentioned in item 2 a similar problem might arise in cases involving two or more communities or countries. Regarding protection under trademark law while the subject matter or trademark protection was a sign to be used for groups and services by entrepreneurs were not TK as such. TK might be indirectly protected under trademark right. For example, if a trademark right was granted to a mark of an indigenous group to which the TK belonged a grant value could be established by using such a guaranteed mark. Regarding protection under trade secret law, to seek protection for certain information under trade secret it might satisfy the requirements of non disclosure, utility and maintenance of secrecy. The issue of public domain should be addressed as stated in protection under patent law in terms of non-disclosure and the maintenance of secrecy. Regarding the protection of TK as human rights, TK could be protected under civil code or other general laws against serious human rights infringements. Finally, a fair balance had been kept between the protection of TK and the protection of public domain under the current IP systems. At this stage there was no perceived gap to modify the protection of TK from the perspective of the IP system.

434. The Delegation of Switzerland underlined that it had always been said that existing IPR (for example, GI, patents or copyrights) could be used or indeed that their use may be envisaged. By contrast, new protection possibilities should be discussed, where IP did not enter into consideration or where protection based on the IPR mentioned was not the appropriate instrument.

435. The Delegation of the United States of America emphasized that many provisions of existing IPR were already available for the protection of TK. Some of these had been noted by the Delegations of Japan and by Portugal on its statement on behalf of countries of the EC.

Principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of various stakeholder groups including indigenous and local communities. For example, moral rights which were provided for under the Bern Convention could be adapted to meet actual needs of communities by addressing specific non economic concerns related to TK. Existing IPR principles and doctrines may also be integrated with customary law approaches. The Committee should build on national experiences of WIPO Member States as well as experiences of indigenous peoples and local communities. In using or adapting existing IPRs to address issues and concerns related to TK. The Committee should not stop with canvassing the use of existing IPRs to address TK issues, and discussion of selected principles and doctrines of unfair competition, contract, cultural heritage and customary law. The Committee was well suited to address specific issues or concerns. For example, the Committee may wish to consider more closely examining the use of unfair competition law by Member States to address specific issues related to TK. The exchange of information on current national, legal and policy developments and identification of successful national practices would advance the work of the Committee. Some Members may raise concerns or specific examples where IP systems were perceived or considered not to be sufficient to preserve, protect or promote TK in a particular context. For example, specific case studies could be further analyzed in this regard. Such an exchange would help the Committee to identify gaps if any in existing international and domestic frameworks. This perceived gaps could then be considered and addressed. Once any such gaps were identified, proposals may then be considered to redress these concerns in a manner that could lead to convergence among members.

436. The Delegation of Brazil considered, as other delegations had mentioned, that IPR had so far proved insufficient to safeguard TK holders against misappropriation. Respect for PIC of the holders of TK and fair and equitable sharing of benefits arising from the use of their TK should be incorporated into the IP system. Where TK was associated with GR the sharing of benefits should be consistent with the measures established in accordance with the Convention of Biological Diversity. In this context, the draft provision in Article 12 of the Annex to WIPO/GRTKF/IC/11/5(c) was a good basis for further discussion. Without prejudice to the decision of the Members of this Committee to afford protection to TK via *sui generis* systems the Delegation believed that the Committee should consider the adequacy of IP mechanisms to provide for the protection of TK by examining possible modifications in rules governing the validity of IP rights with a view to provide for a determined mechanism against the misappropriation of TK.

437. The Delegation of Thailand recognized that the IP system may, to a limited extent, provide some defensive measure aiming at preventing misappropriation of TK such as mandatory requirement of disclosure of origin for patent registration. Nevertheless, existing IP regime were not sufficient to protect TK. They only protected creations and innovations based on TK, not the substance of TK itself.

438. The Delegation of China indicated that the existing IPR regime could to a certain extent provide protection to TK. However, it did not fully meet the needs of the protection of TK. Therefore, a certain adaptation or adjustment should be carried out to the existing IPR system so that TK could be directly protected. For example if Chinese Traditional Medicine met certain criteria it could apply for patent in China. This case demonstrated a good example through the adjustment of the existing IP system to provide a protection to TK. This could be further improved from the practical point of view. Apart from that, certain functions of the IPR system could also be made use of to support other kinds of protection. In addition, in view of the specificities of TK a *sui generis* system could be formulated and implemented for

protection so that the full and overall protection could be provided for TK. It should be emphasized that so far there was no international instrument to protect TK in comparison to the protection of other innovative activities. There was a gap in this area.

439. The Delegation of Indonesia believed that the existing IP right system may not be the right one for the protection of TK. One of the reasons was that TK possessed a different nature and distinctive characteristics that did not fit to the existing IPR regime. These obstacles demonstrated that there was intrinsic insufficiency between the IPR regime and the characteristic of TK. Based on this reason, it was necessary to establish an international treaty system of *sui generis* protection of TK. Finally, a *sui generis* system at the national level was not adequate to ensure comprehensive protection of TK.

440. The Delegation of Burkina Faso stated that, listening to the various statements, the current IPR system could not serve as the direct basis for the protection of TK. After listening to what was said by Japan it understood that no existing IPR system could do the job that had to be done. That may mean that it was not too premature to start thinking today about a different scenario, about a different context. Even if one talked about such a general system as unfair competition, what exactly was being talked about? Looking at the current unfair competition legislation, it found it difficult to see how a community could bring an action for unfair competition against a firm or a company because that firm or company would have illegitimately made use of a symbol belonging to that community. It might be worthwhile thinking back to what happened in Stockholm in 1967. At that time, we had the Stockholm revision of the Bern Convention. What we had today was Article 15 that emerged from that process. We might end up in a situation where someday we end up with a different Intergovernmental Committee discussing the issue of patents and somebody will tell us that that was where we were supposed to discuss this issue. It might be the right time to see where the Committee was and how it could get out of the situation where it was currently, otherwise the poor of this world will simply be left aside yet again and will end up passing on from one intergovernmental committee to another.

441. The Delegation of Peru said that IPR which had been enforced did not take account of the particular features of TK nor the needs and expectations of indigenous peoples in relation to this TK. This was why it required a new instrument for this protection which would take account of these very special features and the needs and expectations of TK right holders. In addition a type of link between conventional IP and the new regime will need to be established for TK in such a way that conventional IP can collaborate with this new regime. One way of achieving this would be through the inclusion of prerequisites of disclosure of origin particularly in the case of requests for patents related to inventions obtained or developed on the basis of TK. In this way an IP system which would be more equitable, fair and therefore stronger could be achieved.

442. The Delegation of Australia reiterated that as indicated by other delegations and as discussed in general terms in various WIPO papers, patents, designs, trade marks, plant breeders' rights, copyright, confidential information and unfair competition laws clearly all had roles to play to protection of TK. It may be that traditional IP concepts could be altered to address particular objectives regarding TK. More general legal concepts such as contract law, fraud and unconscionable conduct may also be applicable. It may be useful to look at specific issues identified as possible misappropriation and examine them more closely. It would be important to explore fully what impact such use had had on the communities involved and, correspondingly, what type and level of response might be required – in general terms the response should be proportionate and appropriate to the actual harm. It would also

be important in such an exercise to fully analyse all avenues of addressing problems. This would include non-legal methods that could provide solutions or partial solutions, how current general legal frameworks could be used to provide solutions, how the current IP system could be used to provide solutions and how concepts from the current IP system might be built upon or developed to provide solutions. It considered that a wide range of policy tools may need to be developed to achieve any agreed policy objectives arising out of the many contexts of TK. Such an approach may be preferable to a 'one-size-fits-all' approach. Member States should be free to choose to implement those policy tools that were of particular relevance to their situations. It was important that any new measures developed to protect TK should be consistent with, and complementary to, existing IP regimes.

443. The representative of Hokotehi Moriori Trust noted that one of the significant gaps that needed to be filled was in relation to the Convention establishing WIPO, in particular the definition section in Article 2 where IP was defined to include literary, artistic works, etc. He was repeating something that had already been repeated although it did not seem to be a criteria for making submissions. Perhaps if WIPO was going to provide adequate protection, recognition and protection for TK and TCEs, the definitions within the governing instrument of WIPO needed to more properly reflect and provide for appropriate mechanisms to protect TK and TCEs. If we were going to develop *sui generis* mechanisms that drew on existing IP law and customary law and other mechanisms TK and TCEs could be included within the Convention establishing WIPO. The Committee seemed to be going round in circles as to whether or not IP law could or could not accommodate TK and TCEs. Having said that there would still be concerns that the IPR system itself was designed for purposes beyond those which were necessary for the holistic protection of indigenous knowledge systems. It was necessary perhaps to go back to the source sometimes to examine the definitions that had been used here. As regards the ability of patents, copyright, trademarks, GI, etc. Moriori and Maori acknowledged that IP law could to some limited extent provide commercial protection but in limited circumstances, in economic circumstances. They could not protect the underline integral values and identity of indigenous cultures which were at threat. Moriori and Maori's mind focus was on preserving the integrity of the culture and identity rather than focusing on the commercial aspects. So he did agree with some Member States that the IP system would struggle to protect TK and TCEs.

*Issue eight: what sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?*

444. The Delegation of Japan reiterated that since Japan was not convinced that TK was eligible for IPR it was not able to go into detail into this issue of sanctions and penalties which was based on the assumption that TK was protected as IP right. Sanctions and penalties against unacceptable illegal acts may vary depending on the level of protection for TK or the level of illegality. Since current IP systems also stroke a fair balance in the field of sanctions and penalties the Delegation saw no need to introduce sanctions, penalties other than existing ones when IP protection was applicable to TK. Discussion on this issue should take into account form or scope of protection and illegality. In order to respond to this question properly a fact finding and exchange of national experiences were necessary. It would also be helpful to know what kinds of damages were incurred by what kinds of conducts.

445. The Delegation of Canada was of the view that it was also premature to address the issue of sanctions or penalties at this stage. However, should there be sanctions or penalties,

they should be proportional to the harm caused and must be consistent with Member State's international legal obligations.

446. The Delegation of Indonesia viewed that article 2 paragraph (1) in WIPO/GRTKF/IC/11/5(c) was a good basis to discuss sanctions or penalties. Sanctions or penalties should not be limited to redress through criminal sanctions only. In this regard, civil redress through civil litigation (for damages) shall also apply. In addition to this, it was also important to consider the role of national law. This inclusion was pertinent since national law played a very important role in ensuring effective protection of TK.

447. The Delegation of China said that WIPO/GRTKF/IC/11/5(c), Part 3, Article 2, could be a good basis for discussion. Sanctions and penalties were not an isolated issue. It was closely related with protective measures. Sanctions or penalties against behavior and acts that were unacceptable or illegal should include but not be limited to IPR related measures, for example, the rejection of patent application or the invalidation of a patent. In addition, that could also include civil or criminal penalties. The application of sanction and penalty should satisfy the compensation to the affected party. In order to avoid an unnecessary burden at the same time the sanction and penalty should also be determined enough to illegal behavior and acts.

448. The Delegation of the United States of America shared some of the concerns referenced by the Delegations of Japan and Canada. As noted in its response to question 4, it believed that the Committee should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by various stakeholders, including indigenous peoples and traditional or other cultural communities. Once the Committee reached a more informed understanding of particular concerns or harms at issue, the Committee will then be in a position to canvass remedies under existing law including copyright, trademark, patent, unfair competition, trade secret, criminal, criminal and or customary law to determine whether there were gaps in existing remedial skills of WIPO Member States.

449. The Delegation of Australia considered that any sanction or penalties should be designed to meet the objectives of the measures put in place and be proportionate and appropriate to any harm caused. It was only once an understanding of objectives and possible measures was developed further that fruitful and detailed discussion regarding appropriate sanctions or penalties could be undertaken. A consideration of whether sanctions or penalties under existing laws could be applied should occur before exploration of other mechanisms, if considered necessary, was undertaken. Introduction of measures without proper evaluation of their enforceability, proportionality to the likely harm, their impact and role was likely to cause uncertainty and not deliver the desired objectives.

450. The Delegation of Algeria, on behalf of the African Group, was of the view that appropriate, civil and criminal sanctions and penalties should be applied to behavior or acts considered to be unacceptable and illegal.

451. The Delegation of Brazil pointed out that measures should be put in place to ensure that enforcement procedures were available under Member's legislation so as to permit effective action against any act of misappropriation including expeditious remedies to prevent infringements and remedies which constituted a deterrent to further infringement. In this regard the Committee might consider possible modifications in rules governing the validity of IPR with the view to provide for deterrent mechanisms against misappropriation of TK in the cases where the granting of IPR had infringed rules on TK protection especially that of PIC.

The draft contained in the Annex to WIPO/GRTKF/IC/11/5(c) should incorporate a specific provision on the issue of sanctions and penalties, criminal and civil, within an international instrument.

452. The Delegation of the Russian Federation agreed that there should be adequate and appropriate penalties, appropriate to the infringement occurred. They should cover a number of points such as the type of protection. There should therefore be a fine or some other compensatory measure.

453. The Delegation of Switzerland emphasized that any protection of TK required adequate sanctions applied to behavior or acts considered unacceptable or illegal, in order to be meaningful. Several options were possible, depending on the policy objectives of the protection of TK, and the rights and obligations attached to TK. Behavior or acts considered to be unacceptable or illegal could be subject to civil or criminal sanctions, according to the nature of the behavior or act. Sanctions could, *inter alia*, be in the form of a fine or damages paid. As a next step what sanctions were currently available should be assessed, and whether these existing sanctions were appropriate to prevent the Behavior or acts considered to be unacceptable or illegal. Should this assessment reveal gaps, we could discuss the introduction of new sanctions. These sanctions needed to be carefully designed in order to prevent behavior or acts considered unacceptable or illegal, while at the same time providing clarity and legal certainty for all involved.

454. The Delegation of Morocco supported the statement made by the African Group. Protection of TK was something that could only be effective if that protection was appropriate. Therefore, the protection had to be genuinely implemented and when there was a violation or an infringement of the protection of TK then clearly measures had to be taken to deal with that. It was necessary to either have preventive measures to end it once and for all or else some kind of sanctions and penalties had to be applied or one had to have a system for compensation to be paid to the injured party. Of course the compensation, the damages to be paid would have to be adequate and proportional to the damage caused. There was a need for penalties or sanctions when there had been a violation of the protection of TK.

*Issue nine: which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?*

455. The Delegation of Kyrgyzstan informed the Committee that its Parliament had recently passed a law on TK, given the fact that this law provided the general provisions and their policy governing this issue as well as provided for legal guarantees in social and economic issues with regard to TK linked to GR as well. The law also provided for guarantees for fair and equitable benefit sharing for TK. As the Committee was looking at historical heritage of indigenous peoples, this law governed all issues and all problems under discussion. There were still some shortcomings in some provisions covered by this law. The work of this Committee was going to help them greatly in resolving certain issues. The Committee had done a lot of work in identifying the numerous problems that existed in this area. WIPO/GRTKF/IC/11/5(c) provided with a basis which was now mature enough to look at all the issues linked to TK. Now with regard to TK and whether there was a need to have national or international protection the Delegation felt that one of the fundamental problems in this area was the difficulty that existed in defining criteria for TK and the criteria for defining the commercial use made of TK. The lack of legal mechanisms made this more complicated. It would be useful to have a uniform international approach in providing

protection for TK. It hoped that there will be conclusions from this Committee that would help them in their future work.

456. The Delegation of Japan reiterated that it was not in a position to be convinced that IPR could be extended to TK and not convinced of the justification about creating a legally binding international instrument. Before discussing ways of internationally addressing this issue discussion must be conducted on what domestic solutions existed and where the limit lied and the extent to which contracts and so on were incapable of addressing this issue. Discussions based on factual information or national experiences exchange about what damages had been caused by what illegal acts was essential.

457. The Delegation of Canada believed, as previously noted, that how this Committee addressed the list of issues should be dependent in large measure on the policy objectives identified. Once the objectives were determined, it would be in a position to assess what issues should be addressed at the international level and what issues should be addressed at the domestic level. However, this will be a complex task. It believed that the domestic legal framework and concerns of Member States should guide the shape and direct our discussions as to what issues, if any, should be addressed at the international level. In addition, discussions on any potential form of protection at the international level should reflect the particularities of each country and be consistent with its international obligations.

458. The Delegation of the United States of America shared many of the views expressed by the Delegation of Japan. Indeed, a focused discussion on the promotion, preservation and protection of TK required a careful consideration of both national and international aspects of the complex issues before the Committee. Further, and consistent with the mandate no outcome should be excluded. At this time the Committee should concentrate its efforts on engaging a sustained robust discussion on the substantive issues before it based on national experiences that could help us to continue to identify convergences and differences that existed among members and thereby assist the progress in this Committee. In this manner, the Committee could address these matters internationally and in a way to assist actions and potential coordinated actions that could be taken at the national level.

459. The Delegation of Portugal, on behalf of the European Communities and their Member States, even if it was premature at this stage to deal with this question, supported a flexible approach and considered such an approach essential in order to take account of the diverse measures of TK protection which already existed at national and regional level. The final decision on the legal protection of TK should be left to national legislators. National authorities should have necessary flexibility in determining the appropriate measures which best reflected the needs of their local or indigenous communities in the domestic context. At international level the European Communities had a preference for a non binding legal outcome. It meant *sui generis* models or other non binding options. TK protection should also be consistent with already existing IP systems and international treaties.

460. The Delegation of Brazil said that an international instrument was required to address the problem of misappropriation of TK. That international instrument should set out minimum standards with a view to facilitate enforcement of provisions of national legislations in third countries, in particular those targeted against acts of misappropriation. The international domain of the work of the Committee lay in determining general rules applicable to the protection of TK such as: (1) the requirement for PIC and when applicable for benefit sharing; (2) reference to cases that constituted acts of misappropriation; and (3) a rule requiring effective enforcement measures to be put in place. At the national level, legislation



would lay down specific relevant definitions as well as the applicable procedures for the identification of parties eligible to protection, maintenance and exercise of rights over TK.

461. The Delegation of China was of the view that protection of TK consented both international and national dimensions. Many delegates had mentioned that the national dimension could afford experiences for international harmonization but more importantly international harmonization could facilitate and guide national legislation and at the same time help to solve common problems. It was also helpful to reduce the conflict that was brought about by the difference of national legislation. One outstanding problem right now was the cross border use of TK and the misappropriation of the use of TK. In this case international harmonization, in particular a binding international instrument, was indispensable.

462. The Delegation of the Russian Federation said it had already spoken in favor of a progressive approach for setting up a system for the protection of TK as regard to identifying issues that should be dealt with internationally. It was important first of all to define the different types of measures and to look at national experiences in implementing national provisions which already existed. Based on the principle that an international instrument should set out minimum standards for protection, the wording of such an international instrument should be flexible by necessity.

463. The Delegation of Norway believed that the core elements should be dealt with internationally, while taking into account the need for flexibility and different local concerns as appropriate. Hence, a minimum standard for protection of TK should be provided for on the international level.

464. The Delegation of Algeria, on behalf of the African Group, held the view that protection of TK was far from a purely national issue. WIPO had the responsibility to develop international framework for norms and standards leading to a legally binding international instrument. In view of the multicultural and transnational nature of TK Member countries will concurrently develop appropriate national legal framework to protect and promote TK.

465. The Delegation of Australia stated that, acknowledging that no outcome was excluded from the work of the Committee, it favored solutions to particular issues in the form of non binding mechanisms as this provided for greater flexibility and choice of implementation at the national level. Further consideration of uses of TK that were considered problematic needed to be carried out. This was necessary to ensure a more detailed understanding of the issues involved and how the current systems could be used more effectively or improved. In general terms, a flexible approach to the protection of TK would ensure that appropriate mechanisms were available to suit the range of needs of indigenous peoples and local communities and to ensure that an appropriate balance was achieved between those needs and the needs of the broader community. This flexibility should also extend to respect for the diversity of legal systems amongst Member States. Consultations and cooperation with other international forums was important and consistency with relevant provisions of existing international instrument was critical to ensure the continued and effective operation.

466. The Delegation of Indonesia was of the view that this question actually posed a cause to identify reasons in justifying the need for an internationally legally binding instrument and relationship of national legislation with the international instrument. National legislation may regulate the owners of TK and its utilization but in fact national legislation could not address the whole issue in a comprehensive manner such as the issues of territoriality, globalization

and international commercialization of TK as well as the appropriate recognition of foreign right holders. Therefore, it was necessary to have an international system for the protection of TK. The International system will also sufficiently deal with the issue of disputes and enforcement on the one hand and on the other hand international instrument will also offer positive protection which was required in order to address cross boundary issues. In addition to this, regional instruments could also be an effective way of addressing those issues.

467. The Delegation of Sudan supported first of all what had been said by the Delegation of Algeria on behalf of the African Group. National legislation was not sufficient in itself to provide protection because misappropriation of TK also entailed the appropriation of the culture and values of the society in question. Of course this was knowledge which evolved each day in accordance with the local context and in the challenges of each environment. Therefore, equitable benefit-sharing was something related to contemporary knowledge and this was justification for providing for an international legal instrument.

468. The representative of Tupaj Amaru had requested the floor to comment on issue no. 8 but also commented on issue no. 9. First, in the history of indigenous peoples, the European colonizers pillaged all TK and the wealth and cultural heritage of their ancestors. The international community had a huge debt to indigenous peoples. Indigenous peoples had asked for compensation for the damages caused in the past. They requested a symbolic compensation, one dollar, for pillaging that went on for centuries. However, the international community was so egotistical that it did not want to recognize this and to give one dollar for the pillaging that went on to the detriment of indigenous peoples for centuries. And secondly, all instruments had protection mechanisms and mechanisms for sanctions. Any binding or non binding instrument, for example conventions, etc. had specific clauses which stipulated what the sanctions should be from an administrative, civil or communal perspective and, in this context, a binding or non binding treaty or convention would not have any value particularly in international law if it did not have mechanisms providing for sanctions. Therefore, instruments should include sanction mechanisms for everything related to the current piracy that pharmaceutical, countries, both multinational and international, and for processing companies, which had their headquarters in various developed countries. For example, he referred to theft, corruption, bribery that went on in addition to fraud and infringement of the property of others because all agreed private property should be defended. In this sense collective property of indigenous peoples should also be protected. This was quite obvious because one could not have two standards, one standard of international instruments such as the Paris Convention or the Bern Convention. In Article 10 of the Bern Convention, Paragraph b, stipulated certain sanctions for infringers of IPR and the same principle should also apply to any future instrument that the Committee was going to develop and adopt in the coming year hopefully. In WIPO/GRTKF/IC/11/5(c) what was missing was an Article, or a paragraph, which would spell out the specific sanctions to be used in cases of piracy for those who were misappropriating properties without PIC of indigenous peoples. Therefore, he was going to continue to advocate in international, regional and national fora for compensation for indigenous peoples because this was a recognized right in current international law.

469. The Delegation of South Africa supported the statement of the Delegation of Algeria on behalf of the African Group. It supported delegations who had reiterated the importance of advancing the work of the Committee forward towards building consensus on an international legally binding instrument. Member countries were already working to develop national and regional legal frameworks which now needed to be supported on an international level. Sufficient work had been undertaken at national and regional levels and now required an

international binding instrument to ensure the effective implementation of these national and regional initiatives. WIPO/GRTKF/IC/11/9 additionally highlighted the extensive work that had been carried out within this Committee. Based on its experience of revising its legislation South Africa had noted the usefulness of the national exercise thus also came to unawareness of the limitation of the national effort and thus worked towards consensus for a binding international instrument to enhance the national mechanism. In light of this, the work of the Committee should focus specifically on a text-based approach within the current discussions in the Committee focusing first on areas where there was already in general consensus.

470. The Delegation of Peru felt that in order to set up and divide international issues and national issues on the one hand the Committee needed to give enough flexibility to countries so that they could take appropriate measures at a national level. On the other hand certain minimum standards also needed to be established at an international level so that it was possible to guarantee protection for TK at an international level. Without these international minimum standards the measures taken at a national level would be insufficient and therefore it supported the statement made by the Delegation of Brazil.

471. The Delegation of New Zealand stated that it was not certain when it should actually make this particular intervention, because it related to comments made under the discussion on duration of protection. The Delegation made it then, given that its concern may also have some relevance to cross-border issues. Some observers had raised the possibility of having stronger recognition or protection for indigenous peoples as opposed to migrant local communities. This distinction arose in the context of the issue relating to the duration of any protection. New Zealand recognized that special relationships may exist within various member states between the domestic government and indigenous peoples. For example in NZ, the Treaty of Waitangi had been found to create a special relationship (e.g. fiduciary and the principle of partnership) in certain circumstances. However, that special relationship was founded in a domestic and unique source. It raised concerns with making a distinction between indigenous peoples and migrant communities at the international level. The discussions with some member states indicated that some countries had concerns with this distinction because domestically they may not have communities which could be characterized as “indigenous” according to international customary definitions of indigenous peoples. However, they may have migrant local communities which held significant bodies of TK and TCEs that may meet any definition of TK and TCEs. The world was getting smaller and smaller. It was a reality that local communities migrated for various reasons, natural disasters was one example of reason for migration. Local communities may even migrate to a different State all together. The Delegation raised its concern with the distinction made and considered that further analysis was needed on this issue.

472. The Delegation of Algeria stated that the issue as to whether countries should legislate prior to, during or after the adoption of an international instrument, was not in itself of paramount importance. Countries know they had to legislate at national level but the major interest indeed was in having an international instrument. There were several reasons for that. Firstly, there was the whole principle of national assimilation, secondly, there was the principle of reciprocity and thirdly, there was the principle of the most favored nation clause. This existed in all international treaties of this type. The Committee knew what already existed, what had already been adopted under the auspice of WIPO, the TRIPS Agreement, and nonetheless countries like Algeria were obliged to go along with that agreement. There was now an opportunity of discussing issues, proposals put forward by WIPO. There was also the results of the survey conducted by WIPO, proposals that had been made by many countries. All of this could fit into the work which will ultimately result in an international

instrument. All of this basic information should allow the Committee to start work on building this international instrument. This will allow Member States either to legislate in their own country or to add to existing legislation in their own country.

473. The representative of Amauta Yuyay endorsed what had been said by the representative of Tupaj Amaru and in that context recalled what he had said the day before. Symbolic compensation, symbolic payment of damages was something that should go hand in hand with real compensation in terms of recognition and protection of the rights of indigenous people when it came to TK and TCEs. The day before he read on the Internet about the possibility of changing the attitude that was generally taken by the Western society to the use of resources whether indigenous resources or other resources that had to be safeguarded and protected. It was a call for a change in behavior. It was suggested that the West had to change its attitude if it was in fact to make progress and to produce a genuinely binding instrument.

474. The Delegation of Libya believed that there was a need for an international binding instrument. There were two reasons for that. On the one hand, national legislation alone was not sufficient to protect TK particularly in developing countries as their legislation was changing very quickly as indeed were the institutions in those countries. That meant that often things were overlooked and that was a problem. Secondly, having a binding international instrument for TK would make it possible to protect TK from developed countries who often legislated just in their own interest taking account purely of their own interests and this very much to the detriment of developing countries. The international instrument should take due account of all situations which existed both within countries and between countries when it came to TK. The instruments should also take particular account of the need for a compensation to be paid for the pillaging that had been carried out by colonialists in the past.

475. The representative of the Ogiek Peoples Development Program (OPDP) proposed an issue which should be dealt with internationally. One was to identify the use of IPR globally, monitoring the use and keeping the database while nationally was domestication of existing laws and also providing space for the protection and the promotion of IPR.

476. The representative of the Mbororo Social Cultural Development Association (MBOSCUA) strongly supported an international binding instrument. Considering that most African States had very hostile policy towards indigenous people and communities, he believed an international instrument would set these excess of the African States towards indigenous people and their culture and TK. He gave an example of what was happening in his country, Cameroon. Whereby, their traditional spiritual leaders died two weeks ago and, according to their own cultures and traditions, they needed to follow spiritual and sacred way to enthrone a new traditional ruler to take over the throne. Unfortunately, they had been refused this right because of a world rich multimillionaire who was violating the right of the Mbororo indigenous people in Cameroon and had corrupted the local administration to impose an imposter on their throne. The government of Cameroon was supporting him because he was a Member of the Ruling party in the country and he was extremely rich. An international instrument could be able to check such misbehavior of some State authority.

*Issue ten: how should foreign rights holders/beneficiaries be treated?*

477. The Delegation of Portugal, on behalf of the European Communities and their Member States, believed that the principle of national treatment should apply: what consisted on giving the same protection to TK originated in other States as was accorded to TK originating in its own territory.

478. The Delegation of Japan stated that since it was not in a position to be convinced that IPR could be extended to TK and not convinced of the justification of creating a legally binding international instrument, it could not go in detail into this issue. The treatment of foreign entities would depend on the type of protection TK would be granted and the corresponding international regulation.

479. The Delegation of Algeria, on behalf of the African Group, held the view that foreign rights holders and beneficiaries as referred to Article 14 of WIPO/GRTKF/IC/11/5(c) should be treated in the same way as the local beneficiaries by virtue of an international legally binding instrument. To this end all limitation and possible sanction should be applied to both foreign and local beneficiary on equal basis. It expressed its satisfaction for the importance and the usefulness of the discussion during more than a week now. It was mainly satisfied with the large consensus coming from Delegations and NGOs that there was a necessity to have an international binding instrument which aimed to give the necessary protection for TCEs and TK. It hoped all these discussions and consensus on this issue would help the Committee go forward in the work and come at the earliest time to a concrete result on that issue.

480. The Delegation of Brazil remained convinced that an international instrument was required to address the problem of misappropriation of TK and it was not too early or premature to engage on that discussion. This international instrument should afford foreigners the same treatment as nationals or a treatment not less favorable. On that sense, like mentioned by the Algerian Delegation, Article 14 to the Annex of WIPO/GRTKF/IC/11/5(c) represented another good basis to discuss the issue.

481. The Delegation of the United States of America believed, for the reasons set forth in its previous responses to the different questions, that it was premature for the ICG to undertake a focused discussion on treatment of foreign rights holders and beneficiaries. While wide divergences still existed among members on many issues of both substance and process, it was convinced that continuing the work of canvassing existing mechanisms, identifying gaps and exchanging national experiences would eventually lead to convergences. However, with respect to this question in particular, one of the general guiding principles extensively discussed within the Committee had been respect for relevant international agreements. It understood this principle to include the fundamental principle of national treatment or non discrimination with respect to foreign rights holders with regard to other IPR. This principle of IPR system should continue to inform the spirit of the discussions within the Committee.

482. The Delegation of Italy said that the applicable principles should be the principles of reciprocity of protection.

483. The Delegation of Yemen pointed out that foreign nationals should be granted rights in this area as in similar areas of IP. This would mean that obviously reciprocity would have to be applied as it was under the Bern Convention.

484. The Delegation of Morocco supported what had been said by the African Group. It was important to move forward on the basis of the progress that had already been made in the

course of the discussion and debate. It was important to endeavor to ensure to move forward in implementing this international instrument needed in order to protect TK. TK was something that could be protected through an international instrument which would clearly set out measures and steps that could be taken in order to afford real protection to TK. A set of rules would have to be laid down which would then go on to have an effect on national legislation. National legislation was something very important but it did not cross borders therefore, in itself it was not sufficient to deal with this problem. The provisions of international agreements were particularly important. The principles underpinning those agreements were very important, in particular the principle of reciprocity. On that basis, States would be able to afford rights to foreign right holders on the same basis as nationals. It believed that the text before the Committee was a sound basis for further discussion.

485. The Delegation of Canada was of the view that discussions on the treatment of foreign rights holders or beneficiaries should take place after the Committee had identified the objectives and the intended beneficiaries. Should future work of this Committee focus on foreign rights holders/beneficiaries, it should be guided by the overarching principle of consistency with international obligations of Member States.

486. The Delegation of China believed that before the unified international instrument was set up various countries could abide by the bilateral treaties or the mutually beneficial principles to provide protection to the foreign rights holders. Only when this international system would be set up, then equal protection to the foreign right holders could be provided according to relevant rules.

487. The Delegation of Mexico considered that Article 14 of WIPO/GRTKF/IC/11/5(c) was a good basis for discussion of this point. Moreover, the principle of “national treatment” should be taken into account during future deliberations on this subject.

488. The Delegation of Nigeria supported the position of the Delegation of Algeria on behalf of the African Group. The documents were a good basis for further work in this area. As far as interim protection for foreign rights holders was concerned it was of the view that rather than work out some interim arrangements, what was needed now was for the international community to begin to think of an international legally binding instrument for this area. As soon as that was done then the foreign rights holders may be sure that their interests would be adequately protected.

489. The Delegation of Libya stated that national treatment was not enough to ensure that the rights of foreign holders be the same as those of other holders. There was a need for this principle of national treatment but rights and freedoms had also to be enforced and respected under international law. Therefore, this treatment was not sufficient. It could also lead to perverse effects and it was important to ensure that this protection be effective and protect the rights of foreign holders particularly in developing countries.

490. The Delegation of Indonesia was of the view that Article 14 of WIPO/GRTKF/IC/11/5(c) was a good basis to discuss this issue. The protection, benefits and advantages available to TK holders and their national legislations that gave effects to this international standards should be available to all eligible TK holders whose nationals or habitual residents of a prescribed country was defined by international obligations or undertaking. Eligible foreign holders of TK should enjoy benefits of protection at the same level as TK holders whose nationals were from the country of protection. A combination of national treatment principle that depended on certain conditions and limitations and mutual

recognition was an acceptable principle. In addition, since this was the last question under the issue of TCEs and TK, the Delegation added that it would work closely in regard to those two issues and would also follow any issues regarding TCEs and TK for further discussions.

491. The Delegation of Switzerland agreed with what had been said by the United States of America and the Canadian delegations. Accordingly, it also considered discussing this issue to be premature at this point in time. Additionally, the fundamental principles of international IP law should apply, in particular the principle of national treatment.

492. The Delegation of South Africa supported the statement of the Delegation of Algeria on behalf of the African Group. It was of the view that it was not premature to discuss these issues owing to the sufficient work that had been undertaken at national and regional levels that now required an international binding instrument. It pointed out to WIPO/GRTKF/IC/11/9 as an excellent piece of historical work of what had been achieved in the Committee. It supported the application of the principle of national treatment and reciprocity. As indicated by the Algerian Delegation regarding the progress made on the discussion on the Substantive Provisions on TK, it noted that the text-based approach had contributed immensely to the emerging general consensus on the substantive issues.

493. The representative of the International Indian Treaty Council (IITC) was concerned about what was covered by national laws, about their rights related to TK. There was an inherent conflict when the rights were subject to national legislation, particularly given the fact that the vast majority of States did not have national legislation which recognized and protected the rights of indigenous peoples. If there was national legislation then the enforcement of the rights was seldom or non-existent. He was therefore in a situation which was difficult to support this Article. However it could continue with the deliberations in future sessions.

494. The representative of the Congolese Association of Young Chefs supported the African Group's position of giving the same rights to national and foreign rights holders. It also supported the idea that same rights should be given to nationals and foreigners because if they were two different scenarios this would provide for two measures. This would mean that under developed countries could have the same rights as developed countries. If there was one right this should mean that it would be possible for everyone to enforce international legislation to provide for the protection of TK. This should allow for all indigenous peoples to benefit from the same rights at an international level. The same applied in the Congo in the misappropriation of the fauna and the savanna. There was destruction of TK because the only resource the Congo had was the forest and the legislation did not allow certain peoples to benefit from this resource. This was why there was a need for protection of TK. It was a question of urgency now.

495. The representative of the Ogiek Peoples Development Program (OPDP) referred back to issue number 9. There was an additional issue that should be dealt with internationally which was formation of a Committee to be receiving the government report and also the shadow reports and/or complaints from governmental organizations. Then in the last question on how the foreign right holder's beneficiary should be treated, because there was too much exploitation and misuse of TK, there should be no equal treatment for now. However, as soon as the binding instrument would be in force then we would have to treat them as other people using it in the community level.

*Decision on agenda item 8: traditional knowledge*

496. The Committee took note of documents WIPO/GRTKF/IC/11/5(a), WIPO/GRTKF/IC/11/5(a) Add., WIPO/GRTKF/IC/11/5(a) Add 2., WIPO/GRTKF/IC/11/5(b), WIPO/GRTKF/IC/11/5(b) Add., WIPO/GRTKF/IC/11/5(c), WIPO/GRTKF/IC/11/6 and WIPO/GRTKF/IC/11/7. The composite decision taken by the Committee on future work on agenda items 7 and 8 is reported under agenda item 10.

## AGENDA ITEM 9: GENETIC RESOURCES

497. The Chair introduced documents WIPO/GRTKF/IC/11/8 (a) and WIPO/GRTKF/IC/11/8 (b).

These documents are summarized in document WIPO/GRTKF/IC/11/9 as follows:

At its tenth session, on the basis of its discussions regarding genetic resources, the proposals made by a number of delegations, document WIPO/GRTKF/IC/8/9, and within the specific mandate of the Committee established by the WIPO General Assembly, the Committee requested the Secretariat to prepare for its consideration at its eleventh session: (i) a document listing options for continuing or further work, including work in the areas of the disclosure requirement and alternative proposals for dealing with the relationship between intellectual property and genetic resources; the interface between the patent system and genetic resources; and the intellectual property aspects of access and benefit-sharing contracts; and (ii) a factual update of international developments relevant to the genetic resources agenda item.

This document provides the material so requested by the Committee. It describes the background of work on IP and genetic resources before the Committee was created, and provides an overview of the Committee's own work. It covers the three clusters of substantive questions which have been identified in the course of this work, namely technical matters concerning (a) defensive protection of genetic resources; (b) disclosure requirements in patent applications for information related to genetic resources used in the claimed invention; and (c) IP issues in mutually agreed terms for the fair and equitable sharing of benefits arising from the use of genetic resources. The document catalogues certain technical measures or activities, which have been identified by Committee participants at past sessions to partially address these issues. It also provides the required factual update of international developments relevant to genetic resources.

*Reports from Intergovernmental Organizations*

498. The representative of the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agricultural Organization (FAO) explained that the Treaty was, along with the CBD, the only international instrument regulating access and benefit-sharing for GR today. He commended the Secretariat of the Committee for the excellent documents prepared under agenda item 9 at the request of the tenth session. They were substantive, thorough and in-depth. Regarding the documents currently under consideration, several of the



options and developments described related closely to recent progress in the implementation of the International Treaty on Plant Genetic Resources. That was due to the advanced implementation stage of the Treaty's Multilateral System on Access and Benefit-sharing and its STMA, or SMTA, which in the future may interface with existing IP information systems, in particular patent information systems, as well as questions on the acquisition, use and exercise of IP rights at different stages of the access and benefit-sharing process under the Treaty. Three particular developments under the Treaty related to the Committee's work were worth mentioning: recent developments on the implementation of the Multilateral System and the operation of the Standard Material Transfer Agreement, or SMTA, which may offer references for the further evolution of the Online Database of Access and Benefit-sharing Contracts and guide contractual practices developed by the Committee, as referenced in Part C under WIPO/GRTKF/IC/11/8(a); recently initiated work to establish an information infrastructure for SMTA Management and for facilitating the reporting obligations of Providers and Recipients of genetic material to the Governing Body and its possible relation to options under Part A; and the interfaces between the Multilateral System of Access and Benefit-sharing of the Treaty and possible disclosure requirements in patent applications, in relation to options under Part B. The International Treaty was the only existing multilateral system which today provided facilitated access to key agricultural GR, that were crucial for global food security, and which had achieved a fully operational, international commercial benefits-sharing mechanism under which the recipient of a plant GR from the Treaty's System had to contribute a fixed percentage of the gross sales from a new commercial product – namely 1.1% - to an international benefit-sharing trust fund under the Treaty, if that product was itself a plant GR for food and agriculture, if it incorporated materials accessed from the Treaty's Multilateral System, and if the availability of that product was restricted for research, training and breeding by others. Through the Funding Strategy of the Treaty these funds would eventually benefit farmers and agricultural priority programs in developing countries and countries with economies in transition. The benefit-sharing mechanism was implemented through the Standard Material Transfer Agreement, or SMTA, of the International Treaty, which was an ABS contract adopted by the Governing Body of the Treaty last year and which implemented the International Treaty through a standard contract. That SMTA was already in use globally by a wide range of stakeholders and the Secretariat was receiving copies thereof according to the reporting obligations of providers and recipients of genetic material. For example, the IARCs of the CGIAR were applying the SMTA, the NARS of several Contracting Parties, as were numerous private and public entities transferring GR of the relevant crops. In the practical implementation of the contract numerous lessons were learned which might be of interest to the option listed in paragraph 3(viii) of WIPO/GRTKF/IC/11/8(a). In particular, there was a body of experience emerging with benefit-sharing options which were related to IPRs and those which were not. The SMTA contained two options for benefit-sharing: the first option, provided for payment to the Treaty's Funding Strategy of 1.1% of the sales of a commercialized product, such as a new crop variety, which incorporated material accessed from the Multilateral System, when there were restrictions such as patent protection, that resulted in the product not being freely available to others for research and breeding. In other words, that benefit-sharing option was linked to the acquisition, use and exercise of certain IP rights. Under the second option, the user of the System could opt for a crop-based payment system, whereby they paid at a lower rate, namely 0.5%, on all their commercialized products of a particular crop, regardless of whether material from the MLS was incorporated in those products, and regardless whether or not they were freely available to others for research and breeding through the exercise of IP or other rights. Thus, the application of the SMTA under the MLS of the Treaty might in the future provide a practical body of experience which could further differentiate the role of IP rights in benefit-sharing for certain material. The second

area, current work on patent information systems might in the future create possible synergies with information systems currently being considered in the context of the implementation of the Treaty's SMTA. In the third area, numerous past documents of the Committee, such as the Technical Study on Disclosure Requirements, had identified that the MLS of the IT would be referenced if any disclosure requirements were to be developed in that context.

499. The representative of the FAO Commission on Genetic Resources for Food and Agriculture described the activities of the Commission since the Tenth Session of the committee. The Commission was an inter-governmental body, currently with 170 countries and the European Community as members. It was the only inter-governmental body specifically dealing with all GR for food and agriculture. The important question of access and benefit-sharing, including the three clusters of substantive questions which had been identified in the course of the committee's work on GR, continued to be of crucial interest for the food and agriculture sector and, of course, in particular, for the FAO Commission on GR for Food and Agriculture. For the Commission and FAO, in general, the overriding objective, including in relation to access and benefit-sharing, was to achieve Millennium Development Goal 1, the *eradication of extreme poverty and hunger*. Access and benefit-sharing rules may directly impact on the availability and utilization of GR for food and agriculture, and may thus have a direct impact on food security and on poverty eradication. FAO members therefore continued to attach much importance to the work of the Commission on Genetic Resources for Food and Agriculture, and to the International Treaty on Plant Genetic Resources which, in fact, was a specific type of an access and benefit-sharing framework. The Commission had held its Eleventh Regular Session from June 11 to 15, 2007. The main outcomes of the meeting had been: The completion of the preparations for the International Technical Conference on Animal Genetic Resources which would be held from September 3 to 7, 2007 in Interlaken, Switzerland. The Conference at which FAO would present the first comprehensive report on *The State of the World's Animal Genetic Resources for Food and Agriculture*, was expected to adopt a *Global Plan of Action for Animal Genetic Resources* which may form the basis for national and international initiatives, including in the field of access and benefit-sharing. The Commission had also adopted a 10-year Multi-Year Programme of Work which covered the Commission's full mandate, *i.e.* all components of biological diversity relevant to food and agriculture. In the context of that program, the Commission had also considered cross-sectorial issues, in particular, access and benefit-sharing; the role of IP rights in relation to GR; and the development of targets and indicators for biodiversity for food and agriculture. With regard to the issue of access and benefit-sharing, the Commission, at its Tenth Regular Session in 2004, had already recommended that "it contribute to further work on access and benefit-sharing, in order to ensure that it move in a direction supportive of the special needs of the agricultural sector, in regard to all components of biological diversity of interest to food and agriculture." At its last Session, in June, the commission had once again emphasized the importance of considering access and benefit-sharing, in relation to all components of biodiversity for food and agriculture and had decided "that work in that field should be an early task within its Multi-year Programme of Work". In fact, the commission had decided to include access and benefit-sharing as a priority in its Multi-year Programme of Work, and had scheduled the consideration of policies and arrangements for access and benefit-sharing for GR for food and agriculture as a major milestone for its next session which would take place in the second half of 2009. As mentioned before, the commission had also recognized the importance of being able to consider questions regarding the role of IP in relation to GR. It had therefore requested that FAO continue to keep under continuous review developments in all relevant forums and report to the commission at each of its regular sessions. The commission had also considered a document on the cooperation between WIPO and FAO

which had been produced by FAO and the International Bureau of WIPO. The commission had welcomed continued collaboration with WIPO and recognized the need to continue collaboration in areas of mutual interest. FAO therefore wished to strengthen and deepen the collaboration, in mutual respect for the respective mandates. It had consistently participated in the meetings of the committee and would continue to offer its help and support with the objective of seeking continued complementarities and synergy between the respective activities, including through mutual reporting in the atmosphere of mutual support.

500. The representative of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations mentioned that the Division serviced the UN General Assembly in its work related to oceans and the law of the sea and acted as the Secretariat of the UN Convention on the Law of the Sea. The representative provided some information on the work of the General Assembly and related bodies relating to marine GR. The UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea facilitated the annual review by the General Assembly of developments in ocean affairs, by suggesting particular issues to be considered by the General Assembly, with an emphasis on identifying areas where coordination and cooperation at the intergovernmental and inter-agency levels should be enhanced. The eighth meeting of the Consultative Process, held from 25 to 29 June 2007, had focused its discussions on the topic “marine GR”. The in-depth consideration of the topic had taken place in a discussion panel as well as in plenary sessions. The report of the Secretary-General on oceans and law of the sea (contained in document A/62/66) and in particular its chapter on marine GR had provided background information for the meeting. The discussions in the panel had been divided into three segments, which had been each launched by panel presentations. The first segment had been launched by scientific presentations aimed at improving an understanding of marine GR, their vulnerability and the services they provide. The second segment had focused on activities related to marine GR in particular experiences in collection and in commercialization. The third segment, which had focused on international cooperation and coordination on issues related to marine GR, had addressed both current activities at the global and regional levels, as well as current and future challenges. Upon the invitation of the Co-Chairpersons of the Consultative Process, Mr. Rama Rao, Deputy Director, at the WIPO Coordination Office in New York, had made a presentation on relevant developments in the context of WIPO. IP rights in relation to marine GR had been further raised in the ensuing discussions and the need for a better understanding of several aspects of IP regimes in relation to marine GR had been highlighted. While the Consultative Process had been unable to reach agreement on the elements to be suggested to the General Assembly for consideration under its agenda item on “Oceans and the law of the sea”, the Co-Chairpersons’ report of the meeting would include possible elements suggested by the Co-Chairpersons representing their understanding of the progress in the consideration of the elements at the conclusion of the eighth meeting of the Process. In particular, the Co-Chairpersons intended to suggest that the General Assembly “recognizes that several aspects of IP regimes could be better understood, and to that end, encourages States to participate in ongoing discussions in appropriate fora, including on disclosure of origin of marine GR, TK, impacts on the sharing of knowledge, and implications for access and benefit-sharing.” It could thus be expected that the General Assembly would further consider the issue of marine GR at its sixty-second session later that year, including the Co-Chairpersons’ elements. The representative informed delegations that marine GR in areas beyond national jurisdiction would be further discussed at the second meeting of the Ad Hoc Open-ended Informal Working Group, established by the General Assembly in resolution 59/24, to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The Working Group would hold its second meeting in the first half of 2008.

501. The representative of UPOV stated that UPOV was an intergovernmental organization, established by the International Convention for the Protection of New Varieties of Plants (the “UPOV Convention”). The UPOV Convention had been adopted on December 2, 1961, and had been revised in 1972, 1978 and 1991. The Mission of UPOV, based on the UPOV Convention, was: “To provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.” As of June 18, 2007, UPOV had 64 members. Furthermore, 18 States and the African Intellectual Property Organization (OAPI) had initiated, with the Council of UPOV, the procedure for becoming members of the Union and almost 50 other States had been in contact with the Office of the Union for assistance in the development of legislation on plant variety protection. The majority of the members of UPOV were developing countries or countries in transition to a market-oriented economy. The members of UPOV shared the opinion that new varieties of plants were a key factor to raise agricultural productivity, to help to improve rural incomes, to respond to the requirements of national and international markets and thereby to contribute to rural and overall economic development. Therefore, they wished to provide their farmers and growers with a broader choice of new and improved varieties by means of an effective system of plant variety protection. The UPOV system continued to be the only internationally harmonized effective *sui generis* system of plant variety protection. The recently published “UPOV Report on the Impact of Plant Variety Protection”, available on the UPOV Website, contained strong evidence that the introduction of the UPOV system and membership of UPOV could open a door to economic development, particularly in the rural sector. An important conclusion was that the operation of the UPOV system and membership of UPOV together provided an effective incentive for plant breeding in many different situations and in various sectors, and resulted in the development of new, improved varieties of benefit for farmers, growers and consumers. UPOV considered that plant breeding was a fundamental aspect of the sustainable use and development of GR. It was of the opinion that access to GR was a key requirement for sustainable and substantial progress in plant breeding. The concept of the “breeder’s exemption” in the UPOV Convention, whereby acts done for the purpose of breeding other varieties are not subject to any restriction, reflected the view of UPOV that the worldwide community of breeders needed access to all forms of breeding material to sustain greatest progress in plant breeding and, thereby, to maximize the use of GR for the benefit of society. UPOV encouraged the Intergovernmental Committee on IP and GR, TK and Folklore to recognize these principles in its work and to ensure that any measures it developed, in particular those relating to access and benefit sharing, prior informed consent and disclosure of origin, were supportive of these principles and, therefore, of the UPOV Convention.

#### *Substantive statements*

502. The Delegation of Peru recalled that Peru was one of the original world centers for agriculture and livestock, and that on its territory there were approximately 20,000 species of plants (ten per cent of the world total), of which 5,509 were endemic (approximately 27 per cent). Peru was the country with the largest number of species of plants with known properties and used by the population (4,400 species), and possessed 182 species of native domestic plants, with hundreds and even thousands of varieties. Peru was a pluriethnic and multicultural country where 14 linguistic families and 72 ethnic groups existed, and according to the latest information, almost one-third of its population was indigenous. That indigenous population lived mostly in the rural area of the country, grouped together in 5,812 rural (Andean) communities and 1,315 native (Amazonian) communities. Peru’s rich biological

and cultural diversity had motivated its interest in protecting and developing activities such as those described in the document. Peru had taken a series of specific measures at the national level to combat biopiracy, including the creation of the National Commission for the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples (hereinafter, the National Commission against Biopiracy). Since its creation in May 2004, it had conducted activities designed to identify and follow up on patent applications filed or patents granted abroad, relating to biological resources from Peru or with collective knowledge of Peruvian indigenous peoples. In the international sphere Peru had submitted various documents both to WIPO and to the World Trade Organization (WTO), providing information on the action taken and difficulties encountered. Likewise, since 1994 Peru had submitted proposals concerning the need to link the patent system to the rules on access to genetic resources and the protection of traditional knowledge within the Convention on Biological Diversity (CBD), WIPO, WTO, etc. In that regard, the idea had been put forward of modifying and adjusting the international patent system to include requirements of disclosure of origin and legal provenance of genetic resources and traditional knowledge. In the document submitted by the Delegation of Peru the process implemented by the Commission to identify potential cases of biopiracy was described, together with the administrative action undertaken against patent applications being processed, which referred to inventions obtained or developed from a resource of Peruvian origin (using in certain cases traditional knowledge of indigenous peoples of Peru), wherein it had been identified that they did not satisfy patentability requirements. Reference was also made to the limitations and difficulties encountered in identifying, processing and analyzing patent applications or patents which involved rights wrongly granted. The main aim of the document was to raise awareness of the fact that the efforts made by countries such as Peru were insufficient. In order to complement the measures that could be taken at the national level, at international level the following were required: an international instrument for the protection of traditional knowledge should be established; the requirement for the applicant of a patent containing directly or indirectly biological resources or traditional knowledge to disclose the source and country of origin of the resource or knowledge used in the invention, as well as proof of legal access to said resource or knowledge, should be included. Similarly, Peru continued to be committed to making known its national experience, together with the various cases in which action had been taken at the international level; it thus considered that it could help other developing countries to make progress with their protection work. At the same time, it was hoped that all those developed countries in which potential cases of biopiracy had been detected would take note of the seriousness of those cases and consider the information provided. However, the commitment of all was necessary for the Committee to complete the work for which it had originally been set up more than seven years previously. The Committee's original mandate had sought to tackle in real terms biopiracy and discover the way in which the patent system, and in general the intellectual property system, could deal with the problem. To date, after several years' work, that aim had been achieved. However, each day new cases arose, as evidenced by the document. Indigenous peoples and the countries in which they lived could no longer – and should no longer – be kept waiting. The Delegation trusted that a constructive spirit would guide the discussions on future work and would quickly allow the decisions that so many hoped for from the Committee to be adopted.

503. The Delegation of Japan held the view that the relationship between the TRIPS Agreement and the CBD contained two problems. One was the erroneous granting of patents and the other was compliance with the CBD provisions on prior informed consent and benefit sharing. Japan had been proposing the one-click database search system because it was positively convinced that the problem of erroneous patent granting could be solved by improving the search environment for prior art concerning GR and related TK as well as by utilizing systems

providing information and the invalidation trial system. On that proposal, they had received some feedback. For example, some were concerned that access by third persons to the proposed search system might encourage information leaking. They had been giving an explanation about the one-click database search system at Committee Sessions and other opportunities. They believed that the explanation they would be giving at the current Session would give the participants a more detailed idea about how the proposed system could help solve these problems. Regarding the structure of the proposed system, according to the proposal, databases should be separately kept by the IP Offices of WIPO Member States. As the figure showed, the search system was constructed of a WIPO portal site which would have links to databases kept by WIPO Member States. WIPO Member States would, then, respectively gather information about GR and related TK and enter such information into their databases. On the side of WIPO, a portal site with a search engine would be created. Through that portal site, one would be able to directly access databases held by other member States. Just by entering a search formula onto the WIPO portal site, an examiner could access databases of other member States through direct links established on the portal site and search information about GR and relating TK. The search result for all the relevant databases would then appear on the display. To prevent access by third persons and as described in Item III of the document at hand, Japan proposed that an IP address authentication system should be introduced. Using that system, the WIPO portal site would be made accessible only to an IP Office which had a specific IP address. That meant that the only users of that site would be IP Offices with a specific IP address. The Advanced Industrial Property Network (AIPN) was a database search system developed by the JPO. The system did not deal with databases for GR but employed a similar IP address authentication system. Based on that system, only IP Offices with an IP address registered with the JPO could access file wrapper information kept by the JPO. To date, the JPO had been successfully blocking any access by a third person. As to the problem of information leakage, there was a risk that information could be leaked from a notification of reasons for refusal which contained information about documents cited by an examiner. Such could be substantially diminished, however, by minimizing parts to be cited from publicly known documents stored in databases. Leakage of unpublished information would not happen because, basically unpublished information was used as reference information and would not be directly cited in a notification of reasons for refusal. About registration of cited documents and other reference materials, when an examiner accessed the WIPO portal site for patent examination and found useful information in databases he searched that could serve as prior art information or other forms of reference information, the WIPO portal site would have a function that would enable the examiner to register the information on the patent applications, for example, an application number cited or referred to when searching for information on the GR. For instance, the examiner could link a code number that specified information on certain GR and the application number of a patent application which involved information on the GR. Then, he could register the data on that link in the WIPO portal site. In the future, necessary data items should be discussed in WIPO. Users of the WIPO portal site would be limited to examination authorities and public organizations that dealt with registration and administration of GR information. That site would not be made open to the public. The one-click search system, therefore, would not encourage unfair use of TK.

504. The Delegation of Switzerland viewed all three agenda items of the Committee -that was, GR, TK, and TCEs - to be on an equal footing. The work of the Committee on GR should thus be intensified, and a proper balance should be found when dealing with these three agenda items. Option (i) listed in paragraph 3 of WIPO/GRTKF/11/8(a) dealt with disclosure requirements. In that regard, the delegation welcomed the opportunity to present the proposals Switzerland had submitted WIPO/GRTKF/IC/11/10 on the disclosure of the source of GR and TK in patent applications. Switzerland, not “demandeur” with regard to the disclosure issue, had submitted its proposals because it recognized the importance of

transparency with regard to access and benefit sharing. Three elements of the Swiss proposals were first, the proposals explicitly enabled the national legislator to require patent applicants to declare the source of GR and of TK in patent applications [see the proposed new Rule 51bis.1(g)]. That was to be achieved through an amendment of the Regulations under WIPO's PCT. That optional approach would not oblige developing countries, especially the least developed countries, to amend their national laws. In those national patent systems choosing to require the disclosure of the source, it was *mandatory* for patent applicants to fulfill that requirement. Non-fulfillment could carry civil and criminal sanctions. Second, the term "source" was chosen in order to ensure consistency with the three international agreements on access and benefit sharing: namely the CBD, the Bonn Guidelines and the International Treaty of FAO. And third, to further strengthen the effectiveness of the proposed measure, an on-line list of government agencies competent to receive information about the declaration of the source was proposed. Patent offices which received patent applications containing a declaration of the source should inform the competent government agency about that declaration. These proposals presented a viable and simple way forward. The proposals could be implemented in due time and required only minimal amendments to the PCT Regulations.

505. The Delegation of Portugal, on behalf of the European Community and its twenty seven Member States, looked forward to participating in discussions regarding the relationship between IP and GR and would like to see the intergovernmental committee make progress in that field. It acknowledged efforts of the Secretariat in the preparation of WIPO/GRTKT/IC/11/8 (a) that contained the list of options for further work on GR, and WIPO/GRTKF/IC/11/8 (b), related to a factual update of international developments relevant to the GR agenda. These documents provided the material requested by the committee in previous sessions, covering the three clusters of substantive questions, which had been identified in the course of those sessions and constituted a good basis for continuing the work in that area. The EC had tabled several proposals on GR and the disclosure requirement, contained in WIPO/GRTKF/IC/8/11. The EC had already had the opportunity to express its preference for a binding and mandatory disclosure requirement that should be applied to all patent applications. Amendment of the Patent Law Treaty (PLT), the Patent Cooperation Treaty (PCT) and, as the case may be, regional agreements such as the EPC would thus be necessary. Regarding that last requirement, the applicant should declare the country of origin of GR if he was aware of it. If the country of origin was unknown, the applicant should declare the source of the specific GR to which the inventor had had physical access and which was still known to him. There were good reasons for an obligation to disclose that an invention was directly based on TK associated with the use of GR. Consequently, the applicant should declare the specific source of TK that was associated with GR if he was aware that the invention was directly based on such TK. However, there were concerns about the possibly unclear scope of the term TK. In order to achieve the necessary legal certainty, a further in-depth discussion of the concept of TK was necessary. The way the patent applicant should submit the relevant information to the patent offices should be standardized and organized in a non-bureaucratic and cost-efficient manner. In that regard, the disclosure of the information should be effected by the inclusion of questions to be answered in a standard patent application form. If the applicant failed or refused to disclose information on the country of origin or source, in cases where he claimed that the invention was directly based on GR and/or associated TK, the application should not be further processed and the applicant should be informed of that consequence. Eventual sanctions outside the field of patent law should be imposed on the applicant or holder when incomplete or incorrect information had been disclosed. However, the character and the level of these sanctions had to be determined by the individual Contracting State. In order to make the disclosure requirement an effective

incentive to comply with access and benefit-sharing rules, the introduction of a simple notification procedure to be followed by the patent offices was an indispensable measure. It would be adequate to identify in particular the Clearing House Mechanism of the CBD as the central body to which the patent offices should send the information available from the declarations on disclosure. As a conclusion, the consideration of the issue on GR was an important task for the Committee and that the proposals were entitled to an in-depth discussion, alongside the proposals of other members.

506. The Secretariat responded to the proposal of the Delegation of Japan by way of providing some information on the evolution of the portal which had been established on the WIPO website in regard to disclosed TK and information on GR and to mention some of the developments in that context. They related rather directly to some of the proposals of the Delegation of Japan. Concerning the structure the Delegation of Japan had suggested that separate databases might be kept by each industrial property office but emphasized that there would be a capacity for a unified search across as it were a distributed database and WIPO was certainly following that methodology. It left the choice to member States or to proprietors of databases as to whether they wished to give WIPO the data as it were or rather establish a linkage to their data via a unified system. Certain things that WIPO needed to consider certainly in the future were first of all technical assistance. If, as under the Japanese proposal a separate database was to be maintained by every office then technical assistance was needed to the offices of developing countries that did not have the capacity to maintain such a database. The possibility of a WIPO standard about data structures should be considered. A standard for a data structure had been developed within the committee in the past, but it had never found its way through to another committee of WIPO known as the Standards and Documentation Working Group which was responsible for establishing the WIPO industrial property standards many of which related to data structures. Concerning the question of access by third parties, the evolution of its own portal was slightly different from the proposal that had been put by the Delegation of Japan. It certainly encompassed it, but Japan's proposal was for a database that would be available for the purposes of the search and examination of patent applications in particular and would be available to industrial property offices, whereas WIPO portal would be available also to the public. There was an increasing tendency for various members of the public to examine patent and there were even experiments with the use of, for example, peer patent review of patent applications. Public participation in the patent system was certainly a trend and should be encouraged. Certain information in the database should not be made available to the public and WIPO had conceived of the possibility of differential access to the database, namely that certain parts of the database would be available to all members of the public and other parts of the database which indicated by the proprietor of the database originally as being sensitive or confidential would only be available subject to the specific terms that were set by the proprietor of the data in the first place. WIPO had had that discussion with certain member States who were the custodians of very important databases in that area and did conceive that it would be a question of coming to an agreement with every single database proprietor as it were. The evolution of the portal and certainly more things would be visible about that in the coming six months. It would be covering not just information about GR but also information about TK, disclosed TK in the case of publicly available data or guarded confidential TK where a proprietor had indicated that it was prepared to make it available for the purposes of a limited access to a class of persons such as industrial property offices for the unique purpose of search and examination of patent applications. While the WIPO database would cover a broader area of course there was always the possibility of a specialized search in particular areas or a search of the whole of the database or a search of the whole of the database and associated patent documentation.



507. The representative of the fifteen International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) expressed their appreciation of the efforts of the committee to put forward and evaluate possible options for defensive protection of GR against the granting of illicit IP titles. That issue was particularly close the heart of the CGIAR Centres whose objective was to produce goods that were openly accessible, with particular emphasis on the poor in developing countries. In May 2003 the CGIAR Centres System-wide Information Network for Genetic Resources (SINGER) had been formally linked to the WIPO On-line Portal of Databases and Registries Concerning GR. Details of SINGER and the making of that link were included in WIPO/GRTKF/IC/5/6. It was important to note that SINGER was being significantly upgraded and linked with other databases as part of the global effort to develop the Global Information System envisaged under the International Treaty on Plant Genetic Resources for Food and Agriculture. The CGIAR Centres were actively pursuing other means of defensive publication. In 2005, the International Crop Research Institute for the Semi-Arid Tropics (ICRISAT) had signed a Memorandum of Agreement with the European Patent Office allowing ICRISAT to include its publications as part of the Non-Patent Literature of the European Patent Office. Thanks to that agreement, information and knowledge generated by ICRISAT was being provided to European patent examiners for consultation in prior art searches. Furthermore because of information sharing arrangements of the EPO, the same literature would be included in prior art searches of the US Patent and Trademark Office and the Japanese Patent Office. About 65 documents produced by ICRISAT had been consulted in the prior art searches since the agreement with the European Patent Office had been signed. With ICRISAT, the Central Advisory Service on IP of the CGIAR (CAS-IP) had produced a guide detailing how other CGIAR Centres or public institutions could make similar agreements with the European Patent Office. In May the current year, the Genetic Resources Policy Committee of the CGIAR had recommended that other International Agriculture Research Centres explore making such agreements.

508. The Delegation of the Islamic Republic of Iran supported the Delegations of Algeria and South Africa in general. The Committee may concentrate its efforts towards concerted and consolidated international support for GRTKF, rather than dealing with each issue individually. The subjects were closely interwoven and interrelated and an integrated approach naturally fell within the mandate of the Committee.

509. The Delegation of Algeria on behalf of the African Group gave some elements that had to form the basis of the future work on GR. It took note of the documentation submitted by the Secretariat which included different proposals from member States. These proposals contained useful suggestions for inclusion in the development of future work on GR and associated TK. The following elements should form the basis of future work on GR: GR were closely intertwined with TK and therefore had an international dimension. There was critical need for inclusion of the requirement of disclosure of origin of GR and associated TK in any patent application where GR and associated TK had been used. The Committee had to accelerate its work in developing a sui generis framework for GR and associated TK based on the principles of disclosure of origin, prior informed consent and benefit sharing as a minimum requirement. IP played a critical role in granting the right of local and indigenous communities to share the benefit arising from the use of GR and associated TK. The work done on GR in the Committee WIPO had to be complementary and mutually supportive of the work in other fora such as the WTO, particularly amendment of Article 27/3(b) and the CBD on International Regime on Access and Benefit Sharing Areas. The delegation took note of the work being done in the SPLT.

510. The Delegation of the United States of America sustained continued work of the Committee in the area of GR. As was noted at the founding of the Committee, GR, TK and folklore were integrally related and could not be separated. Therefore, the Committee was uniquely suited to work on these matters and to resolve differences among members that exist on these issues. The delegation appreciated the explanations and comments provided by various members of the committee. These comments helped to gain a deeper understanding of concerns and positions raised in the committee and also confirmed the wide divergence of views among members existing in the committee. In particular, some members had proposed new patent disclosure requirements relating to disclosure of origin or source or GR used in patent applications, as well as disclosure of evidence of prior informed consent and evidence of equitable benefit-sharing. These newly proposed disclosure requirements had the objective of preventing what was referred to as “misappropriation.” In light of the comments made, and despite the wide divergence of views among members, it appeared that the Committee Members generally shared the objectives of: providing for prior-informed consent, providing for equitable benefit-sharing and preventing erroneously granted patents. However, the proposals for new patent disclosure requirements would not achieve any of these objectives. Instead, these proposals would increase litigation, create a disincentive for innovation and reduce any benefits that may be shared. The delegation had explained that in great detail in its previous submission to WIPO in the discussions related to responding to an inquiry from the CBD which could be found in WIPO/IP/GR/05/INF/1. In that light, it opposed these proposals. These proposals would not effectively promote transparency with respect to access to GR and equitable benefit sharing, as many GR were commercialized without being improved upon so as to rise to the level of an “invention.” Furthermore, many unpatented inventions were marketed, and many patented inventions were never brought to market. Patent laws were not the appropriate means to address matters of misappropriation of GR and TK, or other matters of “misconduct.” The delegation urged, instead, the creation of effective national systems of access and benefit sharing with respect to GR and TK, which were independent from IP laws. A national system may incorporate, for example, regulations that required the use of collection agreements to condition access to GR or TK on appropriate compensation. Compensation may include monetary and non-monetary benefits, such as regular reporting requirements. That type of system was the most effective way to ensure that benefits were shared with respect to inventions developed from GR or TK. To that end, the United States of America had previously submitted a document to the Committee, which detailed an access and benefit sharing regime currently in place at U.S. National Parks and looked forward to continued exchanges of national practices in that forum. The delegation shared the general concern that had been raised by many other delegations, with respect to preventing erroneously granted patents and ensuring that as much prior art was discovered as was possible for any given case. In that light, it supported further elaboration in the Committee of the proposal made by Japan in WIPO/GRTKF/IC/9/13. The document explained in great detail reasons, contrary to the assertions of proponents of new disclosure requirements, that proposed disclosure requirements would not achieve the objective of preventing erroneous patents. Instead, Japan suggested more direct proposals relating to a new “one-stop-research” database for TK on a global scale. The United States of America supported further elaboration of the proposal by Japan as a way forward to address concerns raised in a direct and pragmatic fashion and looked forward to consideration of the proposal by the Committee. Any disclosure requirement in the patent laws would likely serve to delay or create uncertainties in patent rights from which benefits might arise. The result would be to reduce incentives for innovation by undermining the patent system. Without patent rights, there would be little or no benefits to share. A fact-based approach, considering specific examples or national experiences, could best achieve consensus. The TRIPS Council had

already engaged in some of these discussions. In that forum, for example, a significant discussion had taken place with regard to an instance of perceived misappropriation in the case of a U.S. patent for turmeric. The analysis by the TRIPS Council, in the view of the United States of America, clearly confirmed the view that disclosure requirements were not an appropriate solution to the concerns raised. Specific cases or examples of perceived instances of misappropriation should be discussed in the Committee in order to clarify differences and, hopefully, lead to bridging these differences through the process. The United States of America would actively pursue the discussions in the Committee with the aim of achieving consensus that addresses the concerns raised by WIPO Members with respect to the relationship of IP and GR while avoiding the negative consequences inherent in proposed disclosure requirements.

511. The Delegation of South Africa associated itself with the statement by the Delegation of Algeria on behalf of the African Group. It thanked the Secretariat for the useful documents, WIPO/GRTKF/IC/11/8 (a) and (b) on GR and take note of the various options for continuing further work. South Africa attached great importance to the preservation, conservation, maintenance and protection of TK, TCEs and EoF and GR. The Committee had a definitive mandate to consider the international dimension of GR. As clearly articulated by Article A (j) of the CBD, the intrinsic link between GR and TK needed to be reinforced. South Africa supported the disclosure requirement in the patent application of IP rights where the subject matter of application concerned or made use of GR or associated TK. Furthermore South Africa supported acceleration of the work in developing *sui generis* international framework for protection of GR and associated TK within minimum requirement of disclosure of origin, prior informed consent and mutually agreed terms on benefit sharing. IP rights had a role to play in granting rights to local and indigenous communities in sharing of the benefits arising from the use of GR and associated TK. The work of GR within the Committee needed to complement and support the work of the CBD on the international regime on access and benefit sharing and the FAO international treaty on plant and genetic resources for food and agriculture. South Africa also supported the amendment of WTO TRIPS Article 27 3(b). South Africa recognized that the national legal and institutional frameworks were important in the regulation of access to GR and sharing of benefit arising from their use. However, the use of GR and associated benefit was an international commercially orientated system that could not be effectively implemented by the source country alone. Given the international dimension of the use of GR and associated TK and the challenges faced by many countries in implementing relevant legislation on the protection of GR and associated TK, an international legally binding instrument would set general norms and standards, address national gaps and complement national efforts in regulating the use of GR and ensure fair and equitable sharing of benefits arising from the use of GR. At national level, GR had an important role in contributing to its social economic development. As a party to the CBD, South Africa had developed a national environment management biodiversity Act. Chapter 6 of the Act dealt specifically with bioprospecting and access and benefit-sharing and provided a framework for the regulation of access and benefit sharing in South Africa. The Act also recognized the protection of indigenous knowledge relating to the use of GR. The Patent Amendment Act of 2005 made provision to safeguard indigenous knowledge and its uses. An international regime would complement national effort to ensure clear enforceable procedures for both provider and user countries and ensure protection of GR and related indigenous knowledge systems and equitable sharing of benefits particularly in the area of technology transfer, research and capacity building. South Africa as a country rich in biological resources and a member of like minded mega biodiverse countries strongly called for the development of a legally binding international instrument.

512. The Delegation of the Islamic Republic of Iran supported the statements by Algeria on behalf of the African Group and South Africa. In discussing GR, the Committee may concentrate its efforts toward concerted and consolidated international support for GR, TK and Folklore, rather than dealing with each issue individually. The subjects were so closely interwoven and interrelated and an integrated approach toward them naturally fell within the mandate of the Committee.

513. The Delegation of Canada stated that building upon the work already done by the Committee and mounting international evidence that there was a need for greater expert input and analysis of IP-issues related to GR and disclosure, Canada encouraged the committee to make reasonable, technical progress in the area of GR. WIPO/GRTKF/IC/11/8 (a) and WIPO/GRTKF/IC/11/8 (b), were a concrete first step in deepening the understanding of issues related to GR in the committee. WIPO/GRTKF/IC/11/8 (a) listed 10 options for continuing or furthering the work on GR. Canada would welcome clarifications as to their meaning and implications. The delegation expressed concerns that some of these options assumed that there were clear linkages between the patent system and access and benefit sharing. It was too early to say that such linkages existed in the present discussions and would encourage a fact-based approach favoring the sharing of national experiences in relation to the protection of GR, as such an approach could deepen the understanding of the issue. Time and consideration should be given to a full scoping of the issue before proceeding further. Canada had a strong interest in learning about the effectiveness of disclosure mechanisms in countries that already had such procedures as well as alternative models. That process could be one method of ensuring that the committee's work remained within the terms of its mandate on GR in a constructive and productive fashion. Canada believed that the committee should work to identify potential areas for future work with respect to GR. It agreed with the US and supported a further examination of issues relating to a disclosure requirement, provided that it also captured alternative proposals for dealing with the relationship between IP and GR. Information contained in WIPO/GRTKF/Q.5 could be useful in assessing current patent office practices with respect to TK associated with GR. The delegation also supported the consideration of options for the expanded use, scope and accessibility of the Online Database of IP clauses in mutually agreed terms of access and equitable benefit sharing, as well as the development of case studies in the field of GR, including those involving licensing or contractual practices. Assuming databases initiatives could fall under option (vi), the delegation saw merit in discussing further the Japanese database proposal set out in WIPO/GRTKF/IC/9/13 and further explained in WIPO/GRTKF/IC/11/11 as a potential tool for patent examiners to improve the quality of their searches involving GR.

514. The Delegation of Norway pointed out that an obligation to disclose the origin of GR had been described as the most effective way of ensuring compliance with the CBD and provisions on access and benefit sharing and that Norway agreed with that. Similar arguments were appropriate in respect of TK. Disclosure requirements in national patent applications in respect of GR had been introduced in national legislation in Norway which had entered into force 1<sup>st</sup> of February 2004. So the number of patent applications where the disclosure requirement had been relevant - is not great, in fact it was a rather small number. However, Norway had at that point in time some experiences that it would like to share with the committee. There were 13 applications that had been identified and applicants had provided information regarding country of origin or supplier country in many of the applications; however a number of the applications had been withdrawn due to other circumstances. Of the 13 applications one patent had been granted, so far and information had been disclosed during the examination upon invitation from the Norwegian Patent Office.

The topic of disclosure was being discussed in a number of international forums including the WTO and different committees in the WIPO and a number of different options were on the table. Thus, the outcome of the committee's work would be part of a larger international framework dealing with issues on the interface between IP and GR and TK, and also TCEs. Norway had in previous meetings welcomed the proposal of EU in respect of the relevant WIPO treaties, and considered it to be an important proposal. Norway had proposed in the WTO an amendment of the TRIPS agreement to introduce a mandatory obligation to disclose the origin of GR and TK in patent applications, cf. WIPO/GRTKF/IC/10/INF/2 p. 3-5. Norway was of the view that also the relevant treaties under the auspices of WIPO, namely the Patent Cooperation Treaty and the Patent Law Treaty should be amended in a similar manner, and that such amendments should be considered by the Committee. It was important that the treaties, including the CBD, were mutually supportive. Key elements of the proposal were a mandatory obligation to disclose the origin of GR and TK in patent applications; patent applications should not be processed unless the required information had been submitted. However, non-compliance with the disclosure obligation that was discovered post-grant should not affect the validity of the patent. That obligation should apply to all patent applications (international, regional and national). Before the lunch break, the representative from the Treaty on plant genetic resources for food and agriculture had spoken of the need to have a reference to the multilateral system of the Treaty included in future disclosure requirements. Norway, in response to some questions from Switzerland, had henceforth specified its proposal in order to accommodate the multilateral system. The Norwegian proposal for a mandatory disclosure requirement for GR and TK in patent applications should also be seen in context with the Norwegian proposal for TK protection. Both these proposals formed elements of a necessary framework at the international level to further conservation, sustainable use and ensure prior informed consent and equitable benefit-sharing for GR and TK. In regard of the list of options of further work contained in the document provided by the secretariat, Norway welcomed the list and could support future work based on it, with a preference for priority given in particular to option (i), the development of disclosure requirements.

515. The Delegation of China expressed its appreciation for the documents prepared by the Secretariat on the protection of GR, noting that various options were proposed in those documents, each based on different considerations and with different focuses. The delegation believed that the incorporation in the patent system of provisions on the disclosure of source requirement would further improve the existing IP system, and would also be conducive to safeguarding national sovereignty over GR, ensuring prior informed consent and fair sharing of benefits, and achieving the long-term objectives of protecting biological diversity. Albeit not the only means for the protection of GR, the IP system had an irreplaceable role to play and could work in coordination with other means and approaches to ensure effective protection. The delegation concluded that although several international fora, including CBD, WTO - TRIPS, FAO and WIPO, were all involved in the deliberations on the protection of GR, they were doing so with different priorities and from different perspectives, and that the Committee should therefore play a unique role in that regard.

516. The Delegation of Pakistan asserted that the Committee had been discussing for seven years, but there was only modest progress. WIPO should take the lead role in discussing substantive issues including model provisions for GR. The Committee should work towards a mandatory disclosure requirement in patent applications. There was a need for a sui generis framework on the disclosure of origin, prior informed consent and benefit sharing on mutually agreed terms. Databases were a good suggestion in principle, but the level of development of

different countries should be kept in mind. The Committee should work first on the mandatory disclosure requirement leaving the sharing of databases to a later stage.

517. The Delegation of Senegal thanked the Secretariat for all the documents provided. It supported the statement made by Algeria on behalf of the African Group and noted the statements made by the Representatives of the Food and Agriculture Organization (FAO) on behalf of the Governing Body of the International Treaty, and of the Commission on Genetic Resources for Food and Agriculture, in particular on the multilateral system of facilitated access. However, at the same time the international rules, being discussed within the CBD, on access to genetic resources and associated traditional knowledge, and the sharing of monetary and non-monetary benefits resulting from their use, was part of the requirement of the disclosure of source in applications for legal protection of a genetic resource as an additional measure. In addition to the information requested previously, that requirement would, at the same time, allow all the information relating to the genetic resource in an application for protection to be disclosed. The amendment requesting additional information would result in the provision of an effective and transparent follow-up for the use of genetic resources allowing the effective implementation of the principle of benefit sharing, with which everyone agreed, and provide a fuller examination of prior art by intellectual property offices including patent offices.

518. The Delegation of Kenya expressed its gratitude to the Secretariat for the excellent documentation on GR. Kenya was keen to see the conclusion of an international framework to safeguard GR. Kenya had now enacted access and benefit-sharing regulations and was developing comprehensive laws on the protection, management and regulation of GR and associated TK. Kenya's desire and commitment to advance discussions in GR was born of the fact that the country had been victim of biopiracy. To give but a few examples, Bayer pharmaceutical company had developed a diabetes drug from a bacteria discovered in a Kenyan dam. In addition, an American company, Genencor, had collected micro-organisms called extremophiles from one of Kenya's Soda lakes which had been used to develop a product that gives Jeans a Stonewash appearance. In both cases, no benefit accrued to the country despite the high earnings enjoyed by these companies. Genencor had persistently denied any wrongdoing. An international response to issues of GR was essential and timely. The delegation supported mandatory disclosure of origin of GR in patent applications coupled with evidence of prior informed consent.

519. The Delegation of Brazil emphasized that a disclosure requirement for GR and associated TK was important for Brazil as an item of international agenda per se. The issue was being dealt with in several fora and in different negotiating or multilateral contexts. It was important to mention recent developments in the WTO and that information was lacking in WIPO/GRTKF/IC/11/8(b), the factual update of international developments. There had been some very interesting developments in the TRIPS Council, for instance, and in of course in informal discussions in the Uruguay and the Doha round. Of course informal discussions in the Doha round might not be ready for adequate reflection in that document, but TRIPS Council discussions on the issue certainly were ripe for reflection. And among these developments, one of great importance is the proposed amendment to TRIPS Article 29, Article 29bis in fact. Some delegates in the Committee were referring to Article 27 3(b), but in fact there was a proposal for an amendment to TRIPS to include an Article 29bis that would include a mandatory disclosure requirement on GR and associated TK. While in the last TRIPS Council, that particular proposal which had been already co-sponsored by 14 WTO members, had won over the co-sponsorship of all of the African Group, and that should be stated in the document as a very important factual update of the situation. There

were around 41, the number of African Group members that were members of the WTO and were present on the TRIPS Council. There had also been a statement on behalf of the LDCs in support of the amendment. The LDCs had not decided to co-sponsor it as such but they had decided to support it, which represented an additional number of countries. And one could add that, for example, Europe could live with some kind of a disclosure requirement. The European Union or Commission had not proposed it as in the form of an amendment to TRIPS but it had circulated documents in WIPO indicating that it could support a mandatory disclosure requirement in an international treaty or multilateral framework as such. Norway explicitly supported an amendment to TRIPS with that purpose. The Swiss proposal that did not refer to a mandatory requirement but it did refer to an agreement, an amendment to existing multilateral treaties that would lead to explicitly enabling countries to adopt a disclosure requirement. One would come to the conclusion that there was a majority of members both in WIPO and at the WTO that in one way or the other perhaps to slightly different degrees did support an international multilateral solution for a disclosure requirement to be adopted. The delegation did not endorse the view that the Committee faced a wide divergence of views on that issue. There might be a few countries that opposed, but there was a clear majority that supported some form of multilateral action to adopt a requirement of that kind. Recent developments had occurred mostly in the WTO context. Of course there had been also some developments in the informal negotiations on the Doha Round and there was a linkage under the same negotiating mandate between the issues of the disclosure requirement on the one hand and extension for GI protection on the other hand. Both these issues went hand in hand in the Doha Round and in the recent informal consultations and they were being discussed on the basis of parallelism between the two. The Committee was also an interesting framework for a possible advancement of the cause for a disclosure requirement. For Brazil, the issue was mutual supportiveness between two international treaty systems particularly the CBD and TRIPS. The delegation shared certain objectives that other members had put forth such as ensuring greater transparency and traceability of patenting activity related to GR and associated TK on a global basis. Thus it underlined that the nature of the mandate of the Committee that was to focus on the international dimension of the problem not the national dimensions. When there was a problem of biopiracy or misappropriation or erroneously granted patents, these problems had an inherent international dimension that needed to be addressed through an international solution. Therefore it was not enough for each member simply to present their national solutions or come to the Committee to have fact-based discussions that led back to each of the national context. Because as with piracy in general, it was a global phenomenon and the issue was that a lot of the biopirates removed the resources from one place, from one country, from one national jurisdiction with the associated TK and they would use the attempt to exploit them through patenting activities and other jurisdictions. There was a movement of these resources beyond cross borders that needed an international solution. Certain proposals were circulated in WIPO, the Swiss proposal for example, that suggested that a possible solution could be through an amendment of the PCT and the PLT. The Swiss proposal contained several interesting elements from the technical point of view. The greatest difference with the Swiss proposal was that it was not mandatory. But beyond that a lot of the technical solutions contained in the Swiss proposal for the PCT and PLT seemed well thought out, they appeared to be workable and they promoted the transparency and traceability. There was an interesting linkage with the disclosure requirement and with the issue of creating some form of international clearing house of information. Information that could be deposited in the form of a database on patents where the patentee had disclosed information on GR associated with that particular patent. The delegation appreciated in the Swiss proposal that that sort of international clearing house mechanism for information on patenting activity relating to inventions that were associated with GR was tied into a disclosure requirement. It was not

something that was presented in the air as the Japanese proposal for a database on TK. That one was presented as a stand alone solution, there was no regulation, no link with the disclosure requirement, there were no additional responsibilities transferred to the patentees. It only promoted further international exposure of existing TK. Brazil could not agree to pursue that sort of solution at that point. Any kind of database on TK that was not linked to the adoption of a disclosure requirement would be a non starter. Even if the Committee discussed and decided to proceed further on the basis of said proposals as the Swiss proposal or ideas contained in the proposals by the EC and Norway, it could be useful but it would be without prejudice to ongoing negotiations at the WTO. It agreed with Pakistan that very little progress had been made in the past during the last six years of Committee activities on that issue and if members were serious about pursuing any sort of concrete action in that area in the Committee, the Committee would certainly need a shot of adrenalin. It had been basically a talk shop; countries just repeated the traditional positions. Some members repeated positions they had stated more than five years ago. It was interesting to hear them again but that would not help make any concrete progress. It was not a demonstration of interest in a concrete outcome on a reasonably short term basis. The disclosure requirement had to be mandatory. Mandatory was a relative term in WIPO because even if one amended existing treaties or if one adopted a stand alone solution, not all members of WIPO were necessarily forced or obliged to subscribe to these particular amendments or multilateral legal solutions. Certain members could decide to take part in these agreements and these treaties whereas others remained outside so the mandatory nature would apply only to those members that agreed to take part in whatever solution for the disclosure requirement. The word mandatory seemed to frighten certain delegations, but it should not be the case because WIPO had an inbuilt flexibility in the way it dealt with international norm setting. Perhaps the International Bureau could give some support in that as well. One idea was to further explore the possibility of introducing some changes into the international patent classification treaty to have some kind of category that was more clearly a reflection of a patent that was related to GR. There had been a growing patenting activity worldwide in the biotechnology field. But the way the classification systems worked it was not very clear as to where the group of patents that were related or could be related to GR were exactly. They were very difficult to identify because the system had its own historical rationale and perhaps it could be improved in that way. It would also be helpful for the objectives of transparency and traceability and even for monitoring patenting activities statistically to see how much the private sector or those who were rights holders or who wished to be rights holders, what was exactly the dimension of that movement towards patenting inventions that could have some relationship with GR and associated TK. That would be important information from the legal point of view and from an economic and commercial point of view as well. But the way the IPC was currently designed did not help very much to find that out. A lot of members were referring to the idea of a legally binding instrument also when they referred to GR and the disclosure requirement. Concepts were being mixed up; the idea of a legally binding treaty made sense when speaking of a treaty that was broader and that would exist for the sole purpose of protecting TK or TCEs per se. But the issue of disclosure of GR did not necessarily require a legally binding treaty. Additionally Brazil as one of the proponents of disclosure requirement in the WTO through a TRIPS Amendment had stated several times that it did not seek to arrive at an additional substantive patentability requirement through these proposals. It would be a patentability requirement, non substantive in nature. Therefore being non substantive had implications with regards, for example, to sanctions and legal affects on granted patents. It would be important for those members who may oppose the idea of disclosure requirement because they thought it would apply in the same nature as a substantive patentability requirement or that it might not be compliant with the requirements that TRIPS and other treaties allowed for currently. The delegation would be particularly in favor of finding a way



to make a real forward movement in that issue. But if delegations were just going to repeat positions then the Committee should simply forget about a disclosure requirement and talk about something else.

520. The Delegation of Australia considered it was crucial that the committee continued to work on the full range of issues under its mandate, on an equal footing, including GR. That was an important part of the committee's work that had not received as much attention as it deserved. WIPO more broadly was well-placed to undertake work that would contribute in a meaningful way to the body of knowledge that existed on issues pertaining to IP and GR. The work that had been undertaken to date on GR had been very useful and had had very practical outcomes such as, e.g., the improvement of the quality of patent examination through the extension of minimum documentation related to TK and GR required for patent search and examining authorities under the Patent Cooperation Treaty (PCT). WIPO was the pre-eminent body dealing with IP matters and was in a unique position to carry out detailed work on GR issues as they relate to IP. The delegation would like to see further work aimed at practical outcomes developed by the committee, particularly those that developed the capacity of holders of GR and TK to develop contracts and agreements regarding access to GR that met their particular needs and aspirations. Australia was particularly interested in further development of and consideration of options for the expanded use, scope and accessibility of the Online Database of IP clauses on mutually agreed terms for access and equitable benefit sharing as indicated in option (viii), paragraph 3 of WIPO/GRTKF/IC/11/8 (a). The Australian Department of the Environment and Water Resources was currently developing model contracts to support Australia's implementation of Access and Benefits Sharing arrangements under the CBD and these may be appropriate for inclusion on the WIPO database. The delegation urged consideration of options for stakeholder consultations on and further elaboration of the draft guidelines for contractual practices contained in the Annex of WIPO/GRTKF/IC/7/9. That was referred to in option (ix). It also supported the development of case studies, describing licensing practices in the field of GR based on concepts of open source licensing as indicated in option (x). It supported the suggestions by the United States of America and Canada that that should be broadened to include all licensing practices, not only copyright related licensing. The delegation supported deletion of the words after the word 'resources'. It thanked the Delegation of Japan for the introduction of its proposal for a 'one-click' database search system to assist examiners carry out more efficient prior art searches concerned with GR and related TK. It also thanked the Secretariat for its clarification of the WIPO portal. It supported further development of the proposal under option (vi). It could also support option (vii) if the recommendations or guidelines for search and examination procedures for patent applications were in the form of non-binding guidelines. Australia had some reservations about some of the draft guidelines and would like to provide further written comments on them. Because there was no consensus on an international multilateral solution for a disclosure requirement to be adopted, the delegation preferred not to focus work in WIPO on disclosure proposals per se but would like to see some further ground work carried out on the perceived problems with the current system in order to get a better grasp on the scope and actual impact of the problem that were dealt with and its relationship to the IP system. It would, however, support the US and Canada regarding work on option (ii) with the amendment to that proposal suggested by the United States of America. At the last session of the Committee the delegation had described in some detail the implementation of the national ABS system in Australia and that provided a good case study of transparent, traceable and effective access to GR in a manner consistent with, e.g., the requirements of the CBD. It would also be interested to hear further information on the Delegation of Brazil's proposal to improve the IPC to better identify and trace patents related to GR.

521. The Delegation of India thanked the Secretariat for the preparation of comprehensive documentation on the issue of protection of GR and listing of various options in WIPO/GRTKF/IC/11/8(a). It was only fair and equitable to have a mandatory disclosure requirement on use of GR and/or associated TK in patent applications. A harmonious interpretation of the CBD and the TRIPS Agreement would invariably support that view. India was, therefore, in favor of the first option under paragraph 3 of the document mentioned above, i.e. "Development of a Mandatory Disclosure Requirement such as has been tabled in the Committee". The delegation took note of the proposals made by the European Community, Switzerland and Norway, in respect of disclosure and the modality to deal with the inadequate/non-compliance or willful misrepresentation. The disclosure requirement should be mandatory and its non-compliance should have a direct impact on consideration of the patent application, and if the patent had been granted, affect its continued validity. As elaborated earlier, India had moved an amendment of the TRIPS Agreement in the WTO and was synergizing efforts with the progressively increasing number of member States to secure a mandatory requirement on disclosure of the GR and/or associated TK in patent applications with serious consequences on patent validity, in case of non-compliance. It shared the frustration of a large number of member States at the lack of substantial progress on that issue and would like to see a more structured meaningful and substantive discussion for a positive outcome in a time-bound manner. The Committee had to be more than a mere talking shop. That had gone on for far too long already. India had tried to protect its GR and/or associated TK by enactment of the Biological Diversity Act 2002 and the Patents Amendment Act 2005. The Indian Patents Act, as amended in 2005, in Section 10(4) (d) (ii) (D) provided for mandatory disclosure of source and geographical origin of biological material used in the invention when applying for a patent. It also provided for penal provisions in the form of opposition in Section 25(j) and revocation of patents in Section 64(p). Applicants were also required to give a declaration that in case the biological material has been used from India, necessary permission of the competent authority should be provided before the grant of the patent. Indian Patents Act Section 3(p) mandated that an invention which in effect was TK or an aggregation or duplication of known properties of traditionally known component(s) was not a patentable subject matter. The National Biodiversity Authority which implemented the National Biodiversity Act, before granting approval, was required to ensure that the terms and conditions subject to which approval was granted, secured equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers. The delegation commended the approach adopted by India for protection of its GR, for consideration and adoption, as a template for further discussion, by the Committee.

522. The Delegation of Japan believed GR were an important issue that the Committee should address. Regarding the disclosure requirement however the information acquired by the disclosure requirement was not directly related to patent examination adjudication including novelty and inventive steps. The Committee work would be based on the assumption that there was such a linkage and if the disclosure requirement was intended to address the CBD compliance it should be addressed from broader perspectives other than IP. The delegation thanked the International Bureau for presenting a couple of options for future work. Japan could go along with number (ii). However alternative proposals for dealing with the relationship between IP and GR should be added as the United States of America and other delegations had supported. Japan went along with (iii) and (vi). But since it was not sure whether their database proposal was included in option (vi) it requested that a more

express mention of database should be included in the description of that option. Japan supported options (viii) and (ix). Work had been suspended and should be activated again. It also supported option (x). However it questioned the reasons for mentioning distributing innovation or open source wording in that context. The reason it proposed a distributed database system where databases were maintained and managed in each country was that each member State concerned would be the most competent and appropriate entity to contact indigenous groups within their territory and coordinate interest among them and correct their information. E.g. there might be some sensitive in nature. The distributed system was more cost effective than maintaining and managing internal database in International Bureau in Geneva. Regarding access to public the proposal was mainly intended to address uneasiness by indigenous groups or exposure to GR so it was thought to be a closed system but Japan was open for building a differential access that allowed for access by the public on certain conditions. Regarding TK, the system could be also extended to incorporate TK. On the linkage between applications and GR, the Japanese proposal mentioned that GR holders could get some information about each application regarding their GR, which would be helpful for GR holders to get a picture where applications with any relation to their GR had been filed in the world.

523. The Delegation of Indonesia thanked the Secretariat for its work in providing the documents on the issue of GR. The documents provided valuable and useful information regarding the latest development of the discussions of the issue of GR within WIPO and in other fora. GR were very vital and important for all member countries, especially for developing countries, as they provided a huge commercial value, technological and industrial advantage. Unfortunately, the level of misappropriation was quite significant. In dealing with the issue, Indonesia had been confronted with several obstacles such as boundaries limitations, resolution on disputes between member countries and compensations for misappropriation and damages of biodiversity. On the other hand, different legal instrument as well as different institutions responsible for the misappropriation of the GR further created complexities and difficulties. In observing that situation, the delegation had also noted that there should be more elaboration on the implementation of the requirement of the disclosure of origin of GR. Regarding the list of options in WIPO/GRTKF/11/8 (a) page 2, which was derived exclusively from proposals put to the committee by member States and other committee participants, including national and regional submissions, proposals by other participants and the committees working documents, Indonesia welcomed the list as the basis for further discussions, while at the same time underlined that that list should not prejudice the work of other forums, both within and beyond WIPO. The delegation expressed its commitments to work closely with all members and also with the WIPO secretariat as well as with other related international organizations on that important issue.

524. The Delegation of Thailand expressed its view that since the real problem of bio-piracy was derived from the exploitation or misappropriation of GR and associated TK outside the territory of the country of origin, a national law could not grant protection to GR and associated TK outside its jurisdiction. Without adequate and effective protection of GR and associated TK at the international level, the problem of misappropriation would continue. It was therefore necessary to introduce an international binding instrument for such protection. Regarding the options listed in the WIPO/GRTKF/IC/11/8 (a), the delegation supported option (i) of the document to develop a mandatory disclosure of origin requirement for patent application, as well as the requirement of prior informed consent and sharing of benefits for the originator of GR and associated TK. It also supported the amendment of the Article 29bis of the TRIPS Agreement for the same purpose.

525. The Delegation of Namibia explained that the authority to determine access to GR in the country rested with the Namibian government as provided for in the Constitution. The protection of TK associated with GR should be applicable to the relevant laws, domestically, regionally and internationally. It was for that reason that the delegation was aligning itself with the statement made by the Delegation of Algeria speaking on behalf of the African Group in calling for a legally binding international instrument. The documents before the committee constituted a sufficient base for the Committee to continue to work towards a concrete outcome, which was a legally binding international instrument. The delegation supported South Africa and others that viewed option (i) in WIPO/GRTKF/IC/11/8a as the basis for future work in that respect.

526. The Delegation of Mexico was of the opinion that the national intellectual and industrial property authorities should facilitate the application of the obligations under the CBD. With respect to the list of options presented, Mexico might consider it appropriate to continue with the following tasks: compiling an inventory of periodicals, databases or other information sources, and stimulating the development of model contractual practices contained in Annex I of WIPO/GRTKF/IC/7/9. The Delegation insisted that the question relating to genetic resources should continue to be analyzed by the Committee.

527. The Delegation of the Republic of Korea expressed substantial concerns on introducing mandatory disclosure requirement. It was unreasonable if few member States blocked the progress of the Committee. However it was also unreasonable that a majority of member States, which had a small portion of international patent applications, forced the member States, which had the majority of patent applications, to accept such a burdensome requirement. It proposed to discuss further on how to lessen the burden of the applications on that matter.

528. The representative of the Eurasian Patent Office (EAPO) said that the problem of preventing the unlawful appropriation of GR and TK was currently extremely important and of particular concern to developing countries, since knowledge and resources were one of the main factors in their economic development. The EAPO approved the basic principles governing the work of the committee – balance, flexibility and constructiveness – and supported the proposals for further activities by the committee, aimed at devising legal mechanisms for the protection of GR/TK. Considering that the standards regulating access to GR/TK and the sharing of benefit from their use constituted an effective instrument for the protection of GR/TK from unlawful appropriation, the EAPO nevertheless believed that the new requirements for disclosure of an invention relating to GR/TK, i.e. the compulsory indication of the source or origin of GR/TK in application materials, were not an effective measure for achieving the stated aim. The patent laws of many countries in the world contained the requirement for the compulsory disclosure of the essential features of an invention in a patent application in a manner sufficiently clear and complete for an invention to be carried out by a specialist. That meant in particular that application materials or information sources relating to prior art must contain information on the means and methods whose use enabled an invention to be carried out in the form in which it was characterized in the claims. Information on such means and methods should either be disclosed in the description of an invention or, if it were not disclosed in the description, the information should contain an indication that it was well known and also a reference to the information source available at the priority date, in which those means and methods were described in sufficient detail for them to be reproduced by a specialist. If doubt arose during an examination as to the possibility of carrying out an invention and achieving the technical result by the proposed means and methods, a request was sent to the applicant with the

appropriate reasoning. According to the results of the response to a request, an application could be rejected. In the case of inventions relating to a biotechnology product (biological material), the patent legislation of many countries provided for a standard concerning the deposit of such a product (material), if it could not be disclosed in an application to such an extent that an invention could be carried out by a specialist and if there was no open access to such a product (material). Thus, modern patent legislation sufficiently regulated the obligation to disclose an invention in application materials, including for inventions relating to GR/TK. The inclusion of a special requirement concerning the indication of source or origin of GR/TK in application materials could lead to the creation of uncertainties in the process of examining applications and additional obstacles in assessing the patentability of inventions. The EAPO supported the views that the approach to assessing the patentability of inventions relating to GR/TK should not be modified. It should remain unified for all inventions. The main difficulty for patent offices was to conduct a patent search of GR/TK subject matter. Therefore, the creation of appropriate GR/TK databases, suitable for search purposes and essential for examining inventions relating to GR/TK, was a current task. The EAPO supported the proposal by the WIPO Intergovernmental Committee on IP and GR, TK and Folklore to include specific databases and information resources relating to GR/TK in the PCT minimum documentation for conducting a patent search, including the conduct of such a search of national applications. The EAPO considered the proposal by Japan to create a special GR/TK database with restricted access only for patent office examiners to be extremely interesting. However, the legal status of such a database as a component of prior art remained uncertain. The production of certificates concerning prior informed consent for the use of GR/TK and/or fair and equitable sharing of the benefits from their use was, in the opinion of the EAPO, beyond the limits of the patent system and should be regulated above all at the national level with the help of special legislation. International cooperation was also required to play a major role in that regard. The EAPO hoped for further development and coordination of mutual efforts in order to create an effective system of protection for GR/TK within the framework of the WIPO Intergovernmental Committee on IP and GR, TK and Folklore. The EAPO thanked the Secretariat of the committee for the documents prepared for the committee's Eleventh Session, and also WIPO and UNEP for the technical research conducted on the mutual links between GR/TK and the patent system.

529. The Delegation of Singapore explained that the country was a small and highly urbanized country where wildlife continues to thrive. It has more than 360 species of birds and 200 species of hard coral. A recently completed survey recorded 35 plant and animal species that had not been previously sighted in Singapore. In recent years, new species had also been documented. The potential for research and development in various fields was thus significant. Some years ago, Singapore researchers had successfully developed and patented a compound extracted from the blood of the horseshoe crab that could be used to detect contaminants in pharmaceutical products. The crab lives in mudflats throughout South East Asia, including Singapore. As both a user and provider of GR, Singapore therefore takes great interest and concern in the current Committee process. A win-win solution had to be formulated in order for all stakeholders, regardless of development status, to benefit from the global array of GR, TK and Folklore. Such a solution would on one hand secure the interests of providers of GR and TK, and yet, on the other hand, ensure that the patents system continued to operate efficiently for all users. Singapore therefore proposed a framework based on the following concepts: To secure the interests of providers of GR and TK, it is suggested that Providers of GR and TK should have a fair and equitable share in the benefits arising from the use of their GR and TK; and Providers of GR and TK required a system to facilitate easy identification of whether there had been prior informed consent and benefits sharing with them. On the part of the patent system, the patent system had to continue to

encourage new and innovative research and development involving GR and TK. In that regard, current procedures for patent applications should not be made more cumbersome; and protection and commercial exploitation of patents involving GR and TK should not be hindered. The delegation encouraged members to consider a framework based on the concepts just described as a means towards a win-win solution, taking into account the concerns of all stakeholders at the Committee. In light of the above, the delegation sought clarification on whether the current proposals addressed the concepts in the framework just described: First, on the subject of GR and mandatory disclosure requirements, such disclosure requirements should ensure the continued ease and viability of the patent system as a tool to facilitate the protection and commercialization of the output of those engaged in research and development involving GR and TK. In that regard, some issues to consider were: Whether accurate information was readily available and accessible to satisfy any disclosure obligation, and what was the level of disclosure required? These questions were particularly relevant where the GR was found in more than one territory or was obtained by the user through intermediaries. What were the financial and administrative implications associated with mandatory disclosure requirements? Were there steps which could be taken to alleviate any possible financial and administrative burdens? Second, in the case of non-disclosure, the possible consequences that had been suggested were non-processing of a patent application, non-grant of a patent, patent revocation, and rendering a granted patent unenforceable. However, these raised issues that should be thought through carefully: Did these suggested consequences help GR and TK providers reap the benefits of commercialization arising from patent protection? If accurate information and documents were not readily available and accessible, would a bar or delay to obtaining patent protection be reasonable? Yet another possible consequence that had been suggested for non-disclosure was the transfer of the ownership of the patent. On that point, would such a transfer be reasonable to the original patent owner, who had invested significant resources in the research and development effort? A related issue was - Would the transferee have the capability, resources and expertise to prosecute and maintain the patent, in addition to commercially exploiting the patent? Finally, the current proposals pointed to the necessity of amending the PCT, the PLT and other regional and international patent instruments. Were there other alternatives that supplement the existing patent system with a complementary process that encourages disclosure and sharing of benefits, yet safeguards the principles of the existing patent system? The delegation looked forward to engaging in an exchange of views on these issues, in the shared objective to find agreement on a workable solution that addressed all the concerns.

530. The Delegation of Turkey believed that, where inventions were based on GR or TK, the origin or source should be disclosed in patent applications. Within that context the draft Turkish patent law, which was before the parliament for approval, had incorporated a provision related to the mandatory disclosure of origin or source of GR and TK where applicable. The draft law was expected to enter into force in 2008. The provision was in line with the European directive 98/44/EC. National protection was not sufficient and an international system was required for the protection of TK and especially GR. Therefore the delegation welcomed the proposals submitted to the secretariat for the purpose of the protection of GR within an international context.

531. The Delegation of New Zealand stated that in the main international fora that were currently looking at issues relating to IP, GR and TK and TCEs, particularly in the WTO, CBD, and WIPO, all member States seemed to agree that GR and TK not be misappropriated, and that appropriate mechanisms provide for equitable access and benefit sharing. These were issues of significant consequence for New Zealand. The country was both biologically diverse and had a significant indigenous interest in the preservation of GR and protection of

TK. As indicated, these issues were at the heart of a very substantial commission of inquiry that had just recently concluded in New Zealand, so the discussions in the committee, as well as in the TRIPS Council and in the CBD were followed with great interest. It was also important to note that the New Zealand government was at the early stages of a policy development process to address domestic issues relating to bio-prospecting. For those reasons, it encouraged discussion based on the facts, including examples of specific cases and national experiences. In that regard it appreciated the interventions of Norway, Kenya, Australia and Singapore, and of the observer Biodiversity International who had provided some elements of their experiences. New Zealand considered it appropriate for the Committee to continue to pursue its work program to assess the implications of the various proposals for the various stakeholders and would welcome the opportunity to comment on them at up-coming sessions. It thanked the Secretariat for its very useful and constructive work in putting together the documents on GR and in proposing a list of options for continuing or further work. It looked forward to further consideration of the range of options.

532. The representative of the Third World Network was of the view that one of the fundamental challenges was the patenting of life forms including GR, or parts of these resources such as its sequences, and some derivatives. As a result of the TRIPS Agreement, the extension of patentability to selected life forms and processes had been “globalized”. In the past several years, the world had seen a great race by companies, universities and other entities particularly from developed countries to patent GR or parts of it. It was reported that in 2003, the USPTO declared that it was “under siege” with an estimated 300,000 patent applications involving biological and genetic material every year. In 2000, the three main patent offices of the US, Europe and Japan had had more than 3 million outstanding patent applications on these types of materials. The *Guardian* had already reported in 2000 that patents were pending or had been granted on more than 500 000 genes and partial gene sequences related to plants, animals and other organisms. In agriculture, many developed countries were allowing large scale granting of broad patents on plant varieties. There were patents on varieties of Soybeans, Maize, Wheat, Potato and even on Rice which was the staple food for nearly half of the world’s population. In a recent report dated 30 April 2007 by the Canadian civil society organization ETCGroup citing figures from industry analyst Context Network, there were only 3 companies (Monsanto, Du Pont and Syngenta) that accounted for US\$ 8,552 million (8.5 billion) or 44% of the total proprietary seed market. For example, the rice plant, a staple crop common to most if not all developing countries, had been the subject of 15 patent applications before WIPO, the EPO as well as the US PTO. These patents related to the gene sequences of the rice genome, around 30,000 of them, which would give Syngenta control over key characteristics of rice and other staple crops including how they grow and develop. That monopoly on the rice gene sequences would affect the way rice would be planted by the world’s farmers. The use of these GR from developing countries by corporations and research institutions in developed countries was frequently based on TK of the indigenous peoples and local communities. That resulted in an ironic situation of “reverse transfer of technology” in which it was the poorer developing countries that were transferring their knowledge and resources, and thus technology to the rich developed world. For example, the value of germplasm from developing countries to the pharmaceutical industry in the early 1990s was estimated to be at least 32 billion US dollars per year. Today the value was even more. Another estimate by RAFI indicated that genes from the fields of developing countries for only 15 major crops contributed more than 50 billion dollars in annual sales in the US. The GR and associated knowledge contributed enormously to the economies and social development of the developed countries while the developing countries got little reward for their contribution and could likely end up paying large corporations royalties to use their own GR, if it was patented and a high price for the use of a product developed from their own

GR and associated TK. One example was the recent case of avian flu. Companies in developed countries were patenting the viruses and its parts obtained from developing countries, using it to develop vaccines which were then sold by the companies to developing countries at about US\$ 20, a price which was unaffordable to most in developing countries. That situation highlighted the current global inequities. In May, WHO had taken a decision recognizing the sovereign rights of States over their biological resources and had agreed to explore the sharing of fair and equitable benefits arising from the use of the virus particularly with developing countries. For that reason, it was timely for the Committee to do studies on the increasing trend of patenting life forms, to analyze the impact of such a trend particularly on developing countries, and to initiate discussions on subject matters that should be off-limits for patent applications. That should be considered as a matter of priority alongside the substantive work of the Committee on the defensive protection of GR i.e. disclosure in patent applications.

533. The Representative of Amauta Yuyay thanked the Secretariat for the work done to provide the documents on time for each session, something which undoubtedly constituted a basis for the work of Amauta Yuyal. It would appreciate receiving the Spanish translation of document WIPO/GRTKF/IC/11/8(b), in order better to understand the list of options, since it was very complex to understand the rhetoric on that subject and, in that regard, it associated itself with the statement made by the Delegation of Peru. Ecuador was a very small country but was one of the countries with the greatest biodiversity in the world. In the Galapagos Islands alone there was 95 per cent of the planet's biodiversity. The growing of maize in the Andean world and, in particular in Ecuador, was an ancestral agricultural practice, knowledge of which was rich in terms of its sowing, growing and harvesting. From maize alone more than 100 gastronomic specialties could be prepared as drinks; for that reason, the relationship of genetic resources was inherently linked to traditional knowledge, thus contributing to the development of developed countries. Currently, many of its lands had been trialed for flower cultivation, thus changing its age-old culture using options alien to its visions.

534. The representative of the Saami Council thanked the Secretariat for preparing the list of options contained in WIPO/GRTKF/IC/11/8 (a). The Council could support all ten proposals for future work, but like others wanted to underline that the focus had to be on option (i); Development of a mandatory disclosure requirement. The same arguments had been heard over and over again for the last five Committee sessions or so, which indicated not that there was a need for further discussions, as suggested by some, but rather that it was time for a decision. In addition, participants had presented a number of positive experiences with disclosure requirements, so there was no need for further studies of national or international experiences. Like many others, the Saami Council believed that there was broad support for a mandatory disclosure system that served to prevent the unwarranted patenting of GR and associated TK, and that had to be reflected in the Committee's decision on future work in that field. In any event, a decision should be taken in one way or the other, but further discussions seemed not to be a logical option. The representative offered a proposal for a way forward. Perhaps a small group of delegations could be appointed to come up with a concrete and consolidated proposal for mandatory disclosure requirement. Based on the discussions under agenda item 9, possible members of that group could be Algeria, Brazil, the EU, Norway, Switzerland and perhaps also Indonesia. In addition, the indigenous caucus should also be represented in the small group. The indigenous presence in such a group was clearly warranted. The Saami Council would like to underline what it perceived to be general flaw in the different proposals for mandatory disclosure requirements so far presented, and apologized if it had not studied these proposals carefully and were wrong on that point. Under the deliberations on TK, there had appeared to be virtually a consensus on that the



primary holders of TK were the creators of the same. If that was correct, it was not sufficient that a certificate of origin was mentioning the country of origin, since such a certificate need not necessarily disclose anything about the holder of rights to the TK. Hence, any disclosure requirement, to be relevant and adequate, had to go beyond the country of origin, and also disclose the community/ies, indigenous people/s from which the TK originated.

535. The Representative of the International Indian Treaty Council said that indigenous peoples had the right to fair and equitable distribution of the benefits resulting from the use of their resources, when indigenous communities granted access to and use of knowledge with free prior informed consent. However, without protection and appropriate recognition of the rights of indigenous peoples in terms of permanent ownership of their natural resources, international rules, facilitating access to indigenous knowledge and genetic resources originating in the territories and lands of indigenous peoples, might be premature. Their knowledge was inseparable from their resources. Their rights in their genetic resources should therefore be recognized and protected. In order to protect their rights, the Member States should provide positive recognition for the specific protection systems of indigenous peoples, contained in their rights and traditions. Ownership, security and integrity of their territories were indispensable for their existence, permanent survival and the development of their traditional knowledge. Thus, the International Indian Treaty Council considered that the appropriate authorities for taking decisions and determining the use of genetic resources of indigenous peoples should be the indigenous peoples themselves and their traditional systems.

536. The representative of the Ogiek Peoples Development Program (OPDP) supported the statements by Kenya, Norway and New Zealand. The hunter gatherers were indigenous peoples and not sedentary. They lived sustainably by hunting and gathering in their traditional territories. They had the GR associated to TK and Folklore that were related to wild species and to unique traditional ways of sustainable development. These GR of hunter gatherers like the Ogiek in Kenya and Bushmen in Botswana were very different than the GR and TK of sedentary and agrarian societies. GR should be disclosed from its origin, but not a country of origin so as to prohibit henceforth patenting.

537. The Russian Federation supported the Committee's work to devise a system for TK related to GR. The Russian Patent Office had conducted research into the most forward-looking areas related to GR, as follows: databases containing information on GR, including on their origin; devising method-related recommendations on the registration and dissemination of IP rights in agreements on access to and transfer of GR and associated TK. However, as already stated, the Russian Federation considered the question of the inclusion in invention application materials of the requirement to disclose the country of origin of GR still to be open at the current time, and at the previous session it had raised a number of practical questions relating to the implementation of that requirement. The question appeared to require further consideration. The delegation believed that the proposal by Japan to create and use databases was worthy of consideration. However, it should be taken into account that information contained in databases with limited access and which were confidential had a limited field of use and could not be binding on an applicant. Only information accessible to an unlimited circle of people could be binding. Also of interest was the information from Peru concerning the work relating to research into applications based on decisions involving the use of GR. The Russian Federation supported all 10 areas of work formulated in WIPO/GRTKF/IC/11/8(a) and proposed that the task in hand to reduce the risk of the unlawful grant of patents and to define the possibilities of the patent system in the fight against biopiracy could be resolved from various angles, and all the concrete proposals and

any information on the research done at the national level should be examined and taken into account.

538. The Delegation of Peru thanked all delegations which had made comments on the presentation which Peru made the day before and was of the opinion that the contribution was received positively. It expressed hope that once the document was circulated and translated Peru would be able to receive further comments which would be very useful in continuing the work in Peru, particularly in the committee against biopiracy. On the reactions or some of the comments which were heard yesterday on that point, it had the impression of a kind of *déjà vu*, that kind of comment could be heard periodically, along the same lines as the discussion. However, the reaction was different from the paper presented by the Secretariat which led to the conclusion that from an initial reading of the document it was not quite clear. It thanked the Secretariat for having presented that paper with the various options. It was quite comprehensive and understandable, but somebody coming to the committee for the first time might have the impression, that there were many options on the table and various delegations had very divergent positions and it was therefore impossible to reach agreement. The position of Peru would be to endorse option (i) which was the development of a mandatory disclosure requirement. In the long run the various options were in fact only two. Peru had said on various opportunities that it had no problem with further study in presenting cases, a database would be useful for example, and the study of specific cases would also be very useful. It wanted to continue to present cases and to continue to work on the basis of that understanding. Those who wanted to have a mandatory disclosure requirement were opposing those who did not recognize the need for a mandatory disclosure requirement. As Brazil had said the day before, recently there had been more support for the proposal presented for an amendment to the TRIPS agreement which would include a mandatory disclosure of origin. There was greater consensus on the need to further study that possibility and to negotiate on the basis of a text for the amendment to the TRIPS agreement. Unfortunately, there was a kind of an impasse. Very few delegations did not want to discuss that type of solution because they considered that that would undermine the Patent Cooperation Treaty. And because of that little handful of countries the Committee could not move forward and talk on the basis of a text. Although it was certain that in principle the idea proposed by the Saami Council was right about the possibility of having a smaller group of countries or delegations who would do the work and to see how to implement mandatory disclosure. It would continue to be difficult, because in the long run once again that very small handful of countries would continue to oppose an idea which was more generally accepted and which could meet with consensus which would enable us to have a breakthrough. That should lead to reflecting on the usefulness of such a committee. Why had the committee been created in the first place? And the need for the work of the Committee to continue and not just be a form of discussion but become a negotiating forum which was what it had been created for originally.

539. The representative of Tupaj Amaru recalled that the Intergovernmental Committee, established in 2000 by the General Assembly of the Member States of WIPO, had held and still held as its mandate the examination of the issue of genetic resources within the intellectual property framework and the sharing of benefits deriving from the use of said unprotected resources. However, the Committee had not achieved substantive progress. In order better to understand the extremely complex problem, it was necessary to recall the definition of genetic resources contained in the CBD and other international instruments. For the purposes of the CBD, genetic resources meant the genetic material of real or potential value. In turn, genetic material was defined as any material of plant, animal and microbe origin, or of any other type, which contained functional units of heredity that would allow the

characteristics of an ancestor to be passed on to a descendant, from one generation to the next, through the permanent reproduction of said resources. The Representative said that it was necessary to protect the resources, since the diversity of genetic resources was the material and spiritual source of the survival of humanity, but that in the modern age man continued to destroy biological resources – which were the fount of all life in the mountains. As to the relationship existing between indigenous communities and genetic resources, in the Preamble to the CBD (1992), ratified by 160 States, excluding the United States of America, “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components” was recognized. In the materialistic conception of the history of indigenous peoples, the biological and genetic resources and traditional knowledge which comprised an infinite number of living organisms and other forms of life in permanent transformation throughout more than four million years, constituted the collective heritage of Aboriginal nations and local communities, and was the common heritage of humanity. Consequently, the Committee should examine genetic material not only in terms of the market, earnings and profitability, and investments between providers and receivers of those intrinsic values, but in the spirit of its conservation and sustainable development for the survival of humanity. Although the purpose of the targeted contractual practices was to help parties to produce legislative or administrative measures or model clauses on access for and participation of beneficiaries and the drafting of contracts, that in no way resolved the biopiracy and bioprospecting which were practiced with complete impunity and within the sphere of neoliberal policies. Those people who freely engaged in the unlawful use of genetic resources would never subject themselves to the rules and laws of receiving countries in order to subscribe to and guarantee mutually agreed contracts, as long as relevant international standards did not exist. The formulation of the principles defined in WIPO/GRTKF/IC/7/8 relating to the preparation of targeted contractual practices and benefit sharing appeared in actual terms to be a very simple technical and legal methodology. In practice, that was the opinion of native communities and indigenous peoples that did not have telephones, electricity, or much less Internet access, since technologies and mechanisms, together with legal terms, were too complex in terms of their interpretation and application, and inaccessible to indigenous communities. As in that correlation of forces between the market and protection for life, indigenous and local communities did not have the capacity to negotiate contracts or arrangements with pharmaceutical, bioprospection, agricultural, industrial and cosmetic firms, in reality it would be impossible and improbable to draw up and respect such and such a contract between the parties. Owing to their legal nature, said contracts, agreements and licenses, either through action or omission, would be unfair, and the advantages and benefits would be awarded to only one party to said contracts, other than where a mechanism existed for applying said agreements. The CBD stipulated sovereign control over biological and genetic resources and the need to regulate access to said resources and the rights to the sharing of benefits resulting from their use and exploitation. On the other hand, the Special Open-Ended Working Group, which had been set up in Bonn in 2001, had reported that to date there had been no tangible results from the Bonn Guidelines on access to genetic resources and fair and equitable sharing of benefits resulting from their use. In its report, it had invited WIPO to devise normative frameworks on methods which were compatible with the obligations of States in accordance with treaties. In that sphere as in others, there had been no tangible progress owing to the lack of political will on the part of States. According to the documents mentioned, the Committee had approved a work plan to devise model intellectual property clauses which simply proposed options relating to the establishment of targeted non-binding contractual practices and non-mandatory model intellectual property guidelines and clauses. The Committee had stated at the time that the

practices and clauses would not be mandatory. The guidelines had only an information-related purpose but no legal value. In the guidelines mention was not made of what was patentable and what was not patentable, or of the requirements for disclosure of information relating to genetic resources. The mandate which the Committee had received at the sixth session had been to produce and submit a draft international legal framework. A binding instrument and fair sharing of benefits should be established as a matter of urgency. In the globalized world where transnational companies constituted supranational States within national States, in a world where wars tore humanity apart through the appropriation of natural resources in flagrant violation of the principle of sovereignty of peoples over their natural resources, in a terribly selfish world where biopiracy was practiced with complete impunity, a global response was required to the pillaging, use and misappropriation of genetic resources and traditional knowledge, and there was an urgent need to establish codes of conduct to regulate the blind laws of the market. As with users, multinational pharmaceutical or agricultural and industrial firms, together with businessmen disguised as anthropologists, were not subject to the jurisdiction of the host country and legal protection for genetic resources was required. Secondly, the receiving States among developing countries had lost the capacity for negotiation and could not legally claim jurisdiction over said firms and their subsidiaries set up in their territories, owing to the fact that their legislation had been dismantled and there was no frequent reference to the concept of multinational ownership, nor did legal protection exist for genetic resources against biopiracy and bioprospection. Annex I, paragraph 4(1) on the conditions of use that would apply to the database acknowledged the industrial property right to the handling of genetic material able to allow the production and commercialization of genetically modified products (as in the case of maize). In the electronic database compilation, WIPO, the Member States and information providers should assume responsibility in relation to the use and misuse of the database, and collect all information with complete transparency. In paragraph 4(2)(b) relating to contracting parties, the Representative urged the Committee to include native communities and indigenous peoples as legal subjects with full powers of negotiation or otherwise of contracts concerning access to the genetic and biological resources which they owned. The Committee should also recognize and specify, in an additional paragraph, the full and free informed consent of indigenous peoples and communities in the process of negotiating possible agreements and their actual participation in devising legal mechanisms designed to protect genetic resources and guarantee the sharing of benefits. The procedures for the application of intellectual property rights should require a patent applicant to submit proof of prior consent from the owners of genetic resources and traditional knowledge. As to point (iv) of the contract, indigenous peoples categorically opposed the inclusion of "human genetic resources" in the database, such as samples of human blood or tissue, for reasons of ethics and respect for human dignity. The attempts to transform human beings into commodities that were sold and purchased in the vast free zone of the globalized world were incompatible with the rules of *jus cogens* of international law. In relation to paragraph 4(4)(b) relating to the subject matter of the contract, the Representative asked the Secretariat to provide a clear explanation as to what was understood by the use of the genetic material contained in the database "for reasons of national security" and what would be its aim in the current world which was in permanent danger. In conclusion, behind the complex technologies, measurements and procedures inaccessible to indigenous peoples and communities, there were concealed major economic, strategic and financial interests of the Western powers, as well as the attempt of neoliberal governments to privatize and transfer basic genetic resources and traditional knowledge to a reduced circle of multinational firms. The WIPO International Bureau should organize workshops, round tables and seminars within indigenous communities that were owners or holders, in order to familiarize those owners or holders with the technologies, model clauses, mechanisms and scope of the structure of the database compiled on the WIPO website.

*Decision on agenda item 9: genetic resources*

540. The Committee took note of documents WIPO/GRTKF/IC/11/8 (a), WIPO/GRTKF/IC/11/8 (b), WIPO/GRTKF/IC/11/10, WIPO/GRTKF/IC/11/11, and WIPO/GRTKF/IC/13. The composite decision taken by the Committee on future work on agenda item 9 is reported under agenda item 10.

## AGENDA ITEM 10: FUTURE WORK

541. The Delegation of Portugal on behalf of the European Community and its Member States expressed its appreciation for the progress made by the Committee. As its current mandate reached its conclusion, the Delegation was keen to pursue the constructive work of the Committee in a spirit of open and responsible collaboration to build upon what had already been achieved. Underlining the importance of wide stakeholder consultations in the process, the Delegation continued to support and welcome the participation of indigenous and local communities, and remained committed to the activities of the Voluntary Fund. The Committee's work over the past years had exposed similarities and differences, and the European Community and its Member States continued to believe that further discussion of the key issues and the exchange of experiences could bring important benefits in the short term. As the Committee had yet to reach consensus on several relevant principles and objectives, it was important to renew its mandate on the same terms as approved by the WIPO General Assembly in 2005, to deepen discussion and better address the complex technical issues at stake.

*Decision on agenda item 10: Future Work*

542. The Intergovernmental Committee reviewed the progress made on its substantive agenda items at the current and previous sessions of its current mandate, and

- (i) Agreed that progress had been made on its substantive work to date;
- (ii) Agreed that its work had greatly benefited from the enhanced participation of representatives of indigenous and local communities made possible by various initiatives including the successful launch of the WIPO Voluntary Fund, and also from the participation of intergovernmental organizations;
- (iii) Agreed to recommend to the WIPO General Assembly that the current mandate of the Committee be renewed as set out in document WO/GA/30/8, paragraphs 93 to 95, namely that:
  - the Committee “will continue its work for the next budgetary biennium on questions included in its previous mandate”;
  - “its new work will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other fora,” and

- “no outcome of its work is excluded, including the possible development of an international instrument or instruments”;
  - the IGC would be urged “to accelerate its work and to present a progress report to the session of the General Assembly” in September 2008.
  - The General Assembly would further request “the International Bureau to continue to assist the IGC by providing Member States with necessary expertise and documentation.”
- (iv) With respect to the content of paragraph (iii), the Committee agreed to work towards further convergence of views on the questions included in its previous mandates, in particular, within the areas of TCEs and TK, on the Lists of Issues agreed at its Tenth Session, with a view to making appropriate recommendations to the General Assembly.
- (v) Agreed concerning its substantive working document on item 7 (TCEs/EoF) that:
- the Secretariat should prepare a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues, and
  - As agreed at the Tenth session, document WIPO/GRTKF/IC/11/4 (c) remains on the table in its existing form and comments made in relation to it are noted.
- (vi) Agreed concerning its substantive working document on item 8 (TK) that:
- the Secretariat should prepare a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues, and
  - As agreed at the Tenth session, document WIPO/GRTKF/IC/11/5 (c) remains on the table in its existing form and comments made in relation to it are noted.
- (vii) Agreed concerning its substantive working documents on item 9 (genetic resources) that:
- the Secretariat should prepare a further update of international developments based on document 11/8(b) which would include omissions identified in the current session, more recent developments, and any other relevant developments reported to the Committee, and
  - document WIPO/GRTKF/IC/11/8 (a) remains on the table in its existing form and comments made in relation to it are noted.

## AGENDA ITEM 11: CLOSING OF THE SESSION

543. The representative of Russian Association of Indigenous Peoples of the North (RAIPON) made a joint statement on behalf of RAIPON and International Indian Treaty Council (IITC). The representative expressed gratitude to the Secretariat for providing very important information and documents for this session, and to the Chairman for his effective contribution and his open and accessible approach to this important discussion and for his effective leadership in committing that in the next IGC, the issue of translation of documents into Russian was also set to be taken care of. These organizations considered that the explicit provision for the protection of indigenous traditional knowledge is Article 31 of the UN Declaration on the Rights of Indigenous Peoples (as adopted by the UN Human Rights Council in 29 June 2007) which states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

These organizations associated with and supported the recommendation made by the Hokotehi Moriori Trust that the Secretariat prepare a compendium to previous research by the WIPO Fact Finding Mission as well as the many submissions provided to the IGC in order to clearly and identify the gaps in existing IP laws in terms of protection of TCEs in order to assist the States which do not appear to appreciate the current inadequacies which exist. The organizations reiterate the appeal made by the chairperson of the UN Permanent Forum on Indigenous Issues to the member states, who are also members of the General Assembly of the UN, to support the adoption of the UN Declaration on the Rights of Indigenous Peoples. The organizations believed that such an instrument will facilitate the various processes of developing other instruments pertaining to indigenous peoples' rights on various issues, such as Traditional Knowledge and Traditional Cultural Expressions.

544. The representative of the Mbororo Social Cultural Development Association (MBOSCUDA) delivered a statement developed by a number of indigenous peoples *ad hoc* observers who had met informally in the course of the current meeting, namely the Arts Law Centre of Australia, Association of Young Chefs (CAYC) Congo, Ethno-ecological Information Center, Lach (RAIPON), Hokotehi Moriori Trust (Rekohu, Chatham Islands, New Zealand), INBRAPI (Brazil), Indigenous Peoples Caucus, Creators Rights Alliance (Canada), Indian Confederation of Indigenous and Tribal Peoples North East Zone (India), Mbororo Social Cultural and development Association, (MBOSCUDA) Cameroon, Ogiek Peoples Development Program (OPDP) Kenya, Tupaj Amaru, Amauta Yuyay (Ecuador), TIN Human, Association des Femmes Nomade Mali, Maasai Cultural Héritage, Sustainable Development Policy Institute, Pakistan, Coresjo Consulative Indegenes, Mexico, and Bioresources Development and conservation Program (BDCPC) Cameroon. The representative thanked the Chair for his inclusive approach to the meeting and respect for the participation of the Indigenous representatives, and the Secretariat for their exemplary development of the documents and their continuing efforts to brief and consult Indigenous Peoples' representatives in particular and on their facilitation of the informal meeting of the Indigenous representatives on 2 July 2007. The representative expressed thanks for the

establishment of the voluntary fund which has made it possible for Indigenous delegates from various parts of the globe to attend and participate in this meeting. In this regard, thanks were extended to Sweden, France, the Christensen Fund, Switzerland, South Africa, Norway and the United States of America. The representative raised the concern that during the session the Chair had called a group coordination meeting and unfortunately no representatives of the Indigenous organisations were invited to participate. The representative requested that a representative of the Indigenous peoples attending this meeting would also be invited to participate in such informal proceedings. TCEs, TK and GR should be seen as a holistic entity, that is so intertwined with the survival and identity of indigenous peoples and they have perceived, used and generated them as such since time immemorial and even up to the present. However, the representative was aware that in the modern era, these TCEs, TK and GR have been misappropriated as distinct or separate entities or in combination with each other, there is really a need to deal with them as such separate entities to be able to protect them effectively. Nonetheless, the following statement reflected their holistic view on these TCEs, TK and GR. The following comments were made about key issues from the Indigenous perspective on the protection of TCEs:

“We consider the need for a legally binding international instrument to be fundamental to all future discussions. We find it difficult to appreciate the position of Governments the wealthy and developed States, who refuse to see the need for such an instrument or the need for better protection of TCEs in addition to current national legal systems, in comparison with the Governments with Indigenous populations who often live in extreme disadvantage. Even in States where there are useful sui generis protections in place, the issue of cross border misappropriation and exploitation of TCEs remains unaddressed and the need for an international instrument remains pressing.”

“We recognise that the work that had been done to date by the IGC on the development of draft provisions which is most constructive providing a useful basis for ongoing work. We would like to strongly encourage the further development of these provisions by this Committee and in addition the convening of working groups comprised of representatives from member states, experts and includes the participation of Indigenous Peoples. This may assist in advancing the work of the Committee between plenary meetings.”

“We endorse the suggestion of the Hokotehi Moriori Trust that the Secretariat prepare a compendium to previous research by the WIPO Fact Finding Mission as well as the many submissions provided to the ICG in order to clearly and identify the gaps in existing IP laws in terms of protection of TCEs in order to assist the States which do not appear to appreciate the current inadequacies which exist.”

“An international regime must enable the effective implementation, application and enforcement of Indigenous customary laws, knowledge and cultural practices. In circumstances where there is a conflict, Indigenous customary laws and cultural practices shall prevail over domestic law or an international regime (If not harmful to communities). We recognise that customary law extends to the cultural practices and knowledge of Indigenous peoples so as not to exclude those who have experienced serious dislocation within their States.”

“We note that in providing recognition and protections for TCEs, a registration system is likely to exclude some Indigenous communities where because of language barriers,



limited access to technology and remoteness. A possible solution may be to provide some flexibility on this issue at both national and international levels.”

“It is clear that there are pressing problems in the regulation of TCEs, and that the IPR system does not offer a solution to some of the problems. There have been cases of Indigenous people using the IPR system to protect their TCEs. However, the reality is that there are far more cases of non-Indigenous people using the IPR system to take ownership over TCEs and TK using copyright, trademark and patents. In some such cases this had created a ridiculous situation whereby Indigenous peoples cannot legally access their own knowledge. The establishment of an entirely new system, a sui generis system that could incorporate Customary Law could be adopted to suit TCE and TK needs.”

“An international instrument must ensure that the right to prior informed consent of Indigenous peoples is guaranteed and protected as a fundamental principle and must be maintained throughout any access and benefit sharing arrangements where there is potential change of permitted use or third party involvement.”

“Indigenous peoples are recognized as custodians and owners of their knowledge and traditional cultural expressions and have the exclusive right to control and manage their TCEs and TK.”

On the future work and mandate, the representative on behalf of the cited organizations stressed the need for accelerated result oriented focus work, with possible timeline and target. We also recommend to the general Assembly the mandate of the committee be extended to the next budgetary biennium to work in an accelerated manner to realised concrete result within the context of the international dimension of it mandate by focussing on the development of a legally binding international instruments. On behalf of these organizations, the representative called on WIPO Member States to take immediate positive measures to alleviate the adverse conditions currently endured by indigenous peoples. Measures to deal with the protection of TK, TCEs and GR will most likely take a long time, but somehow the direct action by the WIPO Member States on these conditions would demonstrate that their willingness to protect TK, TCEs and GR also extend to the indigenous and local communities themselves.

#### *Decision on Agenda Item 11: Closing of the session*

545. The Committee adopted its decisions on agenda items 3, 4, 6, 7, 8, 9, and 10 on July 12, 2007. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by September 7, 2007. Committee participants were invited to submit written corrections to their interventions as included in the draft report before October 30, 2007. A final version of the draft report was then to be circulated to Committee participants for subsequent adoption.

546. WIPO/GRTKF/IC/11/15 Prov. was circulated as the first draft report required in the above decision. A revised draft, document WIPO/GRTKF/IC/11/15 Prov 2, incorporated written comments received by the Secretariat on the first draft and was submitted for adoption by the Committee. The present document WIPO/GRTKF/IC/11/15 is the final version as adopted by the Committee at its Twelfth Session.

547. The Chair closed the Eleventh Session of the Committee on July 16, 2007.

[Annexes follow]

ANNEX I

ISSUES

Traditional Cultural Expressions/Expressions of Folklore

Issues

1. Definition of traditional cultural expressions (TCEs)/expressions of folklore (EoF) that should be protected.
2. Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF?
3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?
6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?
9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How should foreign rights holders/beneficiaries be treated?

Traditional Knowledge

Issues

1. Definition of traditional knowledge that should be protected.
2. Who should benefit from any such protection or who hold the rights to protectable traditional knowledge?
3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
4. What forms of behavior in relation to the protectable traditional knowledge should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?
6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?
9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How should foreign rights holders/beneficiaries be treated?

[Annex II follows]

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West Africa Coalition for Indigenous Peoples' Rights (WACIPR)

Emmanuel AITOKHUEHI (Deputy Director, Benin City); Joseph OGIERIAKHI (Programmes Director, Benin City); Patrick AGUINEDE (Curator (Folklore), Benin City)

VI. RÉUNION DE REPRÉSENTANTS DE PEUPLES AUTOCHTONES/  
INDIGENOUS PANEL

Patricia ADJEI (Ms.), Arts Law Centre of Australia, Woolloomooloo

Lucia Fernanda Inácio BELFORT (Ms.), Executive Director, INBRAPI, Brasilia

Anastasia CHUKHMAN (Mrs.), Deputy Director, Ethno-ecological Information Center "Lach", Russian Association of Indigenous Peoples of the North (RAIPON), Petropavlovsk-Kamchatsky City

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Jennifer DICKSON (Ms.), Pauktuutit Inuit Women of Canada, Ottawa

Violet FORD (Ms.), Inuit Circumpolar Conference, Ottawa  
Ajmal MEHNAZ (Ms.), Research Associate, Sustainable Development Policy Institute  
(SDPI), Islamabad

John OLE TINGOI, Maasai Cultural Heritage, Nairobi

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

Francis GURRY, vice-directeur général/Deputy Director General

Antony TAUBMAN, directeur par interim et chef, Division des questions mondiales de  
propriété intellectuelle/Acting Director and Head, Global Intellectual Property Issues Division

Wend WENDLAND, directeur adjoint, Division des questions mondiales de propriété  
intellectuelle, et chef, Section de la créativité, des expressions culturelles et du patrimoine  
culturel traditionnel/Deputy Director, Global Intellectual Property Issues Division, and Head,  
Traditional Creativity, Cultural Expressions and Cultural Heritage Section

Hans Georg BARTELS, chef, Section du programme des sciences de la vie et de la politique  
des pouvoirs publics, Division des questions mondiales de propriété intellectuelle/Head, Life  
Sciences and Public Policy Section, Global Intellectual Property Issues Division

Simon LEGRAND, conseiller, Section de la créativité, des expressions culturelles et du  
patrimoine culturel traditionnel, Division des questions mondiales de propriété  
intellectuelle/Counsellor, Traditional Creativity, Cultural Expressions and Cultural Heritage  
Section, Global Intellectual Property Issues Division

Valérie ETIM (Mlle/Ms.), administratrice de programme, Section des ressources génétiques,  
des savoirs traditionnels et de la biotechnologie, Division des questions mondiales de  
propriété intellectuelle/Program Officer, Genetic Resources, Traditional Knowledge and  
Biotechnology Section, Global Intellectual Property Issues Division

Anja VON DER ROPP (Mlle/Ms.), administratrice adjointe, Section du programme des  
sciences de la vie et de la politique des pouvoirs publics, Division des questions mondiales de  
propriété intellectuelle/Associate Officer, Life Science and Public Policy Section, Global  
Intellectual Property Issues Division

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