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

Twelfth Session
Geneva, February 25 to 29, 2008

REPORT

Document prepared by the Secretariat

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*: Reference to page number of report. Provided as an informal guide, in alphabetical order for ease of reference only. Includes statements made on behalf of regional groups under name of delegation making statement.

INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its thirtieth-fourth session further to extend a revised mandate, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee") held its twelfth session in Geneva, from February 25 to 29, 2008.

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, Secretariat of the Convention on Biological Diversity (SCBD), South Centre, United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Trade Organization (WTO) (15).

4. Representatives of the following non-governmental organizations ('NGOs') took part as observers: *Actions genre et développement (AGEDES)*/Gender and Economic and Social Development Actions (AGEDES); *Amauta Yuyay*; Amazon Cooperation Network (REDCAM); American Folklore Society (AFS); Art Law Center; Arts Law Centre of Australia; Assembly of First Nations; *Association congolaise des jeunes cuisiniers et Gastrotechnie Consultancy International*; Berne Declaration; Bioresources Development and Conservation Programme (BDCPC); Bioversity International; Call of the Earth; *Casa Nativa "Tampa Allqo";* Center for International Environmental Law (CIEL); Centre for Documentation Research and Information of Indigenous Peoples (doCip); Centre for International Industrial Property Studies (CEIPI); *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); Health and Environment Program; Hokotehi Moriori Trust; Ibero Latin American Federation of Performers (FILAIE); INBRAPI; Indian Confederation of Indigenous and Tribal Peoples North East Zone (ICITP NEZ); Indian Movement "*Tupaj Amaru*"; Indigenous Peoples' International Centre for Policy Research and Education; Indigenous People (Bethechilokono) of Saint Lucia Governing Council (BCG); Indigenous Peoples' Council on Biocolonialism (IPCB); International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP); International Association for the Protection of Intellectual Property (AIPPI); 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 Federation of Industrial Property Attorneys (FICPI); International Federation of Library Associations and Institutions (IFLA); International Federation of Pharmaceutical Manufacturers and Associations (IFPMA); International Indian Treaty Council (IITC); International Literary and Artistic Association (ALAI); International Seed Federation (ISF); International Society for Ethnology and Folklore Studies (SIEF); International Trademark Association (INTA); Inuit Circumpolar Conference; IP Justice; Jigyansu Tribal Research Center (JRTC); Knowledge Ecology International (KEI); Maasai Cultural Heritage; Max Planck Institute for Intellectual Property, Competition and Tax Law; Mbororo Social Cultural Development Association (MBOSCUDA); Music In Common; Ogiek Peoples Development Program (OPDP); Pauktuutit Inuit Women of Canada; Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Sudanese Association for Archiving Knowledge (SUDAAK); Sustainable Development Policy Institute (SDPI); Tebtebba Foundation; Third World Network (TWN); *Traditions pour Demain*/ Traditions for Tomorrow; Tulalip Tribes of Washington; *Union internationale des éditeurs* (UIE)/International Publishers Association (IPA); *Union mondiale pour la nature* (UICN)/The World Conservation Union (IUCN); *Unisféra International Centre;* West Africa Coalition for Indigenous Peoples' Rights (WACIPR); and *Yamatji Marlpa Barna Baba Maaja* Aboriginal Corporation. (69).

5. A list of participants was circulated as WIPO/GRTKF/IC/12/INF/1, and is annexed to this report.

6. Document WIPO/GRTKF/IC/12/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. Mr. Antony Taubman (WIPO) was Secretary to the twelfth session of the Committee.

AGENDA ITEM 2: ELECTION OF THE OFFICERS

Decision on agenda item 2

9. Upon the proposal of the Delegation of Romania, on behalf of the Group of Central European and Baltic States, seconded by the Delegation of the Russian Federation on behalf of the Group of Central Asian, Caucasus and Eastern European States, the Committee elected as its Chair Mr. Jaya Ratna of Singapore, and as its Deputy Chairs Mr. Abdellah Ouadrhiri of Morocco and Mr Lu Guoliang of China, in each case unanimously, by acclaim and for the duration of its current mandate for the biennium 2008-2009.

AGENDA ITEM 3: ADOPTION OF THE AGENDA

Decision on Agenda Item 3

10. The Chair submitted, and the Committee adopted, the revised draft agenda circulated as WIPO/GRTKF/IC/12/1 Prov 2.

AGENDA ITEM 4: ADOPTION OF THE REPORT OF THE ELEVENTH SESSION

Decision on Agenda item 4

11. The Chair submitted, and the Committee adopted, the report of its Tenth Session (WIPO/GRTKF/IC/11/15 Prov 2).

12. The report as adopted was subsequently published as document WIPO/GRTKF/IC/11/15.

AGENDA ITEM 5: ACCREDITATION OF CERTAIN ORGANIZATIONS

Decision on Agenda Item 5

13. The Committee unanimously approved accreditation of all the organizations listed in the Annexes to documents WIPO/GRTKF/IC/12/2 and WIPO/GRTKF/IC/12/2 Add. as *ad hoc* observers: Abantu for Development Uganda (AFOD), *Association Internationale de la Promotion et de la Défense de la Propriété Intellectuelle*/International Association for the Promotion and Defense of Intellectual Property (AIPDPI), BAL'LAME, Boomalli Aboriginal Artist Cooperative, Egyptian Society for Folk Traditions, Ethio-Africa Diaspora Union Millennium Council, The Foundation of Support of Iranian Elites (F.S.I.E), The Global Coalition for Biocultural Diversity, *Grupo de Investigación en Política y Legislación sobre Biodiversidad, Recursos Genéticos y Conocimientos Tradicionales*/Policy and Legislation on Biodiversity, Genetic Resources and Traditional Knowledge (PLEBIO), International Society of Ethnobiology (ISE), Kadazandusun Cultural Association Sabah, New England

Conservatory of Music (NEC), Sarawak Kayan Association, Vibe, and Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation.

AGENDA ITEM 6: OPENING STATEMENTS

14. The Delegation of Algeria on behalf of the African Group reiterated the importance it attached to the work of the Committee and the issue of genetic resources (GR), traditional knowledge (TK), and expressions of folklore (EoF), and its desire to contribute in a positive and constructive fashion to the negotiation process which was under way. TK and GR had played and still played a vital role in the day to day life of the bearers and beneficiaries of such rights or knowledge. The interest in their protection rested not only in their attachment to the traditional cultural and scientific heritage but also the benefits arising from this TK as a source of wellbeing and cultural scientific and economic development. Indeed they were key to food security and key to the health of millions of people in the developing world. In many developing countries a great part of the population depended on traditional medicine. Modern medicine being inaccessible, traditional medicine remained the only way for affordable care for the less well off. Yet the traditional methods and medicinal plants were tested and exploited without the knowledge and consent of indigenous communities by third parties to developmedicines and other products which then themselves benefit from protection. At the same time as this meeting, TK, GR and TCEs of entire peoples were being pirated and the rights of local communities were being infringed. This led to a serious situation which was getting worst without any definitive and acceptable solution for all being found, despite despite the efforts deployed over the last two decades. That is why the African Group considered that the mission of the Committee was to negotiate a legal instrument which would protect these heritages in an equitable fashion. WIPO didn't start its work from scratch, as the repeated violations of legitimate rights based on TK, GR and EoF had already and for long time been of concern to the international community. This raising of awareness had enabled the topic to be put at the forefront of the general debate on intellectual property. The African Group encouraged the Committee to speed up its work in order to find specific and tangible results that would meet the expectations of most indigenous local and traditional communities of the Member States. They hoped the process under way would lead in a speedy fashion to the adoption of a legally binding international instrument to counter the misappropriation and the misuse of TK committed every day to the detriment of their heritage. Several arguments justified the necessity of international action to protect TK, EoF and GR at the same level as other innovations are protected. These rights had to be protected, both domestically and internationally. They should seek to guarantee to indigenous communities their moral interests collectively and individually. It was especially important to avoid, on the one hand, that an intellectual property right be granted to people other than the indigenous peoples or communities that were the source of the TK concerned, and to preclude, on the other hand, that this TK be exploited without the authorization of the indigenous peoples or communities that were the source and bearers of this knowledge. Indeed the use of TK by research institutions and companies to innovate and to commercial exploitation fuelled apprehension about the misappropriation of this knowledge and posed directly the question of property rights. The protection could draw its inspiration from intellectual property rights while making adaptations in the light of the special characteristics of the people's heritage and TK. This would enable countries and communities endowed with such traditional wealth, for the most part the developing countries, to benefit from them and to be more actively involved in the global economy. While waiting for the adoption of this international instrument which would guarantee the protection of TK, folklore and GR, certain national legislation had already adopted *sui generis* measures for the protection of TK and associated GR. On the

regional level, the African Member States for example had already adopted a model law to protect biological diversity and the interests of local communities. More recently, the two African regional intellectual property organizations ARIPO and OAPI had adopted legal instruments to protect TK and EoF. These instruments were designed to prevent any misappropriation of TK and EoF by third parties. Undoubtedly the instruments put into place by ARIPO and OAPI represented an important step forward. The regional instruments were a point of culmination of regional cooperation in this area and represented substantial progress towards the realization of the objectives defined by African countries and a basis for the multilateral and international work being carried out in this field. The African instruments were designed to limit the object of protection to cultural expressions and related TK in a manner specific to a local or traditional community and which were an integral part of its identity and its cultural heritage. These instruments establish a distinction between knowledge as such on the one hand and TK on the other hand. Such a distinction enabled clearly delimiting the object of protection so that it is easier to identify and so that it may be specifically protected. Indeed, the African instruments proposed constructive solutions to questions that continue to be controversial within the committee. Among these were the issues of the beneficiaries of such protection, as well as the objectives of protection, the exceptions or limitations to the rights linked to cultural expressions and TK which are eligible for protection and the duration of the protection that they are to be granted. The difficulties met in the area of a definition of certain concepts should not serve as an alibi or a subterfuge to delay furthers this process globally. The contributions made by Member States on the basis of the twenty issues previously identified and the discussions on the questions of substance debated in the Committee's recent sessions should enable progress on the substantive issues. Regarding the protection of GR, it was indispensable to improve the defensive protection of GR against illicitly granted intellectual property titles. This would be achieved by making the disclosure of source or origin a mandatory principle. This upstream protection already enjoyed a legal basis affirmed by a number of principles including the sovereignty of states in the management of their natural resources which was inscribed at the heart of the Convention on Biological Diversity (CBD). Defensive protection should not in any case replace positive protection and should not be confused with the acquisition and the active exercise of rights over the protected material. Defensive protection is provided only to prevent third parties from obtaining intellectual property rights and does not, in itself, prevent the use of this material by third parties. The African Group welcomed the contributions made by the donors to the Voluntary Fund. These contributions enabled the representatives of these communities to take part in the work of the Committee. The African Group expressed its thanks for the good will expressed by the donors and would like to encourage the other Member States to support the Fund financially.

15. The Delegation of Slovenia on behalf of the European Community and its Member States appreciated the progress made by the Committee since its creation in 2001. The working documents for Committee basically reflected the positions and opinions expressed by its Member States. The Delegation welcomed the participation of accredited local and indigenous communities and expressed support for the constitution of the WIPO Voluntary Fund, to which some Member States of the European Community had contributed, and for the appointment of the Advisory Board of the Voluntary Fund. The EU continued to believe that one of the most important achievements of the Committee had been to recognize the importance of TK, TCEs and GR to traditional and indigenous cultures worldwide. The Delegation particularly welcomed the continuation of the Committee's mandate for the biennium 2008/09, and reiterated the commitment to contributing to the work in as constructive a manner as possible. It continued to support the Committee's spirit of open and responsible collaboration, and looked forward to further progress in the form of consensus

solutions. However, the EU also recognized the inherent difficulty that had been encountered by the Committee in defining the essence of TK and TCEs, and the methods that could be used in protecting them. It was not enough to create a definition of what was obviously TK or TCE. The line between what was TK or TCE, and what was not, had to be identified. The European Community and its Member States recognized that some Members of the Committee might wish to reach a practical conclusion of its work within a certain time, for example, during the current mandate of the Committee for the biennium 2008 to 2009. Such a timely result for the work could be achieved in areas where a consensus had already been reached or nearly reached and only if flexible solutions were considered that would not bind individual countries to commitments that did not necessarily meet their needs. With respect to the schedule of the meeting, the EU insisted that sufficient time should be reserved for discussing GR as the last item on the agenda. The Committee now had a great deal of information before it. Therefore, the Delegation encouraged the Committee to focus primarily on the areas where consensus was possible in the short term, in order to achieve a practical result that could be accepted by all Members.

16. The Delegation of Singapore on behalf of the Asian Group stated that the Chairman took over the IGC at an important juncture, at the start of a renewed mandate for the IGC. The Asian Group looked forward to progress and not just a continuation of the Committee process, supported the Chair's initiatives towards consensus building and reiterated the importance attached to GRTKF related subject matters. It was concerned about the misappropriation of traditional expression, TK and GR and stressed that their protection was a fundamental objective of the Committee's work. The work should ensure the interest of its peoples in promoting and preserving its rich cultural expressions, TK and GR. The Asian Group welcomed the debate and exchange of views in the Committee which would contribute to consensus building towards a concrete outcome, including the possible development of an effective international instrument for the protection of GRTKF. The Asian Group expressed satisfaction on the continued emphasis by the Committee on the international dimension of its work. Good work had been done and one could build on the achievements at previous sessions, including the factual extractions as an important resource tool, to identify convergence in views and help build consensus. A significant group of Asian and African countries had adopted the Bandung Declaration on the Protection of TCEs, TK and GR in Bandung, Indonesia in June 2007, reiterating the urgency and importance in addressing this matter. The Asian Group welcomed this and other such initiatives that might help to move closer towards consensus on the protection of GRTKF.

17. The Delegation of Chile on behalf of Group of Countries of Latin America and the Caribbean (GRULAC) attached fundamental importance to the Committee's new mandate adopted by consensus in the GA. TK, folklore and GR must be adequately and effectively protected at the international level. This new and fresh mandate would move the Committee forward towards satisfactory results. GRULAC wanted to constructively engage in the Committee's discussions and was eager to cooperate with other member-countries and with all stakeholders towards ensuring a successful outcome for the Committee's twelfth session. GRULAC insisted that the Committee must concretely move towards the consensus on the international dimension of the Committee's work for the protection of TK and folklore. The Committee must not reject any option or format regarding the nature, content and legal effects of the outcome from the Committee, which could be guidelines, model laws or an international instrument. GRULAC wished to have, throughout the five days, a thorough and substantive discussion on the documents prepared by the Secretariat. The substantive aspects of those substantive issues must be fully discussed and addressed by the Committee for the beginning of a real negotiation. For the last the Committee had to focus discussions in the

documents as they remained on the table in their existing form, including comments made in relation to them. Progress made in other fora should be taken into account. GRULAC recalled that the sixth meeting of the Working Group on ABS of the CBD, celebrated in Geneva from January 21 to 25, 2008, had had a positive outcome. GRULAC, as well as other regional groups, had worked in a constructive manner and presented an important proposal on the GR and the associated TK including the previous and informed consent. It had been said that, after the result of the meeting, negotiations were finally beginning and for the first time no delegation contested the need of an international regime for ABS. The Committee should benefit from the impulse and good results in other fora, recognizing however the different nature, approach and scope of other negotiations. GRULAC supported the agenda and work program. GRULAC attached great importance to the documents contained and acknowledged the work made by the Secretariat. GRULAC welcomed the accreditation of the new organizations with ad hoc status and thought that the Committee would benefit from their expertise. GRULAC supported the voluntary fund that made possible the participation of representatives of indigenous peoples and local communities. The voices of indigenous peoples and local communities were essential for the progress of the work of the Committee.

18. The Delegation of China supported the statement by the Delegation of Singapore on behalf of the Asian Group, and was happy to see that the Committee had held twelve sessions so far. 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. 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 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 such debates. In the meantime, 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. The Delegation regretted that, after eleven sessions of the Committee and various symposia, the progress made thus far was obviously unsatisfactory. It pledged its commitment to continuously supporting the Committee in carrying out its work and to actively involving itself in the deliberations on relevant issues. The Delegation hoped 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.

19. The Delegation of Romania on behalf of the Regional Group of Central European and Baltic States welcomed the participation of accredited indigenous and local communities and hoped that both the works of the session and the respective communities would benefit from the presence of the latter’s exponents in the Committee. The Group was glad that some representatives were able to participate due to the existence of the WIPO Voluntary Fund and appreciated its smooth functioning. As working documents submitted for the current session demonstrated, the Committee had carried out, from its start to present, a significant work of reflection on the content and nature of the protection that could be provided in relation to GR, TK and folklore. The same documents proved the diversity of positions recorded on the topics that represented the object of the Committee. Working towards convergence would

therefore need spotting possible common points and building on them for designing a compromise solution. The Group believed in a positive outcome that would satisfy the main concerns raised by Member States. The Group summarized its position concerning each of the topics on the agenda of the meeting. In relation TCEs or folklore, there were still many issues which needed to be clarified. Aiming at an international binding instrument would be premature in the present state of affairs. Yet the Group could look favorably to guidelines or recommendations, based on proposals set out in the document entitled Objectives and Principles. With regard to TK, the Group supported further discussions of substantive issues, with a view to achieving a clearer understanding of the provisions drafted so far and suggested that *sui generis* models or other international non-binding options should be elaborated. Concerning GR, the Group was willing to concentrate on questions related to a mandatory disclosure requirement and to devote more time to discussions on this topic. The Group was most interested in any development that could lead to a breakthrough. It had a refreshed enthusiasm and hope that other Delegations would be eager to join for advancing the works of the Committee with openness and pragmatism.

20. The Delegation of the Republic of Korea acknowledged and welcomed that the Committee had made valuable contribution to the areas of GRTKF and that its work had thus far been of great importance. Korea supported its future work. The discussions in the Committee had made some progress. But, in spite of the efforts made over the past few years, the Committee had been unable to produce substantial outcomes to protect GRTKF, given the wide gap between Member States' interests regarding most of the main issues. The Committee had difficulties because it had focused too much on political justifications and solutions rather than on technical aspects. Therefore, an intensive technical study on the protection of GRTKF was necessary. For example, the exact identification of GRTKF subject matters which were not protected by the existing IP system was crucial. Korea doubted this clarification and any ensuing discussion would not have a common basis for discussion. Additionally, this confusion between subject matter of IP laws and that of any GRTKF protection might cause many legal disputes disturbing the existing IP system. Secondly, Korea proposed to start complementing the existing IP system, until the technical study for protecting GRTKF was mature. In this context, over the last few years, Korea had drawn up documentation on TK to prevent it from being patented erroneously. It had published its database in the Korean Journal of Traditional Knowledge (KJTK) and Traditional Korean Medicine (TKMed) and launched the website KTKP last December, with a searching service. The address of the website was www.koreantk.com. Korea hoped the Committee would make substantial progress.

21. The Delegation of Thailand aligned itself with the Statement made by the Delegation of Singapore on behalf of the Asian Group. This was a crucial meeting. Over the past seven years, eleven previous sessions of the Committee were held, dating back to 2001, and a renewed mandate started. While Thailand recognized the good work done at previous sessions, it saw need to be frank and candid with that not much progress had been achieved towards international protection of GRTKF. Each delegation certainly had many legitimate concerns which were sought to address, but this was not the time to restate old positions. Rather, it was time to put heads together and come up with a fresh and constructive approach, which would reinvigorate the process and allow taking a step forward. In the first place, Member States should consider developing a roadmap for the deliberations in order to chart the course over the next two years. This would give a clearer picture of what needed to be done and what lied ahead. There was a need to mobilize the thinking, consolidate the views, and lay proposals on the table in a constructive manner. In so doing, it would be possible to create a sense of mutual trust and understanding, which would enable to move ahead together.

The factual extraction of both TK and TCEs served as a good basis to continue the exchange of views among Member States. It would be most useful for the Secretariat to undertake a compilation of all the convergence points, in an objective manner. Such an exercise would serve as a starting point to build on and establish a level of comfort. This could eventually lead to a common agreement on a set of early-harvest issues of convergence. Along the way, it was important not to lose sight of the ultimate goal at hand that was to work towards a legally binding instrument on this issue. This should be done in a step-by-step and incremental manner. Such an international instrument should lay the basic ground rules in which Members could create a framework to complement the existing IP system. It reiterated that it did not seek to create new ground rules, but merely to see how the existing rules could be supplemented and help to fill in some of the gaps in order to achieve a more equitable system. Recalling the Bandung Declaration on the Protection of GRTKF, Thailand continued to call for effective international protection against misuse and misappropriation of GRTKF that included the mandatory disclosure of origin, prior informed consent, and benefit sharing. It was without doubt that much substantive groundwork remained to be done, and for this not only hard work was required but also political will. Hence, there was benefit of intensifying the inter-sessional consultations as done within the framework of the development agenda. Such informal consultations in Geneva, among the experts and in consultation with the capitals, would help to clarify issues, bridge differences and prepare for the next session in October. Thailand stood ready to work for a successful Committee. It called on all Member States to adopt a flexible attitude and a spirit of compromise in order to make incremental steps forward.

22. The Delegation of South Africa supported the statement of the Delegation of Algeria on behalf of the African Group. Its position within the Committee continued to remain compatible with similar qualitative shifts observed by many developing countries particularly that of the African Group to continue to actively pursue negotiations that yielded conclusive and decisive outcomes. South Africa, together with the African Group and other developing countries, continued to demonstrate within the WTO, the CBD and other international fora, dealing with this issue, a consistent support for the negotiations of a legally binding international framework. In light of the outcome of the 2007 WIPO GA and the current changes occurring within the organization, South Africa underscored the necessity of accelerating progress within the Committee in 2008. It was within this context South Africa implored Member States to comply unconditionally with the spirit of the mandate of the Committee as intended when first agreed upon in 2002. Whilst South Africa recognized the complexity of the work ahead, it viewed the decisions of the eleventh session of the Committee as providing a solid foundation on which to base future work of fundamentally important issues. The Committee had agreed to work towards further convergence of views on the questions included in its previous mandates, particular within the areas of TCEs and TK. It believed that there was now a deeper understanding of the broad diversity of views held and stronger mutual respect for the different perspectives that were brought to the table at the end of the eleventh session. In addition, the outcome of the eleventh session would bring greater determination and courage to strengthen the hands and future bargaining powers of Member States towards the final establishment of an internationally binding instrument which South Africa urgently sought. Within this context, South Africa reaffirmed the continuity and consistency of its support for the work of the Committee. Any future work had to continue towards an accelerated completion and therefore the factual extractions of comments compiled by the Secretariat in documents WIPO/GRTKF/IC/12/4(b) and WIPO/GRTKF/IC/12/5(b) had to be discussed together with the working documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, as reproduced in documents WIPO/GRTKF/IC/12/4(c) and WIPO/GRTKF/IC/12/5(c) since they provided the basis for

future work of the Committee. Broad analyses of the eleventh session as contained in the factual extractions were useful towards analytically assessing the role and weight of different factors and the efficacy of different tactics that Member States would employ. South Africa had in the interim evaluated such factors within the process of charting the way forward towards a substantive framework and with suggestions as to what should be included in it. South Africa's Indigenous Knowledge Systems (IKS) Policy had been the first step towards the initiatives for the protection of indigenous knowledge on a national level. Since then the Department of Trade and Industry's (DTI) policy framework on the protection of indigenous knowledge and a draft bill was currently before the Parliamentary Committee for discussion. The policy which had been introduced to South Africa's Parliamentary Committee on Trade and Industry was entitled "Policy Framework for Indigenous Knowledge through the Intellectual Property System" together with the first draft of the Intellectual Property Laws Amendment Bill. These pieces of legislation were just a start by South Africa to ensure that its indigenous knowledge was protected. The current Committee session was not just another session awaiting an extended lifespan in 2009. South Africa hoped that there should be progress for substantive development given the renewed mandate of the Committee. South Africa remained steadfast and committed to the process.

23. The Delegation of Mexico fully supported the statement made by the Delegation of Chile on behalf of GRULAC. The new mandate given by the General Assembly to the Committee would make it possible to achieve concrete results to achieve the protection of TK, TCEs/EoF and GR. The Delegation believed that TK, TCEs/EoF and GR should be protected effectively both nationally and internationally bearing in mind the prior informed consent of the holders of this knowledge and resources. To achieve that aim it was necessary to work in a constructive way looking for bridges and solutions, and making proposals that would achieve international consensus on these subjects. It was high time using the impetus of the new mandate to initiate substantive negotiations within the Committee. The Committee's work had matured sufficiently for this process. On genetic resources, it was necessary to draft terms and definitions agreed on by consensus that would facilitate the development of international mechanisms that addressed the needs of GR within intellectual property systems. It was also necessary to set up data bases of TK and to make them available to intellectual property authorities. Regarding undisclosed TK, this required mechanisms to protect the confidentiality and integrity of the information. Incorporation of TK within these databases should be subject to the the request of local and indigenous peoples and communities on the basis of the principle of prior informed consent. It was important that there should be a link permitting the exchange of information between the competent authorities who granted intellectual property rights and those authorizing access to GR. Regarding TCEs/EoF and TK, it was essential to find minimum points of agreement with respect to the mandate given by the WIPO General Assembly WIPO in September 2007, particularly regarding the list of issues agreed on at the tenth session. The Delegation was fully prepared to find solutions to these problems and would collaborate in achieving this aim. It therefore proposed to determine the points of agreement and to define the areas that need more analysis and study so as to end up with concrete recommendations to submit to the WIPO General Assembly as requested in the Committee's mandate. It recognized the need to study the different mechanisms for the exchange of information between the competent authorities in intellectual property and the authorities who have to implement provisions on access to genetic resources and associated TK. The Delegation called on the members of the Committee to explore mechanisms for the exchange of information between those authorities so as to contribute to achieving the third objective of the CBD, concerning the equitable sharing of benefits derived from access to genetic resources. The Government of Mexico was working on the design of the first indigenous consultation on the protection by intellectual property rights of traditional

knowledge, traditional cultural expressions and associated genetic resources. The purpose of the consultation would be to hear the views of indigenous peoples and communities of Mexico on these issues, both for the work of the Committee on the international level, and for the drafting of a national law for the protection of the TK of indigenous peoples and communities. The Delegation felt that the Committee should take advantage of and benefit from the experience and discussions in other bodies such as the ad hoc open ended working group on access and benefit sharing under the CBD, as well as UNDP, FAO, the WHO, UNESCO and others. It was also important to continue to hear the voices of the non-governmental organizations, academic experts and indigenous organizations that specialize in the issues which the Committee was discussing.

24. The Delegation of Panama considered that WIPO, as the leading intellectual property body in the world, should be congratulated on the treatment it has been giving the subject especially through the work of the Committee. The protection of their TK, both nationally and internationally, and of course their folklore and genetic resources, were issues of concern to all. It was high time to render social justice to the indigenous and local communities in their countries. 'Social justice,' because it was their ancestral knowledge, which had been inherited from their ancestors, and who among us did not value what belonged to previous generations. WIPO was making history with the directions taken by the Committee and the delegations with their modest contributions would form part of this history. The Delegation had been working hard on this recognition. The Delegation was personally very much involved in this area, which had been working on legislation to protect the collective rights of indigenous peoples through the national Law 20 of 2000 but had also gone beyond legal protection to make efforts to save and preserve TK, both current TK and TK that was threatened with extinction. This has being done through investment projects under the national government and also together with international agencies such as the IDB (International Development Bank). The role of the Government had been to support the initiatives of the indigenous communities and to continue to make important efforts.The very present of the Delegation presence in the meeting room testified to this.

25. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Singapore on behalf of the Asian Group. Obviously, the international community had very well recognized that the international protection of GR TK and folklore were amongst fundamental issues for developing countries in the context of overall IP policies. Additionally, during the course of the last eleven sessions of the Committee, a good understanding of the issues and enough sensitivity at the national, regional and international level of these very significant issues had been achieved. The Committee had moved from a general conceptual stage to a document stage through drawing questions on TK and folklore. Now delegations should confine themselves to answering the questions agreed upon, hoping to arrive at a path towards a drafting stage and outlining necessary provisions and norms as early as possible in the areas under discussion. The decision of the WIPO GA in September 2007 for renewing the mandate of the Committee and its emphasis on the international dimension of its work, illustrated WIPO Member States' wish and goal to reach an international accord for international protection of GRTKF. Therefore, the focus of the Committee's works on the international dimension of protection of GR, TK and folklore without consideration of the following points would not drive towards a proper outcome: 1. the enforcement mechanism for prevention of misappropriation and misuse of GRTKF; 2. recognition of the principle of national sovereignty of states on their GRTKF and obtaining prior consent for access to them; 3. establishment of a benefit-sharing mechanism. The above mentioned goals were attainable only in the case of creation of an international legally binding instrument including *sui generis* system for the protection of GRTKF.

26. The Delegation of Australia indicated that, since the last meeting of the Committee, there was a new Australian Government and it was considering its current approach to policies relating to the intersection of IP and indigenous issues. The work undertaken in the Committee would therefore be vital in helping shape the Australian Government's engagement and collaboration with the indigenous community. Australia welcomed the extension of the mandate for the Committee. To date considerable effort had been expended by Member States to explore and clarify issues in the Committee. This had enabled many Member States to better determine and implement national policies and practices on issues raised here and to share experiences. However as this was the twelfth meeting, there was a growing sense of urgency to build consensus. During the time of this renewed mandate, the Committee should bring positive and real outcomes on IP issues surrounding the protection of TK, TCEs and GR. In particular, the work on the factual extraction list would enable Member States to expedite the process and hopefully resolve key issues. It was crucial that the Committee continued its work on the full range of issues under its mandate, on an equal footing, including in relation to GR. This 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 in this area had been very useful and had had very practical outcomes. This included the improvement of the quality of patent examination through the extension of minimum documentation relating to TK and GR required for patent search and examining authorities under the PCT. However, Australia would like to see further work aimed at practical outcomes developed by the Committee, particularly those that develop the capacity of holders of GR and TK to develop contracts and agreements regarding access to GR to meet their particular needs and aspirations. Australia urged Member States to focus on identifying a work program for this mandate that would allow clear achievements to be reported to the GA in 2009.

27. The Delegation of Canada looked forward to working constructively with Member States and observers in order to advance the substantive work of the Committee in all its mandated areas and to make progress towards practical deliverables. The factual extractions on TCEs and TK (documents WIPO/GRTKF/IC/12/4(b) and WIPO/GRTKF/IC/12/5(b) would be a very useful tool to focus the discussions of the Committee, as well as for consideration of these matters at the national level. A great deal of very useful work had been accomplished by the Committee to date. The issues at stake were complex and extremely challenging and further discussions were required to identify what concrete steps could be taken with regard to the IP-related aspects of TCEs and TK. Canada was committed to deepening the discussions with a view of reaching a common understanding of these multidimensional subject matters, bearing in mind the considerable amount of work Member States and observers had undertaken in refining the draft policy objectives and general guiding principles on TCEs and TK. With respect to GR, Canada was very pleased to see the Committee engage in substantive discussions at the eleventh session. It encouraged Member States and observers to continue meaningful dialogue at the present session in order to enrich the work of the Committee by having fact-based discussions on the ten options for future work on GR outlined in document WIPO/GRTKF/IC/12/8(a). Canada looked forward to engaging constructively in discussions, making progress this week on all core agenda items, and working towards defining a practical and concrete path forward for the work to be undertaken by the Committee for the present biennium.

28. The Delegation of Egypt joined its voice to Algeria's statement on behalf of the African Group and expressed the desire to look into the technical details when speaking about the quality of the documents pertaining to TK, folklore and GR. The Delegate stated that when he came to the Committee more than seven years ago, he had still black hair and his son was a child, but today his hair had become white and his son had become a young man and he was afraid that, if the Committee continued to work at this pace, he might come again and would be depending on his grandson to come here. Egypt wanted to accelerate the work. Currently, there was a certain number of studies and positions been crystallized. It was known who was for and who was against. But since the first day, Egypt had emphasized that it was in the full interest of everyone to have a legal instrument with regard to these three topics so that it would be objective with regards to IP. Egypt re-emphasized this matter. The Committee had to accelerate. The Uruguay round had established an international organization and come up to 28 agreements. The Committee was only trying to seek and achieve one agreement. The Committee should work collaboratively in order to achieve this international instrument.

29. The Delegation of Indonesia saw it as a result of other delegations' consistent contribution and support that the Committee was under the new mandate and able to engage the broader participation of indigenous communities, due to the generous contribution from the Voluntary Fund. With the bulk of substantive documents, it was now the joint task of Member States, to move the discussions regarding the issue of GRTKF forward in order to achieve concrete outcomes. On substantive matters, Indonesia associated itself with the Delegation of Singapore speaking on behalf of the Asian Group. It was important to emphasize the focus of work towards creating an international legally binding instrument or instruments. It might be needed to discuss this issue for several next Committee meetings, but there should be a clear goal that would satisfy an aspiration of many developing countries and the traditional community groups. The Committee should avoid the experience made when the international community was establishing the UN Convention on the Law of the Sea. Discussions on the issue had started in 1973, and it was in force in 1996. The discussion regarding the issue of GRTKF in the Committee had taken time and effort and was too long. The revised Principles and Objectives and list of core issues formed already a good basis for negotiation. Progress, as already declared in the Bandung Declaration on the Protection of GRTKF, needed to be accelerated. Indonesia welcomed the development of deliberation among Member States as thoroughly reflected in the documents WIPO/GRTKF/IC/12/5(a) and WIPO/GRTKF/IC/12/5(c), and WIPO/GRTKF/IC/6(a) and WIPO/GRTKF/IC/6/(c), as well as WIPO/GRTKF/IC/12/8(a) and WIPO/GRTKF/IC/12/8(b). Indonesia welcomed and highly appreciated the documents on the factual extractions prepared by the IB as mandated at the last Committee session. Those documents guided Member States into a more substantive deliberation as well as drove toward concrete outcomes. Indonesia was ready to actively participate and contribute to the Committee.

30. The Delegation of Japan stated that a basic understanding of GRTKF was essential for considering their protection because their features differed from the features of IP currently treated under the existing IP systems such as patents and copyrights. It was positive that some matters had gradually been made clear due to the discussions held since 2001. On the other hand, still many things had to be learned about the problems that existed and how these problems related to IP. Japan welcomed the prolongation of Committee mandates and discussions and hoped that the delegates' knowledge and awareness of the relevant issues would grow. Japan would take an active part in these discussions. Regarding TK and folklore, the delegates should focus on the basic elements of the problem in their discussions. The problem of TK and folklore was rather complicated because it involved a variety of

issues such as definition of terms, the very definition of the problem itself, and the relationship with the IP System. Therefore, the delegates should very carefully discuss this problem. The same applied to GR. Regarding TK and folklore, a common understanding of the basic elements of the problem had yet to be shared among the delegates in such areas as the subjects and objects to be treated in this discussion and definition of terms. Continuous discussion was indispensable for the identification of such basic elements. Japan hoped that the delegates refered to the list of issues from the previous session and looked deeper into these issues. Discussions about policy objectives and general principles were also important. Considering the fact that a common interpretation of the basic elements of the problem of TK and folklore did not yet exist and that the opinions of the members greatly differed about the problem, it was too early to discuss substantive provisions. The members should not yet aim to formulate any legally binding provision. Japan was ready to advance a pragmatic discussion based on the working documents. A constructive and step-by-step discussion was essential. In this regard, the ongoing session was very meaningful. As regarded GR, the problems of "biopiracy" and "misappropriation" had been raised. Japan had continued to state that biopiracy involved two issues. One was the erroneous granting of patents and the other was compliance with the CBD provisions concerning benefit-sharing and prior informed consent. Accurate understanding of these issues was crucial. Also, fact-finding efforts to determine the current status of these issues as well as the actual underlying causes were necessary. The delegates should proceed with the discussion, clearly distinguishing between the policies to be taken within the framework of IP and those to be implemented outside of the framework. Topics relating to GRTKF had been taken up in various fora. As the UN organization specialized in IP, WIPO would take measures that would meet the expectations of many countries regarding the problems relating to GRTKF by fully utilizing its expertise in accordance with its mandates. The twelfth session was the first session to be held under the revised mandates, and Japan would continue to actively take part in the discussions concerning GRTKF. Japan sincerely hoped that frank, constructive and specialized discussions with interested parties would take place during this session.

31. The Delegation of Ecuador endorsed the statement of the Delegation of Chile on behalf of GRULAC. Ecuador aspired to a legally binding international instrument in this field. It welcomed the recent adoption by the United Nations General Assembly in September 2007 of a Declaration on the Rights of Indigenous Peoples which provided important elements to be able to construct a *sui generis* protection system for TK, especially referring to the recognition of traditional medicine and the protection of cultural heritage as well as the protection of other traditional practices mentioned in the declaration. The Delegation highlighted the very important experiences heard in the Indigenous Panel referring to the role of customary law for the protection of TK. In this respect the Delegation supported the idea that these elements should be considered in the development of the *sui generis* system. Ecuador was carrying out an important process of *sui generis* legislative development which protected the collective knowledge which was linked with biological resources and TCEs. This process emphasized the recognition of the collective ownership by the indigenous peoples and local communities of these rights of the ownership over their TK, and Traditional Knowledge, the importance of the recognition of customary laws, free prior informed consent, equitable benefit sharing, and the establishment of public and local registers and community registers, among other aspects. The Delegation expressed its gratitude to the donors who had made contributions to the Voluntary Fund which enable the important participation of indigenous peoples and local communities. The Delegation supported the maintaining and consolidation of the Voluntary Fund which would provide for greater indigenous participation which was key to this process.

32. The Delegation of Morocco supported the statement by the Delegation of Algeria on behalf of the African Group. Morocco considered that it was crucial that protection was provided to GRTKF. Morocco had enacted a number of laws to protect TK and TCEs and to put an end to the unlawful improper use of this knowledge. Morocco had, in fact, created a fund for this matter. During the previous meetings, Morocco had tirelessly participated in a very determined fashion in the work that the Committee carried out and it would not cease to hope that the Committee would enable to meet the country's objectives. It was within the power of the Committee to be able to come up with an instrument which would enable us to protect TCEs, EOF and TK and yet only an internationally legally binding instrument would be able to meet that objective, that objective to protect these resources their wealth and to put an end to the eroding thereof through an unlawful and illegitimate use thereof. Such a legally binding instrument was the only way for to achieve this protection. It was high time for the Member States to engage in in-depth negotiations within the Committee and within the mandate of the Committee to enable progress and to find a solution together. Morocco supported and had tirelessly supported the idea whereby it should continue in this vein in this speedy fashion to be able to meet the expectations of all the Member States. To start with this roadmap would enable the Committee to make progress through of course regional negotiations also so that it could come up with solutions that were consensual and mutually agreed. In that respect, Morocco was proud to note that the representatives of indigenous peoples and local communities aspired to be involved in the work of the Committee as they had done in previous sessions. Furthermore the world of donors was key and in that respect, Morocco expressed all its thanks to the donor countries.

33. The Delegation of Sudan thanked WIPO for the efforts provided to safeguard and protect the creativity of indigenous communities, and expressed support for the statement made by the Delegation of Algeria on behalf of the African Group. The Sudanese authorities recognized the importance of TK, TCEs and GRs in the safeguard of the identities of indigenous peoples. Sudan had made effective efforts in that direction. Despite difficulties caused by the absence of international models to refer to, a draft law on the protection of TK and TCEs had been submitted in January 2008. Sudan submitted a number of proposals for consideration: Firstly, priority needed to be given to documentation which was an essential tool that facilitated protection. Secondly, the Committee should provide a guiding model or instrument to assist Member States in drafting national legislation for the protection of TK, TCEs and GRs, including, in particular, a provision for definitions, and other provisions on matters such as term of protection, beneficiaries and exceptions and limitations. Finally, in order to move forward with the work of the Committee, participation needed to be opened also to indigenous peoples in remote and isolated regions.

34. The Delegation of Pakistan aligned itself with the statement made by Singapore on behalf of the Asian Group. The issues under discussion at the twelfth Committee were not new and all were aware of the positions of different countries on these issues. A lot of discussions had already taken place on definitions, objectives, principles and issues related to GRTKF. The delegations exactly knew where the fault lines were. There were two options. The first option was a bottom-up approach that was to continue these discussions, see more and more clarity and develop consensus on these issues. This approach might help to improve the comfort level of different countries, but it would be long and that too without any surety to see light at the end of the tunnel. The second option was a top-down approach that was to take a decision to start discussions on any international instrument. Pakistan understood that a majority of countries was in favor of this approach, whereas others felt that time was yet not ripe for such discussions. Taking this approach was neither new to the UN system nor to the WIPO itself, as was done in case of a Broadcasting Treaty. This approach would have

definite timelines and result in a concrete outcome. If after discussions on international instrument(s), Member States felt that this option was not workable, then the other options could be explored. Which approach to adopt was purely the Chairman's decision which would be based on inputs from the Member States. However, this decision would determine whether the Committee would be able to achieve concrete results by 2009 or the lives of millions who suffered would continue to be the victim of the Committee's indecisiveness for many more years to come.

35. The Delegation of Brazil stated that there was now a great deal of reading material. The Committee was coming close to the point of diminishing returns if more of the same types of documentation were to be prepared for the next session. Brazil was glad to see that the WIPO Voluntary Contribution Fund was functioning and providing important support to representatives of indigenous communities. That was a positive side of the recent work. The new mandate adopted by the GA talked especially of further convergence of the issues. And it also spoke of working without prejudging outcomes which Brazil interpreted to be working with an open mind. However, progress had been elusive and, without dwelling in the past, this was pointed out by several delegations. The Committee during the session should try and look at what could achieve forward movements. Brazil saw a need to focus on substance, and for that the list of issues should be the guide. With regards to the list of issues Brazil thanked and recognized the important work performed by Ambassador Puja of Indonesia of past sessions of the Committee which had led to adopt the list of ten issues which had become the guideline for further discussions on the substance of the issues. In addition to focusing on substance and taking the list of issues as the guide, they should be tackled in an orderly fashion. Discussions had to move beyond statements by delegations towards a more substantive and proactive role for the Secretariat. The fundamental gateway issues were conceptional or definitional in nature. The Committee would get nowhere unless the hands were free of those experts from the Bureau who could actually make some sense of the massive inputs collected in the proceedings in the Committee during its long 8 years of existence. One could not expect to make progress in all areas under preview, but a start could be made by making some progress on at least a few key elements. For Brazil the key elements to be looked at first during this session were the definitions. Without them the Committee could not get to any other of the elements of whatever it was trying to achieve – an instrument, a guidelines or best practices, hard law, soft law, whatever it was without definitions it would never be reached. Brazil would refrain from reiterating its position on the nature of the outcome of the work until such time as progress on substance justified such a debate. Work should be concept based. It was at this point now useless to pick up yet another fact based discussion and try to deal with everything at the same time. The Committee would get nowhere and the documents would be quite duplicative and extensive and they dealt with very complex issues. If there was no help of the IB, the Committee would not make any sense of them. The Committee needed further, greater support from the Secretariat. The Committee could only get this support if it would give a mandate to the Secretariat. Brazil pleaded with all members to do this in the course of this week to provide the IB with a mandate to put some order into this great mass of information that the Committee had already collected through the years. The Committee should focus on substance. This should be done in an orderly fashion perhaps starting by the definitions using that as a point of departure.

36. The Delegation of India stated that there were enough sessions in the past. The issues had been debated, discussed, deliberated, reflected, but at the end, did it get somewhere at the light at the end of the tunnel? India had come with an open mind to look forward to some illuminating discussion and with an open mind to harmonize the concerns of those who had

some concerns, harmonizing even the expectations of the large majority who were looking forward to this discussion leading to some concrete outcomes. India agreed with Brazil that the Committee needed to look at the conceptual issues, clarify them, address them and perhaps allow some maneuvering, some space to the Secretariat to put out some working document which the Committee could reflect and discuss in more detail. That was the point made by the Delegation of Pakistan as well. Perhaps, the Committee could look at an instrument, try to embellish it and try to put in some provisions or some caveats or some kind of acceptance clauses which the Committee really needed to so that it could address expectations and concerns in an instrument. Now, the Committee needed to move forward towards a focused action plan. The core issues still continued to remain disclosure of origin, prior informed consent, ABS. Disclosure must remain mandatory. India also continued to believe that the work of the Committee on the issue of disclosure should be consistent and complementary to the ongoing discussions in different fora namely, the TRIPs, the CBD and WIPO itself. The TK in a large segment of it remained in all form which was difficult to provide or defend without any instrument and without holistic consideration of this issue. If it was to protect the traditional art, the TK, prior art search was also important. India recognized that the lack of classification tools is there. India felt that enhancing the IPC classification of the medicinal groups to 200 sub-groups was not adequate. There was a need to go beyond this. India had taken some initiative and it had TK and classification tools having 25,000 categories. The TKR C classification categories must be more than the IPC sub-groups. The IP system was inaccurate in examining patent applications based on TK and the associated GR because it wasn't skilled in the art in the area of TK, they were not available in patent offices. This was one of the reasons for gross misappropriation of the TK at international level. Training and awareness might provide some relief in the long term. How would there be a need to have a system of integration between the examining offices and the country of origin of TK. India felt that this would provide a particular answer to the problem of patent misappropriation of TK at international level. India was victim of its TK being misappropriated grossly at various levels and it had been forced to defend it in various judicial institutions, spending time, effort and energy and also losing the benefit that needed to accrue to the legitimate holders. India had in the previous meetings mentioned that it had a TK digital library which had 150,000 medicinal categories of knowledge which it could share with the patent examiners on access basis. India emphasized the need to move forward proactively, constructively, so that at the end of this meeting there was some light at the end of the tunnel.

37. The Delegation of the United States of America stated that at the eleventh session of the Committee, the United States was pleased to participate in the beginning of a sustained discussion of a list of ten issues related to the protection of TK and TCEs/EoF. The Delegation welcomed the opportunity to continue, deepen and enrich the discussions, with a view toward reaching a fuller, shared understanding of the difficult questions before the Committee related to the to the protection, preservation and promotion of TK and TCEs/EoF before the Committee. Such a sustained and focused discussion among the Member States on the many complex issues before the Committee was the best way to move the work of the Committee forward. The Delegation was pleased to continue the discussion of issues related to GR, which was an integral part of the work of the Committee. There was a wide divergence of views in the Committee on many issues relating to GR. Nonetheless, progress could be made with respect to a number of concrete proposals outlined by the IB. Deeper consideration of fact-based examples and experiences could help identify commonalities, clarify differences and thereby help achieve tangible results. Over the last several sessions, the Committee had made substantial progress, including several concrete outcomes that were already bearing fruit in a number of Member States. The work of the Committee was proving

to be of assistance to Member States that were exploring the web of complex issues related to the protection, preservation and promotion of TK and TCEs/EoF. Moving forward in the work, one should not lose sight of the significant progress made over the last several sessions in identifying and articulating policy objectives and general principles on TK and TCEs/EoF. Although more work remained to be accomplished on these objectives and principles, the progress would advance the work of the Committee.

38. The Delegation of Norway stated that while recognizing the achievements made by the Committee, there was a need for a focused approach to the work of the Committee, so that further substantial results could be made. In this regard, a focus on the list of questions on TCEs and TK could be useful with a view to identifying points of convergence. This focus at the last meeting proved useful as a way forward. At this stage, a focus on content rather than the legal status of the outcome in respect of TCEs and TK was most useful. In respect of GR, a key question was how the relevant WIPO treaties could be amended in order to best accommodate disclosure requirements. Norway was looking forward to substantial discussions that could lead to consensus and substantial results.

39. The Delegation of New Zealand continued to support the work of the Committee in all its mandated areas and all the possible approaches as elaborated in document WIPO/GRTKF/IC/11/6, and more fully in WIPO/GRTKF/IC/6/6. The Committee had originally identified a variety of potential options: a binding international instrument or instruments (e.g., obliging Contracting Parties to apply the prescribed standards in national law), including stand-alone instruments, protocols to existing instruments or special agreements under existing agreements; a declaration espousing core objectives and principles and establishing the needs and expectations of holders of TCEs/EoF as a political priority (e.g., as the political basis for a further phase of work possibly aimed at more precise legal outcomes); other forms of soft law or non-binding instruments, such as a statement or recommendation (for instance, recommending, encouraging or urging States to give effect to the prescribed standards in national law and other administrative and non-legal processes and policies); guidelines or model provisions (e.g., providing the basis for cooperation, convergence and mutual compatibility of national legislative initiatives for the protection of TCEs/EoF); authoritative or persuasive interpretations of existing legal instruments (e.g., guiding or encouraging the interpretation of existing obligations in such a way as to enhance the desired protection of TCEs/EoF against misappropriation and misuse, or other illicit uses). Some of the issues before the Committee were complex and had implications for numerous stakeholders and therefore required a robust process in order to develop viable solutions for all. Technical discussions and analysis by the Committee might reveal that in fact a combination of these potential options was needed. Therefore New Zealand wished to explore the spectrum of potential approaches in the substantive analysis of the issues. New Zealand looked forward to further analysis of the key issues that had emerged from the tenth session, building upon the previous discussions in order to better understand the practical implications for Member States and indigenous peoples and local communities, with an aim always to building consensus and achieving positive outcomes. During the course of this session, New Zealand liked to focus and expand on a small number of substantive issues, including: the need for relationship and capacity building with indigenous and local communities, and New Zealand's recent domestic publication of Te Mana Taumaru Mātauranga: an Intellectual Property Guide for Māori Organisations and Communities; concerns that New Zealand had heard in relation to the recording and documentation of TK and TCEs for the revival, preservation, protection, and promotion purposes; and the issue as to whether formal definitions of TK and TCEs were in fact needed at the international level. With regards to future work, New Zealand had noticed that the discussions had mainly

focused on the policy objectives and guiding principles and on the set of key issues. The discussions at the eleventh session on the key issues were very productive and the Committee should continue to focus on them. New Zealand also considered the option of soft measures as it considered that these could address some of the current concerns around the misappropriation of TK and TCEs. New Zealand had come to realize that these issues had a significant international dimension that needed to be addressed.

40. The representative of the Saami Council, speaking on behalf of the Creators Rights Alliance, the Saami Council and the Tulalip Tribes drew the attention to one major development that had occurred since the last Committee session: the historic adoption by the UN GA of the Declaration on the Rights of Indigenous Peoples on September 13, 2007. The representative extended the deepest gratitude to those States that had assisted indigenous peoples in achieving the adoption of this groundbreaking instrument, which included almost all member states in the Committee. The Declaration had substantive provisions which were highly relevant to any instrument regulating GR, TK and TCEs that the Committee might agree on. Any such instrument had to respect indigenous peoples' rights to resources, knowledge and cultural expressions, as enshrined in the Declaration. The Declaration was available at the documentation center as Document WIPO/GRTKF/IC/12/INF/6. The representative encouraged all delegations that had not yet done so to study the Declaration carefully. The representative highlighted some provisions in the Declaration of particular relevance to this process. Article 3 of the Declaration confirmed that indigenous peoples had the right to self-determination. By virtue of that right, indigenous peoples freely pursued economic, social and cultural development, which encompassed a resource dimension, under which peoples had the right to determine over natural resources in their territory. Similarly, Article 26.2 of the Declaration proclaimed that "*Indigenous peoples have the right to own, use, develop and control the lands, territories and resources ... they possess by reason of ... traditional occupation or use...*" and Article 28.1 stipulated that "*Indigenous peoples have the right to ... restitution* [of] *lands, territories and resources ... which have been ... taken ... without their free, prior and informed consent.*" In this context particularly noteworthy, Article 31 of the Declaration proclaimed that: "*Indigenous peoples have the right to ... control ... their cultural heritage, traditional knowledge and 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.*" Further, pursuant to Article 11, indigenous peoples had the right to "*... maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature*" and Article 24 confirmed that indigenous peoples had "*the right to their traditional medicines.*" The Declaration further highlighted the relevance of customary law to any regulation of GR, TK and TCEs. Pursuant to Article 34 of the Declaration, indigenous peoples "*have the right to ... maintain their ... juridical systems or customs*". And Article 40 proclaimed that indigenous peoples "*have the right to ... due consideration to the*[ir] *customs, traditions, rules and legal systems*". Finally, pursuant to Article 27, states should "*give due recognition to indigenous peoples' laws, traditions, customs and land tenure systems...*" This underlined that any WIPO instrument pertaining to GR, TK and TCEs had to be compliant with the relevant indigenous peoples' customary laws and protocols. These provisions further entailed that GR, TK and TCEs protected by indigenous customary legal systems did not fall into the so-called public domain, for the purposes of intellectual property. The Declaration offered guidance as to the scope of the principle of state sovereignty over natural resources. This principle could not be invoked against indigenous peoples residing within the state. In practical terms, this implied that state sovereignty was not absolute power and was subject to

universal international law including human rights law. Sovereignty was a principle of international law that in essence provided that no state may interfere in another state's internal affairs. As a consequence, states were essentially free to determine and apply laws and policies within their jurisdiction. This right was, however, subject to any limitations prescribed by international law which limited and conditioned state sovereignty in connection with a state's treatment of persons and peoples subject to its jurisdiction. In line with the limitations on state sovereignty, domestic legislation had to be in conformity with the human rights of indigenous peoples, as enshrined e.g., in the UN Declaration on the Rights of Indigenous Peoples. The representative thanked the UN Member States for demonstrating their readiness to respect these rights by adopting the Declaration. They were looking forward to work together with states in the Committee to implement the rights contained in the Declaration, as they pertained to GR, TK and TCEs springing from indigenous territories.

41. The representative of the Indigenous People's Council on Biocolonialism (IPCB), an Indigenous NGO based on the Pyramid Lake Paiute Tribe Reservation in Nevada in the United States, thanked the donors of the Voluntary Fund for making its participation possible in the Committee meeting for a second time. The organization had participated for many years in the CBD in the ongoing elaboration and negotiation of an international regime on ABS, understood the implications that WIPO's work had for that process, and therefore, was hopeful to bring its experience in the common issues across fora. The fundamental issue for indigenous peoples across all UN fora and at national levels continued to be the recognition of their right to self-determination. It was very clear to them that this fundamental, inherent right of peoples was, in fact, the central right underlying the discussion in this Committee. They were here to assert their right as self-determining indigenous peoples, to own, control, protect, and develop their biocultural heritage, including their knowledge, knowledge systems and GR, including the systems for protection of their knowledge and GR. The representative called attention to two new developments since the last Committee that have occurred in the UN System that were extremely relevant to the work of the Committee. The representative hailed the adoption of the UN Declaration on the Rights of Indigenous Peoples and expressed the Organizations thanks to the Secretariat for including the full text of the Declaration in the informational papers of this meeting. It was now incumbent upon the Committee to specifically examine the implications of the relevant articles to the work of the Committee. The minimum standards set out in Article 3, 11, 12, 19, 24, 25, 26, 27, 31, 32, 34 and 37, in particular, required a re-evaluation of the current draft objectives and principles on TK and TCEs and other proposals for defensive and positive measures to ensure that these existing proposals were legally consistent with the Declaration. This should compose a key part of the Committee's new way forward. IPCB would provide more specificity about this issue under the appropriate agenda items later in the week. The Committee responsible for Convention on the Elimination of Racial Discrimination (CERD) had for several years been reviewing various claims by indigenous peoples that the United States government had violated the rights of these peoples. Specifically, IPCB called attention to the meetings of last week where the Committee had questioned the United States government about its illegal actions regarding the self-determination of the indigenous peoples of Alaska and Hawaii and the illegal removal of those territories from the UN List of Non-Self-Governing Territories. Other important findings from the CERD Committee addressed the United States government's violation of the rights of the Western Shoshone, Lakota, and Cherokee peoples to their lands, environment, and sacred sites. This development in the CERD certainly underscored questions of ownership, control, and development of GR and associated indigenous knowledge that were raised in the Committee. The implications for the work in the UN human rights arena and the developments in that body of international law regarding the land and territorial, cultural and spiritual rights of indigenous peoples was of great

relevance to any work, whether in WIPO, CBD, WTO, and FAO, or in national circumstances, in relation to the GR and associated TK of indigenous peoples. With these new developments, IPCB was optimistic that the times were changing for indigenous peoples, and that WIPO and Member States would realize that IP had a very limited role in the protection of indigenous knowledge and GR. Most importantly, IPCB was hopeful that Member States would soon realize that their human rights obligation was to recognize their right to protect their indigenous knowledge and GR according to their own legal systems on their own terms.

42. The representative of the Mbororo Social Cultural Development Association (MBOSCUDA) supported the position of the African Group, on the issues of a legally binding instrument for the protection of TCEs/EoF and TK and to move these processes forward. The representative wondered if the African Group represented their personal opinions or that of the governments. Because while holding a more dynamic view point here, it seemed that they were seriously disconnected from their Government back home in Africa. The Cameroon Government for example had voted for the UN declaration on the Rights of Indigenous Peoples, but consistently denied the Mbororo peoples the right to freely choose their traditional leader, thereby violating Articles 4 and 18 of the UN Declaration. UN Article 4: "*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*" ARTICLE 18: "*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*"

43. The Delegation of Saudi Arabia believed that the Committee was heading on the right path towards success and it hoped also that the other aspects of the work would make similar progress. It thanked all the delegations present for the progress been made but also shared the point of view of those who had said that the achievements had been modest in the last two meetings and it hoped that the Committee would come up with a protection system for the GRTKF shortly. The Delegation shared the view of those who had said that the Committee had to see what laws had been enacted in different countries. It needed to look at them and what rules had been adopted in certain organizations in this field. But, in some regions many peoples were waiting expectant on the outcome of the work of the Committee. They were waiting to see what the Committee would come up with, to see, then to adapt, enact themselves their own laws, to protect the rights of their own indigenous peoples. The modesty of the outcome of the work of the Committee could have negative effects on the rules and regulations and laws that had been inactive in some states. Indeed these legal systems could start lagging behind significantly if the Committee would not make enough progress in its work.

44. The Delegation of Colombia highlighted the importance of the participation of the indigenous communities and local in these discussions of the Committee and therefore paid tribute to the work carried out in the last sessions of the Committee thanks to the financial support of the Voluntary Fund. There was a clear need to generate some kind of mechanism to guarantee an effective participation, a representative participation and legitimate participation of the indigenous and local communities in the work of the Committee. The Voluntary Fund should have a mechanism to guarantee to the representatives of those communities to have this support, the legitimate support of the consultation that should be available to them, at least for the peoples in Colombia. Participation should not be limited but

rather organized in such a way that it was effective and empowered the participation of these communities in these fora. This led to responsibilities to the participants. The Delegation requested the Secretariat to make a proposal for a mechanism which would operate within Committee to solve the concerns raised by Colombia.

45. The Delegation of the United States of America on behalf of Group B welcomed the participation of accredited local and indigenous communities and expressed support for the constitution of the WIPO Voluntary Fund, to which some members of Group B had contributed. Group B was very pleased to actively participate in the twelfth session of the Committee. Group B noted with approval that the 2007 WIPO GA had accepted the extension of the mandate of the Committee under the terms recommended by the eleventh session of the Committee, which provided an adequate basis for the work over the next two years. At this session of the Committee, Group B members looked forward to continuing and deepening the discussion of the list of ten issues related to the protection of TK and TCEs/EoF, and the list of options related to GR. Group B looked forward to a sustained and constructive discussion this week of the many complex issues before the Committee.

46. The representative of the African Regional Intellectual Property Organization (ARIPO) referred to concerns expressed by a number of delegations about the manner in which the Committee had conducted and addressed its business on the substantive issues before it in the past sessions. In view of firstly the importance ARIPO and its member states attached to GR, TK and EOF and secondly their expectations of the Committee, it was regrettable that after eleven sessions of the Committee, the progress made this far was obviously not good enough in that the Committee had not reached a consensus on the protection of GR, TK and folklore. Since the last session of the Committee, ARIPO and its sixteen Member States had striven to advance this work in the African region through the organization of national and regional consultations (Lesotho, Kenya, Tanzania and Zambia and ARIPO/OAPI expert review meetings) to gain deeper understanding of the underlying issues involved in developing effective, comprehensive and pragmatic frameworks for elaborating a regional legal instrument for the protection of TK and EOF. The Committee had devoted a lot of time to examine recurring issues including the ten questions and was optimistic that the experiences of ARIPO and its member states could be drawn upon in forging the way forward, particularly in addressing the international dimension of the work of the Committee. During the eleventh session of the Council of Ministers of ARIPO held in Maseru, the Kingdom of Lesotho from November 22 to 23, 2007, the Council recognizing the significant and extensive work that the Organization and its member states had undertaken on the protection of GR, TK and EOF since the inception of the Committee, called upon the ARIPO Secretariat to accelerate its work on the protection of TK and EOF and to conclude a regional protocol and its administrative guidelines for the protection of the TK and folklore within the shortest possible time taking into consideration the Committee process. This important decision by the Council of Ministers would enable the Organization to put in place an adequate legal mechanism to prohibit the on-going misappropriation and bio-piracy of these resources while simultaneously ensuring that the right holders and custodians of the knowledge were empowered to utilize their resources for wealth creation and economic development. Today, ARIPO noted with satisfaction the number of national and regional systems that had been developed and were being enforced in the various jurisdictions. Furthermore, ARIPO noted the number of steps that have been taken on matters relating to defensive protection including the inclusion of codified TK in the PCT Minimum documentation, IPC and development of guidelines and toolkits on initiatives for TK registers and databases. ARIPO believed that in order for any legal framework for the protection of these resources to be fully implemented to address the challenges faced by the international community on the protection of GR, TK and

EOF, a number of institutional mechanisms would be required. During the sixth session, the African Group had submitted proposals that highlighted the need for the Committee to equally address other measures that would enable for effective and workable international instrument(s). In this regard, ARIPO was in the process of establishing, alongside its regional legal instrument, institutional mechanisms such as the development of Traditional Knowledge Digital Library (TKDL) and Center of Excellence on Biodiversity, Access and Benefit Sharing at the ARIPO Regional Training Centre. To date ARIPO had been able to develop a prototype of the TKDL which was being updated to incorporate the TK and biodiversity information from all the member states of the organization. All these measures would ensure the effective implementation of the ARIPO Protocol on the protection of TK and EOF. The GA of WIPO had extended the mandate of the Committee for another two-year period. ARIPO recognized and supported the efforts made so far by WIPO and the international community in addressing the complex issues and challenges faced by the Committee in its attempt to develop acceptable international instrument(s) for the protection of GR, TK and folklore. These efforts could see the light of the day if all members of the Committee made comprises in the interest of the right holders without prejudice to the interest of the users. It was in this spirit of give and take that ARIPO wished to reiterate the useful recommendation made to the GA by the PCDA urging the Committee to accelerate the process on the protection of GR, TK and folklore, without prejudice to any outcome including a legally binding international instrument(s). ARIPO hoped that the Committee would reach a consesus in favour of a legally binding international instrument(s) for the protection of GR, TK and folklore. ARIPO also associated itself with the statement made by the Delegation of Algeria on behalf of the African Group.

47. The representative of the FAO recalled its particular interest in GR relevant for food and agriculture. For the FAO and its intergovernmental Commission on Genetic Resources for Food and Agriculture, the overriding principle of policies relating to GR for food and agriculture, including on ABS, was to achieve Millennium Development Goal 1, *the eradication of extreme poverty and hunger*. Policies which might impact on the availability of and the right to utilize genetic resources for food and agriculture, might also affect food security and poverty eradication; such policies should therefore not be developed without careful consideration being given to their effects on the hungry and the poor. FAO's Commission on Genetic Resources had negotiated over a number of years the International Treaty on Plant Genetic Resources for Food and Agriculture which was now fully operational and which was the only international instrument with a multilateral mechanism for ABS for a specific sector of genetic resources. In September of last year, the Interlaken International Technical Conference on Animal Genetic Resources, for which the Commission had acted as preparatory committee, had adopted a Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration. These Interlaken instruments joined the Global Plan of Action on Plant Genetic Resources for Food and Agriculture, adopted in 1996 in Leipzig, and the International Treaty on Plant Genetic Resources for Food and Agriculture which the FAO Conference had approved in 2001 – all these instruments laid the basis for a coherent overall approach to all sectors of GR for food and agriculture. As already reported to the last session of the Committee, the Commission on Genetic Resources for Food and Agriculture had adopted a ten year rolling Multi-Year Programme of Work which covered all components of biodiversity relevant to food and agriculture, including fishery, forest and micro-organism and invertebrate GR. The Multi-Year Programme of Work also covered cross-sectorial issues, in particular ABS for GR for food and agriculture which the Commission had identified as an early task that would be addressed at its next Session, taking place from September 7 to 11, 2009 in Rome. The representative indicated he would brief the Committee in some more detail under agenda item 10, on the Commission's work on GR for food and agriculture in the

context of its Multi-Year Programme of Work and on newest developments with regard to the International Treaty on Plan Genetic Resources for Food and Agriculture. He reiterated the FAO's willingness to strengthen and deepen its collaboration, in mutual respect for the respective mandates. The FAO had consistently participated in the meetings of the Committee and would continue to offer its help and support with the objective of seeking continued complementarity and synergy between the respective activities, including through mutual reporting.

48. The Delegation of Kenya associated itself with the statement by the Delegation of Algeria on behalf of the African Group. It hoped that the work of the Committee would lead to an internationally legally binding instrument, something that developing countries had consistently sought after. This instrument was an important milestone on the road towards addressing the needs, desires and expectations of its local and indigenous communities. There was a need to urgently address the gaps in existing IP regimes that failed to fully deal with issues relating to protection of TK, GR and folklore thereby defeating collective rights and interests of communities who were custodians of these resources. Only a binding instrument would achieve this. Kenya was making steady progress in the development of policies and laws for the protection, management and regulation of TK, GR and folklore. Such policies and laws would afford protection from misappropriation of these resources with the result that their people would reap benefits from the commercialization of products derived there from. The guiding principles and policy objectives developed by the Committee had been of great use in providing guidance during this policy formulation process. The Committee had come a long way in discussions but tangible results in the way of the adoption of a legally binding international instrument for the protection of TK, TCEs and GR had been evasive. Kenya looked forward to the positive outcomes of discussions on guidelines on the recognition of TK in the examination of patents. Kenya was concerned with the proliferation of bad patents. Kenya urged delegates to work speedily towards a favorable conclusion to the issues which had been on the table for a long time and which had been discussed in many sessions of the Committee. The outcome of these discussions would impact on the livelihood of a vast number of people belonging to indigenous and local communities who included a vast number of people from developing countries. There was a duty in this session to work collectively in good faith to achieve the desired goals and outcomes in the interest of their local and indigenous communities. Kenya noted with appreciation the contributions of various countries to the Voluntary Fund which had facilitated the participation of indigenous communities in the Committee and which had enriched the debate on these important issues, and hoped that this trend would continue.

49. The representative of UNESCO confirmed that the results of the Committee would complement the objectives of the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in 2003 by the General Conference of UNESCO. That Convention had entered into force on 20 april 2006 et currently counted 89 States Parties. The Convention addressed the safeguarding of intangible cultural heritage through the adoption of measures, at the national and international levels, aimed at ensuring the viability of this heritage, with the participation of communities, groups, and – where appropriate – the individuals who create, maintain and transmit this living heritage. At the national level, the States Parties undertook to identify and define the different elements of intangible cultural heritage present on their territoory, essentially for the creation of one or more inventories. At the international level, the Convention enabled the international recognition of certain elements of intangible cultural heritage through the inscription of elements of this heritage on the Representative List of the Intangible Cultural Heritage of Humanity; it equally enabled safeguarding on the international level through inscriptions on the List of Intangible Cultural Heritage in Need of

Urgent Safeguarding and through the identification and dissemination of best practices in the field of safeguarding. Since the entry into force of the Convention, the ntergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage had held four sessions to prepare for the implementation of the Convention. During these meetings, the last of which had taken place the previous week at Sofia in Bulgaria, the Committee had adopted draft operationalguidelines concerning among other things the mechanisms and the criteria for placing elements of intangible cultural heritage on the two lists, the use of the resources of the Fund, and the participation of communities, research centres and non-governmental organizations in the implementation of the Convention. On this last point, it was stressed that one provision of the Convention provided that safeguarding activities should be undertaken with the fullest possible participation of the communities, groups and individuals concerned. That was why the Intergovernmental Committee had created the previous September a subsidiary body charged with developing proposals for operational guidelines on the modalities for the participation of diverse actors, notably communities, in the different aspects of the implementation of the Convention. The draft operational guidelines which would be submitted to the General Assembly of the States Parties in June, as regards the participation of communities, encouraged, in essence, States Parties to crate a consultative body or a coordination mechanism which would facilitate the partcipation of communities in the identification and definition of different elements of intangible cultural heritage, in the development of inventories, the process of development and implementatino of programs, projects and activities as well as in the development of applications for inscription on the lists. These guidelines also called on States Parties to endeavour to facilitate the access of communities to results of research undertaken within their communities, and to promote respect for customary practices governing access to specific aspects of intangible cultural heritage. Finally, they envisaged that the Committe could invite communities to participate in its meetings to maintain an interactive dialogue and to consult them on any particular issue. The effective implementation of the Convention began the next July when the operational guidlines would have been approved by the General Assembly meeting in June. If this Convention laid the foundation for the safeguarding of intangible cultural heritage, based on the perennial nature of this heritage, it was nonetheless the case that the aspects of its protection on the basis of intellectual property rights, which were the responsibility of WIPO, were not covered by the UNESCO Convention. In this regard, UNESCO had appreciated the participation of WIPO in the discussions which had preceded and followed the adoption of the Convention. That was why the protection of intangible cultural heritage was a field which called for continued coordination between the activities of WIPO and of UNESCO in the framework of the implementation of the Convention, certain aspects of which were closely linked to intellectual property issues.

AGENDA ITEM 7: PARTICIPATION OF LOCAL AND INDIGENOUS COMMUNITIES

Indigenous panel presentations

50. In accordance with the decision of the Committee at its seventh session (WIPO/GRTK/IC/7/15, paragraph 63), the twelfth session was immediately preceded by a half-day panel presentations, chaired by a representative from a local or indigenous community, namely Ms. Debra Harry, representative of Indigenous People’s Council on Biocolonialism (IPCB), and presentations were made according to the program (WIPO/GRTKF/IC/12/INF/5). At the invitation of the Chair, the Chair of the panel delivered to the Committee the following report of the panel’s proceedings to the Committee:

"The Indigenous Panel on Intellectual Property and Genetic Resources, Traditional Knowlegde and Folklore adressed the issue of indigenous peoples and local communities initiatives in protecting TK, TCE's and GR applying to practical lessons of communities experience. The panel consisted of eight representatives of indigenous peoples and local communities, including Mr. Albert Deterville, representative of Indigenous People (Bethechilokono) of Saint Lucia Governing Council (BCG), Mr. Mana Cracknel, representative of Hokotehi Moriori Trust, Mrs. Fawsia Yousif Glaledin, representative of the Sudanese Association for Archiving Knowledge (SUDAAK), Ms. Margaret Raven representative of Desert Knowledge CRC, Mr. Victor Steffensen, representative of Kuku Thaypan Traditional Knowledge project, Mrs. Neeti Mahanti, representative of the Jigyansu Tribal Research Center (JRTC), Mr. Rodion Solyandziga, representative of RAIPON and Mr. Santiago Obispo, representative of Amazon Cooperation Network (REDCAM). Key points of discussions included the following. Several panelists expressed their appreciation for the September 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples and hoped that the spirit of cooperation and mutual support will carry forward to the work of the WIPO Intergovernmental Committee with representatives of indigenous peoples and local communities. Some indigenous peoples and local communities are using tools such as databases and films to document TK, primarly as a mechanism to preserve and protect TK for the future use by those communities. Several panelists expressed concerns and hightlighted difficulties with documenting TK and intangible cultural heritage and regarding the security of datas that has been collected and stored. Some panelists expressed differing views with regard to capacity-building. One panelist stated that in many cases indigenous peoples are already capable of developing their own mechanisms and tools for protecting indigenous knowledge. Others said that was a need for capacity-building at the local level. One panelist expressed the need for the development of local protocols developed by indigenous and local communities to regulate the collection and documentation of indigenous knowledge. One panelist noticed how difficult it is to attempt to speak about this holistic cultural and landbased knowledge systems in abstract terms such TK and TCE's. Panelists spoke about the need to protect and revitalize indigenous languages as a critical component of protecting TK. Several panelists emphasized that the knowledge system of indigenous peoples and local communities are holistic in nature and its strength and vitality are dependent on the well-being of the knowledge holders themselves. The panelists also spoke about the fact that the knowledge system of indigenous peoples and local communities is intrinsically linked to their land and territories. Thus protection must include ensuring protection of peoples in relation to their land. The chair closing comments emphasized that the most important way to protect indigenous knowledge is to live it."

Voluntary Fund for accredited indigenous and local communities

51. 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 32nd session to create a Voluntary Fund to support the participation of indigenous and local communties' 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 many generous contributions that had been made by Governements and NGO's, such as the Swedish International Biodiversity Programme (SwedBio/CBM), the Government of France, the Christensen Fund, the Government of Switzerland, the Government of South Africa and the Government of Norway. The Chair warmly thanked those generous donors for their valuable show of support. The contributions have enabled the Fund to provide funding for all eligible applicants recommended by the Advisory Board in the past and this is expected to continue. The Chair drew the attention of the Committee to the fact that recommendations on funding were not taken by WIPO or 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 the membership of the Advisory Board was required to be reappointed at each session of the Committee, past members being eligible though.

52. The Secretariat introduced document WIPO/GRTKF/IC/12/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. The document gave details of the funds received, the current balance in the Fund's bank account, the existing and past beneficiaries from the Fund, the allocation of fund to support those beneficiaries and a list of thirty-four applicants for funding in view of the next session of the Committee. The Secretariat recalled that an independent Advisory Board was to be appointed by the Committee. The Advisory Board will meet during this session to adopt recommendations on those thirty-four applicants in view of the next session of the Committee, just as it met during the last previous session and recommended to fund those applicants who are attending the present session with the support of the Fund. The Secretariat pointed out that there were ample funding in order to enable the Fund to support all the individuals who will be recommended by the Advisory Board and that this was likely to continue in the future, adding that the Fund had reached a very healthy level and was able to respond to the growing demand for it.

53. The Delegation of Colombia wished to highlight the importance of the participation of the indigenous and local communities in the Committee and paid tribute to the work carried out during its last session thanks to the financial support of the Fund. There was a clear need to generate some kind of mechanism which could guarantee an effective and legitimate participation of the indigenous peoples and the black, raizales and rom communities, in the Committee. The Voluntary Fund should have an mechanism that guarantees that the representatives of the communities have the support of the legitimate concertation authorities, at least in Colombia. The objective would not be to limit participation but rather to organize it in such a way that participation is effective and strenghtened. Such participation involves a series of responsabilities vis-à-vis the organizations and their traditional authorities. The Delegation of Colombia suggested that the Secretariat be requested to make a proposal within the framework of the Committee for such a mechanism.

54. The Delegation of Switzerland recalled that it had actively and constructively supported the work of the Committee since its creation in 2000. Because it considered to be 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 inputs to its discussions, the WIPO General Assembly decided to set up a Voluntary Contribution Fund for accredited indigenous and local communities in October 2005 in order to facilitate their participation 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 second payment of

one hundred Swiss francs. This payment was made just prior the present session of the Committee so that indigenous representatives could be chosen at that session in view of their participation in the thirteenth session of the Committee. The Delegation of Swizerland looked forward to keep participating in constructive and substantive discussions on IP and GR, TK and TCE's at this and future sessions of the Committee. It was positive that its second donation to the WIPO Voluntary Fund would further facilitate the important participation of representatives of indigenous and local communities in the Committee.

55. The representative of the Amazon Cooperation Network (REDCAM) said that his organization had a mandate for the Amazon region in Colombia, Venezuela, North of Brazil and Guyana and spoke on behalf of the international federation of local communities living there. He referred to the intervention that the Delegation of Colombia made on the issue of local communities and wished to hightlight the fact that there are various local communities living in the northern part of the Amazonian region such as fisher- and hunter-gatherers. He believed that within the concept or the terminology accepted by the UN system, especially at the UNDP, UNEP and CBD, the Committee should invite indigenous peoples and local communities to its work, referring to local communities without specifiying any further information. He suggested that this proposal be thoroughly discussed in accordance with the UN Declaration on the Rights of Indigenous Peoples.

56. The Chair recalled that the Division for Social Policy and Development, Department of Economic and Social Affairs of the UN, requested that the UN Declaration on the Rights of Indigenous Peoples be made available to the twelfth session of the Committee. The Chair drew the attention of the Committee that the text of the UN Declaration is available in the Annex to document WIPO/GRTKF/IC/12/INF/6 for the information of the Committee.

Decision on Agenda Item 7:

57. 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 expressed appreciation that funding has been available for all candidates recommended by the Advisory Board; (iii) took note that travel and daily subsistance arrangements provided for participants funded by the WIPO Voluntary Fund in accordance with Articles 2 and 5(e) of Annex to document WO/GA/32/6 have been applied to enable participation in the meetings of the consultative forum immediately preceding Committee sessions; and (iv) encouraged its members and all interested public or private entities to pledge or to contribute to the Voluntary Fund.

58. 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: Mrs. Marie Kraus-Wollheim, Legal Advisor, Swiss Federal Institute of Intellectual Property, Bern, Switzerland; Mr. Yazdan Nadalizadeh, Counsellor, Permanent Mission of the Islamic Republic of Iran, Geneva; Mr. Alejandro Neyra, First Secretary, Permanent Mission of Peru, Geneva; Mrs. Rodia Parvu, Director General, Romanian Copyright Office, Bucharest, Romania; 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. Albert Deterville, representative of the Indigenous People (Bethechilokono) of Saint Lucia

Governing Council (BGC); Dr. Neeti Mahanti, Jigyansu Tribal Research Centre (JTRC); and Ms. Margaret Raven, representative of Foundation for Aboriginal and Islander Research Action (FAIRA). The Chair of the Committee nominated Mr. Abdellah Ouadrhiri, Deputy Chair of the Committee, to serve as Chair of the Advisory Board.

AGENDA ITEM 8: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

59. The Chair stated that Item 8 was the first of the substantive items and raised very important policy questions for the Committee. Recalling the decisions taken by the Committee at its last session, he encouraged a detailed discussion of the substantive issues involved so that there would be a clearer picture of the points of common interest and of areas where positions might differ.

60. At the invitation of the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/12/4 (a), WIPO/GRTKF/IC/12/4 (b) (the "factual extraction"), WIPO/GRTKF/IC/12/4 (c) and WIPO/GRTKF/IC/12/6.

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

The Committee is currently considering the protection of traditional cultural expressions ("TCEs")/ expressions of folklore ("EoF") through two processes:

(i) consideration of an agreed list of Issues concerning the protection of TCEs/EoF; and

(ii) consideration of a draft set of "Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore" ("Objectives and Principles").

The working documents on protection of TCEs/EoF prepared for the twelfth session of the Committee, in line with the decisions taken at the eleventh session, comprise:

WIPO/GRTKF/IC/12/4(a): 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;

WIPO/GRTKF/IC/12/4(b): the text of the draft Objectives and Principles, identical to the text that was circulated at recent sessions, in line with the decision of the eleventh session that this document "remains on the table in its existing form".

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.

61. The Chair stated that these documents raised the following issues: how the Committee should capture its progress so far and how it should advance its work on the protection of TCEs/EoF, including i) the substance or content of possible outcome(s) of this work, ii) the form or legal status of any such outcome, and iii) the preferred procedures required to achieve such an outcome. He proposed that the Committee work through the ten issues in numerical order. Rather than be repetitive, he encouraged delegations to focus on any new information that they might have and also to proactively identify areas of possible convergence. He recalled that the draft objectives and principles, document WIPO/GRTKF/IC/12/4 (c), remained on the table and that participants were free to make their observations on this working document as well. There was an exceptional amount of high quality substance now on the table regarding the protection of TCEs/EoF, which constituted a remarkable policy asset that was the unique product of this Committee.

Issue I: definition of traditional cultural expressions (TCEs)/ expressions of folklore (EoF) that should be protected

62. The Delegation of New Zealand asked whether there was a need for formal definitions of TK and TCEs at the international level. It was concerned that formal or rigid definitions might not necessarily be the best approach at the international level, and considered that perhaps broad working definitions would be more appropriate. Knowledge and culture were living concepts. They evolved and changed as individuals and communities were faced with new realities in their physical, social, spiritual, and cultural environment. They could also be very subjective or specific to particular regions and communities. By attempting to precisely define TK and TCEs at the international level, there was a risk of over-generalising and freezing the protection or potential rights at the time that they were defined, hence not fully taking into account their evolutionary and distinctive nature. Several Member States had also stated that they considered this issue to be fundamentally important. Some had also asked for more information on the New Zealand Trade Marks Act, 2002 and the statutorily created Maori Advisory Committee (MAC). The MAC, created under the Trade Marks Act 2002, was one example of a model for administrative decision-making that did not require a formal definition of TK or TCEs for it to function efficiently and that could fully take account of the evolutionary nature of the subject matter under assessment. The Delegation stated that it would be interested in hearing from other Member States and accredited observers who had implemented measures or models which did not require a formal definition of TK and TCEs.

63. The Delegation of the United States of America thanked the Secretariat for its work on the preparation of the "factual extraction" on TCEs, which captured the richness and diversity of the views of the Committee and which should prove to be an invaluable tool as the Committee moved forward to deepen its discussion of these complex questions, with a view toward gaining a shared understanding of these difficult issues. The record of work of the Committee was indeed extensive. In the view of the Delegation, however, the extensiveness of the record of the discussions, along with the extremely useful documents and studies produced by the Secretariat, was not a cause for alarm or apology, and certainly not a reason to depart from the tradition, within this Committee, of Member State-driven deliberations. Rather, the rich record of work, not unlike a traditional tapestry, reflected the differing views and underlying values of the Member States that had produced it. The Delegation would view with considerable skepticism any attempt to substitute the actual views of Member States with distillation of those views in a document produced by the Secretariat. The Delegation was pleased to participate in the beginning of a sustained discussion of the list of ten issues related to TCEs. The discussion of the ten issues should proceed in a deliberate and organized manner. In the past, the Delegation had suggested an analytical framework for discussion of particular issues. First, for each issue, examples of specific issues and concerns related to TCEs/EoF would help to ground the discussions. Second, discussions of specific issues should be informed by national and Indigenous experiences wherever appropriate. Third, the Committee should attempt to identify specific inadequacies or gaps in existing domestic legal and non-legal mechanisms to address such concerns. Fourth, to avoid getting the cart before the horse, the Committee should discuss specific outcomes at the international level as the last step in this process. Turning to the first issue, the Delegation recommended a concrete, focused approach. For example, the Delegation would appreciate learning more about, among other things, specific successful national and Indigenous experiences in defining "traditional culture," including temporal issues (for example, how many generations or years would be required for expression to qualify as "traditional"); geographic issues (for example, how would protection be accorded, if at all, for widely diffused expressions); what criteria should be 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; and, the many definitions of TCEs/EoF in use by Member States today. The Committee had made significant progress over the last several sessions in identifying and articulating policy objectives and general principles on TK and TCEs/EoF. Much work remained on the draft objectives and principles. As noted in the past, many of the draft objectives and principles were broadly worded and wide-ranging in scope. Other draft objectives and principles were overlapping, and, in some cases, duplicative. Reducing the number and clarifying the draft objectives and principles would itself be an accomplishment because their sheer number, lack of clarity, and imprecise wording appeared to impeding rather advancing the work of the Committee, including the possibility of reaching any consensus on this aspect of the work of the Committee. To help structure and focus discussion of the draft objectives and principles, the Committee would need to develop a framework for analyzing and prioritizing these draft objectives and principles, a task that the Committee had already begun but should complete over the next three sessions under the terms of the renewed mandate. The draft objectives and principles should be widely disseminated and discussed at the national level among all stakeholders, including Indigenous peoples and traditional and other cultural communities. The Delegation believed that the results of those national conversations should be reported to the Committee to inform and enhance its discussions. Successful national experiences might facilitate progress. After identifying sufficient convergence on the draft objectives and principles, drawing on successful national practices and experiences, the Committee could then consider possible, achievable outcomes. During the current biennium, the Committee could and should set a

realistic and productive goal of reaching a mutual understanding on the most important draft objectives and principles.

64. The Delegation of Slovenia, on behalf of the European Community" and its Member States, reiterated its commitment to contributing as constructively as possible to the work of the Committee and thanked the Secretariat for having prepared the documents for the session and notably document WIPO/GRTKF/IC/12/4 (b) which was a valuable contribution to the Committee's work. This document demonstrated, among other things, the variety of approaches to the definition of what should be considered to be a TCE, and highlighted the other difficult substantive concepts that still required clarification. As to the international dimension of the Committee's work, and as already indicated in previous submissions, it was premature to try to prevent the misappropriation of TCEs on an international level if effective national systems had not yet been established. Consequently, the outcome of the current work of the Committee should be non-binding, and should take the form, for example, of guidelines or recommendations for making national systems more effective. Some of the solutions set out in document WIPO/GRTKF/IC/12/4 (c) represented a good framework for building such guidelines or recommendations. While this might not lead to a perfect solution, at this point a perfect solution was not possible. On the other hand, such a positive approach might be a way forward to a compromise solution that everyone could accept.

65. The Delegation of Japan understood the importance of TCEs for many Member States. However, Japan believed that the depth of understanding shared among the Member States on this issue was still insufficient for any kind of agreement at the international level to be formed. Therefore, as the step to further deepen our understanding of TCEs, Japan welcomed fundamental discussions based on the List of Issues. Even before attempting to finalize the details of the wordings of certain terms, what was more problematic was the lack of common understandings or common perceptions as to what such words should mean. The argument that 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. The Committee should concentrate its efforts on engaging in a sustained and robust discussion of the fundamental issues. This was an essential first step in reaching a successful outcome on the TCEs issue. On the first issue, from a legal perspective, the expression TCEs still remained very vague. The Delegation had already pointed out some problems in the existing attempts to define TCEs in its comments on the List of Issues. However, most of these problems remained unanswered. Some delegations had suggested that Article 1 of the Annex to WIPO/GRTKF/IC/11/4 (c) provided an "adequate basis" for a discussion of the definition of TCEs. In the view of Japan, the efforts of the Committee to date, to define TCEs, while helpful, also embodied and illustrated the very challenges in defining TCEs. The Committee needed a more concrete, focused, fact based approach, including the problems as Japan pointed out in the comments to Lists of Issues. The Delegation would appreciate learning more about specific successful national and Indigenous experiences in defining "traditional culture". In addition, this issue had a strong interrelationship with other issues, in particular, beneficiaries and objectives. The Committee should concentrate its efforts on engaging in sustained and concrete discussions of the fundamental issues, such as definitions, beneficiaries or objectives.

66. The Delegation of Canada recognized the work of the Secretariat in preparing the "factual extraction" (WIPO/GRTKF/IC/12/4 (b)), which was a very useful tool in identifying and comparing the perspectives of Member States and observers, a necessary step in the process to achieving greater understanding and consensus on the work before the Committee. Canada had listened with interest to the eight presentations that were made at the Indigenous

Panel. The panel highlighted the varied and sometimes complex issues faced by this Committee ranging from the protection of languages to the use of databases. In addition, the panel presentations underscored the need to reach a common understanding of the overarching concepts. For example, there was a need to achieve terminological clarity of the key terms regarding TCEs. At the most fundamental, the factual extraction demonstrated that there was as of yet no consensus as to a definition of TCEs. It also showed that there continued to be a lack of concurrence as to the scope of other terms such as "community" and "beneficiaries". As noted in the 1998-1999 WIPO Fact-Finding Mission (at p. 211), "Lack of terminological clarity can confuse and obscure what is already, terminology aside, a complex inquiry." Canada supported engaging in focused, in-depth analysis of these fundamental issues in order to achieve greater consensus and to move the work of the Committee forward. TCEs cut across different laws and jurisdictions. A number of TCEs, such as literary and artistic works, were protected under existing IP laws. Aspects of TCEs that would not properly be subject to IP protection might still be protected under other laws, for example unfair competition, trade secrets, language charters, education law and policy, and cultural property import and export legislation. Notwithstanding the lack of consensus on a definition of TCEs, the factual extraction further demonstrated that the scope of what was, could or should be subject to IP protection, versus protection under other laws or policies, was likely more narrow than the definition of TCEs *per se*. It was important to avoid confusion regarding the distinction between what may be a definition of TCEs and the scope of TCEs that might be subject to protection under the IP regime. Further, there was no firm consensus as to what type of protection should be afforded to elements of TCEs. The factual extraction further revealed that there continued to be divergence on who should qualify as beneficiaries or rights holders of TCEs (i.e. only Indigenous groups or other types of communities?). These issues were of fundamental import. Finally, linked to protection was the subject of capacity. Canada would be interested in having Member States and observers share experiences on capacity-building among communities to be able to better use the existing IP regime and other forms of legislation to protect and promote TCEs. It was hoped that the Committee would continue to engage in an in-depth, step by step analysis of these important over-arching issues in order to achieve greater understanding of the definition of "TCEs", "communities" and "beneficiaries". This would help Member States in reaching further consensus on the matters before the Committee.

67. The Delegation of Italy, supporting what had been said on behalf of the European Community and its Member States, added that the starting point of the whole discussion should be the assessment of the protection already provided to TCEs under the existing international IP treaties. In this respect, Italy agreed with the position expressed by Thailand (WIPO/GRTKF/IC/12/4(b), p.139) that "existing IPRs were not adequate to protect TCEs. 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 could be covered and understandably that may be considerable work but this could be the focus in the next phase of the Committee's work." First, it had to be seen what was already protected or what could be protected further, modifying the existing international legislations and particularly the Berne Convention and then it had to be seen if further protection was necessary, probably at national level. The point of departure, therefore, was Issue 7. It was necessary to take into account Article 2 of the Berne Convention. The protected works in that Article were no different to TCEs, and TCEs did not require a special definition. There already was a list of what was eligible for protection according to the Berne Convention. The Committee should assess what protection already existed and evaluate what necessary subsequent protection might be required for TCEs. And it could possibly assess the possibility of amending existing international treaties. But the Committee should not go via

other *sui generis* systems, which might give rise to conflicts with existing international legislations.

68. The Delegation of Algeria, on behalf of the African Group, stated that WIPO/GRTKF/IC/12/4 (b) reflected what had been expected and requested. On the first Issue, the Group had already set forth its views as to the definition of TCEs/EoF. This process, which began 7 years ago, was very substantial and practical in nature. The texts now before the Committee did not happen by chance, and the Group thanked the Secretariat for the groundwork that it had carried out since the first session of the Committee. There were field missions with Indigenous populations that had been carried out, and there were other interviews and meetings organized. Therefore, it was not necessary to start the exercise from scratch again. The definition proposed by the Secretariat took into account all the different existing definitions that appeared in different domestic, regional and other instruments. These various definitions had enabled the Secretariat to put on the table a proposal. The proposed definition was not perfect and in fact there was not a single definition in any of the different instruments which was a perfect one, one did not exist. Regulations and the laws evolved as times changed. The proposed definition was, however, a basis for discussion, and for this reason the Group wished to accept it as it was in Article 1 of WIPO/GRTKF/IC/9/4 (b). This was a good starting point.

69. The Delegation of Panama, referring to its experiences in the light of Panama's s*ui generis* law that had existed since 2000 (Law No. 20 of June 26, 2000), stated that no definition as such existed for TCEs. The Law aimed to protect collective IP rights and the TK of Indigenous peoples in their creations, such as inventions, designs, drawings and innovations contained in images, figures, symbols, graphs, petroglyphs and other details, in addition to the cultural elements of their history, music, art and traditional artistic expressions able to be used commercially. Article 2 of the Law contained a general list of what was considered to form part of the cultural heritage: customs, traditions, beliefs, spirituality, religious faiths, world vision, expressions of folklore, artistic expressions, traditional knowledge and any other form of traditional expression of Indigenous peoples. The Law contained recognition of the territorial rights of Indigenous peoples as belonging to a community, i.e., Indigenous collective rights, which had been defined as Indigenous cultural and intellectual property rights which referred to art, music, literature, biological, medical and environmental knowledge and other aspects, which had no known author or owner, or date of origin, and were the heritage of a whole Indigenous people. Furthermore, WIPO had established in its Booklet on "Intellectual Property and Traditional Cultural Expressions or Expressions of Folklore" the following description of TCEs as being often the products of intergenerational and fluid social and communal creative processes, reflecting and identifying a community's history, cultural and social identity, and values. The Delegation considered that the creation of an exhaustive list of what was considered to be TCEs or folklore was a delicate matter, owing to the danger that specific elements might be omitted.

70. The Delegation of China (i) welcomed the approach to the protection of folklore at the international level through the discussion of a list of important issues, appreciated the large amount of constructive work done by the Secretariat, and believed that these efforts would play a positive role in deepening understanding and building consensus; (ii) endorsed document WIPO/GRTKF/IC/12/4 (c) as a basis for further deliberations on the issue of folklore; (iii) believed that the on-going debate should gradually shift its focus towards the substantive provisions; and (iv) suggested discussion and clarification of some specific concepts, definitions and issues, such as "misappropriation", "of special value and significance", "rights" and "source of folklore", so as to promote substantive discussions. On

the developments of domestic legislative efforts in the area of folklore, the Delegation informed that a great deal of work had been carried out by its Government. According to the legislation programme of the State Council for 2007 and 2008, the National Copyright Administration (NCAC) had accelerated its drafting of the proposed Regulations on the Protection of Folklore, and had convened a meeting of experts and relevant departments in September 2007 in Beijing, during which the NCAC had briefed participants on the progress made in the Committee and issues raised in the Draft Regulations on the Protection of Folklore were heatedly debated. The Delegation added that in November 2007, NCAC had set up a fact-finding group with participation of some experts, which organised a meeting for the south-western sub-region of China in *Nanning* City of the *Guangxi Zhuang* Autonomous Region, and conducted a field fact-finding mission to *Jingxi* County to identify the needs and expectations of local folklore artists and transmitters as regards folklore protection, and to get a better idea of the current situation in respect of the existence and commercial exploitation of folklore in the region. In January 2008, NCAC had exchanged views with the Legislative Affairs Office of the State Council on folklore issues raised in the Draft Law on the Protection of Intangible Cultural Heritage as proposed by the Ministry of Culture, and reached a common understanding that issues such as folklore and TK should be dealt with only as a rule of principle in the Draft Law. It concluded that in 2008, NCAC would continue its fact-finding and comment-seeking in order to further improve the afore-mentioned Draft Regulations.

71. The representative of the Indigenous People's Council on Biocolonialism (IPCB) stated that Indigenous peoples were rights holders not mere “stakeholders,” as many Member States had said. Although observers in the Committee, they were rights holders in their own Indigenous Knowledge. States did not have any rights to Indigenous Knowledge or Indigenous Cultural Expressions. This was consistent with the minimum standards of the UN Declaration on the Rights of Indigenous Peoples. With the adoption of the Declaration it was now incumbent upon the Committee to re-evaluate whether the current draft objectives and principles were consistent with the minimum standards set in the Declaration, particularly in Articles 3, 11, 12, 19, 24, 25, 26, 31, 32, and 37. There was an artificial distinction between TCEs and TK in these discussions. It was impossible to separate the knowledge from that which would lead to the expressions in a tangible (art work) or intangible way (i.e. performing arts). Regarding a definition, there needed to be a distinction between Indigenous Cultural Expressions/Indigenous Knowledge and the broader category of TCEs/TK. The UN Declaration on the Rights of Indigenous Peoples now required a special recognition of “Indigenous Knowledge” with “Indigenous Cultural Expressions” being a sub-category of IK. Thus, Indigenous Knowledge would be the knowledge of Indigenous peoples. The Declaration and the previous work by UN Human Rights Special Rapporteur Erica Daes on the Protection of the Cultural Heritage of Indigenous Peoples provided guidance as to what would be included, namely: “All kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry, and all moveable cultural property as defined by the relevant conventions of UNESCO” (UN Special Rapporteur, Erica-Irene Daes, Protection of the Heritage of Indigenous People, E/CN.4/Sub.2/1995/26), and “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . . oral traditions, literatures, designs, sports and traditional games and visual and performing arts” (Declaration, Article 31). The representative confirmed that there was no definition of Indigenous peoples in the Declaration, and stated that there was no need for the Committee to establish one. There should be special recognition given to the discrete category “Indigenous Knowledge”, however, she stated. There was also need for recognition of “Indigenous Domain” or “Tribal Domain,” which would recognize an inalienable right for Indigenous Cultural Heritage. IK

could be elaborated within a self-determination and human rights framework which asserted and protected the tribal domain in which IK was inalienable. Indigenous peoples already had their own laws and customs governing IK. True protection of IK and Indigenous peoples' rights would only be achieved when governments, UN bodies, research institutions, and industry recognized Indigenous peoples' own *sui generis* systems for the protection of IK, which might be based on customary law or codified law, as legitimate and effective forms of protection. This was clearly the most appropriate form and system of protection for Indigenous Knowledge, including Indigenous Cultural Expressions. Generally, IP could not truly protect Indigenous Knowledge or Indigenous Cultural Expressions. The limited ability and role of IP to address the protection of Indigenous Cultural Expressions would be to prevent misappropriation, misuse, derogatory use, unfair competition. In the United States of America, there were many examples of misappropriation, misuse, derogatory use and unfair competition. For example, Crazy Horse beer, logos of professional sports teams and university and college teams, model names of automobiles (i.e, Jeep Cherokee) that used names and images of Native Americans. New Zealand's examples appeared to be a good step in this regard, namely (1) certification of authenticity (Toi Iho) for Maori-made products and art on the market, which had served as a model for recent work of Native Hawaiian artists and producers; and (2) the Advisory Board for use of Maori words, symbols, and images in the context of trademark law in New Zealand. These were examples of what national governments could do to prevent misappropriation, misuse, derogatory use, and unfair competition. Several delegations had asked for national Indigenous experiences. However, the representative asked States whether they were having national consultations. For example, in the United States of America there was a long-standing Executive Order that required consultation with all Tribes on a government-to-government basis on any legislation, regulations, policies, or other actions that would impact the Tribes. Had the United States of America initiated such required consultations? Particularly, this would mean that the USPTO should consult with Tribes on the protection of Indigenous Knowledge, Indigenous Cultural Expressions, and Indigenous Genetic Resources. This would be the most appropriate way to truly hear and understand Indigenous experiences. This issue of national consultations was, of course, applicable to all States. In the United States of America, there were non-federally-recognized Indigenous peoples who were also Indigenous Knowledge holders, but did not have the formal legal status within national law that federally-recognized Tribes had. This was the case in Hawai'i. Therefore, the United States of America should consult with Native Hawaiians about Kanaka Maoli knowledge, Kanaka Maoli Cultural Expressions, and the Genetic Resources of Kanaka Maoli originating in the lands and waters of the Hawaiian Archipelago. In the end, true protection for perpetuation and use of Indigenous Knowledge for the benefit of Indigenous peoples would lay in their own law, customary and codified.

72. The Delegation of the Russian Federation stated that both national authorities and public opinion displayed a keen interest in traditional culture. Artistic culture was a compound multi-stage process. It was not limited by creating works of material culture only. It influenced psychology, consciousness, reflections and conceptions of man, and included the whole range of spiritual essence of popular life, world outlook and moral values. Teenagers would not be able to become fully fledged, harmonious personalities without direct and oral initiation into their own cultures. Notions like "intangible cultural heritage" and "forms of expression of tradition culture and folklore" used today world-wide were relatively new. By them was meant both forms of folklore including, in particular, language, music, dance, ceremony, architecture, handicraft and other kinds of artistic creativity and processes, technologies of reproduction of folk arts, and TK and know-how which were transmitted orally from one generation to another. For the Russian Federation, the problem of

safeguarding traditional folk culture, especially that which belonged to small ethnic communities, was most complicated and urgent. The Russian Federation was a multi-ethnic country. One of its major treasures was cultural diversity. The country's various regions had their own cultural roots, their own cultural histories and, today, their own individual ways of development. Still, cultural boundaries did not coincide with administrative borders. For an example, the word "Russians" for inhabitants of the country was used to identify about 150 ethnic communities belonging to all existing linguistic groups and religious confessions. In spite of positive tendencies in the country related to securing necessary conditions for the free development of spiritual life and languages, inter-ethnic communication, and the concession of cultural rights and national autonomy to all ethnic communities, the Delegation was aware of the danger of ousting and levelling authentic cultural traditions. In this regard, the Board of the Ministry of Culture and the State Council had considered problems of safeguarding and State support of traditional culture and noted some problems. These included: 1. Insufficient attention to the analysis of present state and tendencies of development of traditional culture; 2. Insufficient work on search and identification of bearers of traditions, on collecting and promoting of cultural heritage; 3. Lack of approved conception of safeguarding intangible cultural heritage on State level. The Board had specially noted existing problems in the protection of intangible cultural heritage of Indigenous small ethnic communities of the North, inhabiting extreme territories of permafrost. Their unique traditional culture deserved special attention and support. In some regions, programs on traditional folk culture were being adopted and implemented. "Protection" meant securing the vitality of intangible heritage, including its identification, archiving, research, safeguarding and promotion. It was necessary to create registers of intangible heritage and TCEs both on regional and federal level. The Delegation provided information on the Russian National House of Folk Creativity (GRDNT). The safeguarding of folklore and the traditional culture of nations inhabiting the Russian Federation, including Indigenous and small ethnic communities, was part of State Cultural Policy. There was a powerful state system of Houses and Centers of Folk Creativity headed by Russian National House of Folk Creativity. These Houses and Centers functioned in all 89 administrative districts of the Russian Federation. The Russian National House of Folk Creativity was an institution within the jurisdiction of the Federal Agency for Culture and Cinema. Branches of the House worked in direct contact with local folklore groups and bearers of traditional culture with a special focus on small ethnic communities. Side by side with folklore expeditions, researches and analytic work and collecting, very special attention was given in our branches to so-called "basic groups" to study, learn, master, promote traditional culture and transmit their live experiences to young generations. These "basic groups" created authentic repertoire of folk music, songs and dances. Interesting work was done by Children Schools of Folklore, such as the Children's Folklore School in Novgorod the Great thanks to State support. The Centers organized activities and promoted the achievements of folklore groups and individual folk masters. The National Committee for the Safeguarding of Intangible Cultural Heritage had also been established in the Russian Federation. It worked very actively under the auspices of the Russian National House of Folk Creativity and under the auspices of Russian National Commission for UNESCO. Two cultural phenomena – the traditional culture of "semeiskie" (old-believers) of Trans-Baikal and Yakutian traditional epic poetry "olonkho" - had been recently proclaimed "masterpieces of intangible cultural heritage of mankind". Yakutia was an ethnic community of the permafrost region in the North. The culture of "semeiskie" (in spite of their ethnically belonging to Russians) was a special ethno-cultural phenomenon to be qualified as a small ethno-cultural community. That recognition by UNESCO drew support from the State and the political and cultural authorities of the Republics of Sakha (Yakutia) and Buriatia to the problems of the protection, safeguarding and promotion of these particular objects of cultural heritage. The Delegation then provided some concrete examples. The Ministry of Culture

and Mass-Media of the Russian Federation and the Government of Buriatia lent financial support to the Center of Traditional Culture of Trans-Baikal “semeiskie” (old-believers) of Tarbagatay District, Republic of Buriatia to reinforce material and technical resources and to implement the prospective plan of activities for 2001-2010 on safeguarding and continuity of original culture of old-believers. In order to safeguard the epic poetry tradition of Yakutian “olonkho”, under a decree of the President of the Republic of Sakha (Yakutia), life-long personal monthly grants were apportioned to living bearers of the epic tradition, a special legislative bill was under preparation in the Republic of Sakha (Yakutia) on State support of Olonkho, there would be a special state program on its safeguarding and scientific research. It was also decided to organize annually an International TV Folklore Festival “Culture of the World on the Land of Olonkho”. The intangible part of cultural heritage, which in most cases was not subject of fixation, was the most fragile one. In this regard, the Republic of Sakha (Yakutia) prepared a special bill to secure the protection of traditional culture and folklore by legislation. For the Russian Federation, this was a new and promising approach. What was particular for small Indigenous communities of the North, besides the real menace of disappearance and assimilation in contemporary socio-economic conditions, was the dispersed settling of their traditional culture. That kind of dispersal of ethnic masters and performers representing small communities created difficulties in co-ordinating joint efforts of different state institutions responsible for safeguarding and continuity of traditional culture. To secure safeguarding of different objects of traditional culture of that kind, especially for small communities, it was necessary to stimulate activities of ethno-cultural centers located in remote and almost inaccessible areas. Ethno-cultural centers might realize projects for safeguarding and, in some cases, revival of traditional culture. Some other difficulties of safeguarding cultural heritage were connected with the problem of keeping separate unique folkloric resources, manuscripts and phonograms collected in different years by generations of scientists-folklorists and cultural workers. It was a pity that conditions and forms of storing folkloric resources did often not fit up-to-date standards and requirements. One of most urgent tasks was to adopt appropriate measures of processing and treatment of existing archives and phonograms using modern digital and information technologies, producing printed copies to facilitate their large use and access to them. It was necessary to work out special rules and regulations, inter-institutional programs and projects aimed at elimination of negative tendencies resulting in erosion and loss of original traditional cultures of small ethnic communities. There was an urgent need to create regional registers (lists) of objects of cultural heritage, first of all, those under the danger of disappearance. In connection with the preparation of the Federal Program for Safeguarding Intangible Cultural Heritage, the Russian National House of Folk Arts established a Russian national database for objects of cultural heritage under the threat of disappearance. The Council of Experts, composed of scientists and practical workers, had been set up to co-ordinate this activity. It had already worked out a national form of a passport (data file) for each object. Much attention was given to the establishment and stocking of an Indigenous ethnic database. That was primarily one of major concerns of the local branches. As a result of permanent research and analytic work, registers of Indigenous communities, collections of descriptions of phenomena of traditional culture (with photos, descriptions, listings of bearers, etc.) had been created. The work on the safeguarding of traditional culture was also a responsibility of several chairs of folklore and traditional culture in educational institutions, in particular, in Moscow State University of Culture and Arts, in the section of folklore music of the Union of Composers of Russia and in other institutions and organizations dealing in their work with traditional culture. As an example, the Delegation referred to the East-Siberian State Academy of Culture and Arts in Ulan-Ude (Buriatia) which had recently proposed a program “Safeguarding and promotion of traditional arts and culture of ethnic communities in the area of South and East Siberia”. In this region, there were different ethnic communities. Historically, it was an area which had

witnessed since antiquity the migration of Turkic, Mongol and Tungus-Manchurian ethnic groups. Since the 16th century, some groups of ethnic Russians had come to this region. Today, this area was inhabited by several linguistic groups: Turkic – Tyvans, Yakuts, Dolgans, Tofalars; Mongol – Buryats; Tungus-Manchurians – Evenks and Evens; and also Slavic – Russians. Specialists had identified major tasks for this region: research into the traditional culture of ethnic communities; science-based processing and analysis of collected resources; introduction of best samples into the world information space; working out of tasks and concrete forms of realization to solve the major problem – safeguarding of traditional culture and arts of all ethnic communities of the region; working out of science-based recommendations for respective local and regional state authorities to facilitate their long-term conceptual approaches in regional cultural policy; and, short descriptions of appropriate groups and individuals who would benefit from the realization of the project. This project would give moral, material and organizational support to individual performers in different folklore genres, to traditional masters producing articles of traditional handicraft, to folklore and ethnographic groups, to keepers and bearers of traditional culture, to ethnic institutions like ethnic cultural autonomies and to ethnic cultural centers of the region. The realization of the project would also raise the competitive status of keepers, bearers and performers of traditional culture representing a large group of Indigenous ethnic communities, mostly, small ones. There was a project to create a multi-media computerized reference book with resources of best samples of tradition culture in the form of descriptions, photos, drawings, videos with a function of search. The economic benefits for performers and masters derived from touring and concert management activities, promotion of multiple articles of traditional culture and folklore, handicraft products, traditional ceremonies and tourist services was also important. Each year regional and national festivals, competitions, workshops, traditional and folkloric feasts were organised, such as the All-Russia Festival of Indigenous Peoples of the North “Northern Lights”. In the framework of the Second World Decade of Indigenous Peoples, the Federal Agency for Culture and Cinema had adopted the plan of activities for 2008 on safeguarding folklore and traditional culture of small Indigenous ethnic communities of the North. The President of the Russian Federation, Vladimir Putin, in his opening speech at the session of the State Council on “State support of traditional culture in the Russian Federation” in 2006 had said that “traditional culture for our multi-national country is not only invaluable heritage and social preference. Culture of peoples of Russia played a key unifying role in society, contributed to the rapprochement and mutual understanding among people, to the affirmation of principles of consent and tolerance.” This special session of the State Council and the statement made by the President of the Russian Federation testified that safeguarding of traditional cultural heritage was a nation-wide goal. The ways of resolving the problems of appropriate conditions for development of traditional culture were specified in a document called “Main directions of State policy for culture and mass-media until 2015”. The solutions to contemporary problems of traditional culture of the peoples of the Russian Federation, in particular, of small ethnic communities, depended on radical changes and improvement of legal rules and regulations and financial provisions of processes of safeguarding and development of traditional culture. An inter-departmental working group had worked out a draft conception of a federal program for the safeguarding of intangible cultural heritage. Resources of this program would secure safety and continuity of intangible cultural heritage by the reinforcement of material and technological resources of cultural institutions, improvement of existing Festivals, exhibitions and other projects of enlightenment and development. The program “Safeguarding of intangible cultural heritage of peoples of the Russian Federation for 2009-2013” was adopted to secure an integral solution, and the Delegation provided information as to its contents. For several years, the State Prize “Soul of Russia” was awarded in different nominations for achievements in the field of traditional culture. This Prize marked the most outstanding artistic achievements of

folklore groups an individual masters. The Russian Committee for Safeguarding Intangible Cultural Heritage, under the auspices of the Russian National Commission for UNESCO, was established in 2003. Furthermore, the Russian National House of Folk Arts maintained a register of objects of intangible cultural heritage. Information from this register would be used to prepare a Federal project similar to UNESCO's "Live Treasures" project. Regional programs envisaged a number of activities such as research, identification and collection of best samples of intangible and material culture, masters-performers, bearers and experts; creation of audio- and video recordings funds, museums and centers of traditional culture; promotion of folk creativity, feasts and traditional ceremonies, social, family traditions; education and initiation of youngsters in traditional culture; and, professional training and development of artistic contacts. The Russian Federation was also working on databases of traditional culture, involving the Russian National House of Folk Arts. At the same time, it was needed to establish a Federal Council of Experts which would make final decisions on the inclusion of objects of folklore into the Register. The Russian National House of Folk Arts brought proposals to the Ministry of Foreign Affairs of Russia to include them into inter-government draft programs on cultural co-operation on large range of positions concerning safeguarding of traditional culture and folklore. Recently those proposals had been included into inter-government programs of cultural co-operation with Belgium and Luxemburg. Foreign countries demonstrated interest in objects of folklore in the Russian Federation, and the Delegation gave examples of international folklore festivals which testified to this interest. In 2006, the Russian-Byelorussian Council on Safeguarding of Intangible Cultural Heritage was founded in order to consolidate the efforts of specialists working in different fields of culture, arts and education and to benefit from joint professional potential to achieve better results in safeguarding intangible cultural heritage both in the Russian Federation and Republic of Belarus. The work of the Russian National House of Folk Arts and the Russian Committee for Safeguarding Intangible Cultural Heritage developed actively also thanks to their co-operation with international NGO's – CIOFF (International Council of Organizations of Folklore Festivals and Folk Art) and IOV (International Organization of Folk Arts). There was also cooperation with foreign specialists, and the Delegation provided some examples. The Delegation also noted increased interest of Russian and foreign businesses in using elements of folklore for commercial purposes. In some cases, deals had taken place directly with communities. In some other cases, there was unauthorised use. As copyright in the Russian Federation did not cover objects of folklore, that kind of regrettable deed was not considered illegal. Legal solutions for performers and other artists representing traditional culture arose from local initiatives. The Delegation ended by stating that it was interested in the experience of foreign colleagues.

73. The representative of REDCAM, speaking on behalf also of the Federation of National Local Communities, stated that local communities felt that their voice had been heard. The participation of communities in the Committee should be full and effective. The IPCB position on the Declaration on the Rights of Indigenous Peoples was supported. Documentation on successful collective experiences of traditional local communities and Indigenous communities was necessary. There were cases of studies of successful experiences, legal experiences and the reports of exploratory missions, and perhaps there was an overlap of these experiences. Redcam considered that there should be further studies on matters that had not yet been covered.

74. The representative of Bethechilokono Governing Council supported the statement made by the IPCB and referred in particular to Article 31 of the Declaration on the Rights of Indigenous Peoples which would help to reconcile the differences of opinions as to what was and what was not a TCE in relation to Indigenous peoples. Speaking also on behalf of the

Caribbean and Antilles Indigenous peoples' caucuses and by extension Indigenous peoples throughout the seas, small islands developing states, he proposed that the Committee would juxtapose Article 31 of the Declaration and the definition given in Article 1 of WIPO/GRTKF/IC/12/4 (c). The comments made by the Delegation of Panama referring to the establishment of a national law was a good way forward and the Committee should look at the Panama law.

75. The Delegation of Cuba stated that the documents before the Committee were valuable in relation to TCEs and it supported the statement made by the Delegation of Panama regarding the importance of protecting TCEs. The protection should be for the entire benefit of the cultural communities and ethnic groups in the region where they belonged, recognizing relevant customary rules and practices. The statements made by representatives of Indigenous communities were also supported as they suffered every day from the illegal appropriation of their creations.

76. The Delegation of Mexico recorded that it had already provided comments on the ten issues and for this reason it wished to make a general statement on TCEs. In Mexico, TCEs were dealt with together with TK, as they related to Indigenous peoples and communities. That was true because for such groups said expressions were part of a whole, they defined those expressions in relation to themselves and to their vision of the world. In that regard, and with respect to document WIPO/GRTKF/IC/12/4 (c), Mexico considered it extremely important that the substantive elements of that document contained the principle of PIC, recognition of the owners of TCEs and fair and equitable benefit-sharing, as in document WIPO/GRTKF/IC/12/5 (c). In relation to Article 11 on regional and international protection, the following international instruments of UNESCO and the ILO should also be envisaged as references: Convention concerning the Protection of the World Cultural and Natural Heritage, 1972; Convention for the Safeguarding of the Intangible Cultural Heritage, 2003; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005; and, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

77. The Delegation of El Salvador stated that El Salvador had enacted a cultural heritage protection law and had established a special office for the registration of cultural goods in the country and had, therefore, been able to address the cultural heritage issue which had not been addressed before. There were a number of challenges in this field and a number of projects under development. The implementation of the law was a challenge. The country had two delimited Indigenous areas and in those areas there had been established 150 houses of culture, which were networked and managed by the National Council for Culture and Art. These 150 houses had direct links with Indigenous communities and three years ago it had been possible to publish an Indigenous profile of El Salvador with the participation of these ethnic groups. This profiled 400 cultural manifestations linked with these communities. In accordance with Spanish custom, each community had a patron saint. The houses had also been able to promote handicrafts development and marketing. The Delegation described its first digital register of music and dance representing the pre-Hispanic era, and although Guatemala and Honduras might have similar cultural expressions, in El Salvador there were some specific characteristics. Finally, a definition of subject matter was supported, even though definitions might appear rigid or static. However, in future there would always be the chance to develop, revise and add to the definition.

78. The Delegation of the Islamic Republic of Iran believed that the substantive and conceptual issues before the Committee were very important for its work. However, as with

the existing IP regime, it was not necessary to adopt an exclusive definition of TCEs or TK. Definitions might be designated by national laws, but, as the Delegation of Egypt had stated, it might take a lifetime to reach an agreement on definitions in the Committee. The Committee should focus on the international dimension of its work.

79. The Delegation of Egypt supported the statement made on behalf of the African Group. The Delegation expressed surprise that the Committee was not discussing more directly the articles set out in WIPO/GRTKF/IC/12/4 (c) which represented an unusual effort by the Secretariat. The first Article referred to the definition and if this definition was not suitable then another definition should be developed, but it was necessary to discuss all the 11 articles in this document. All countries had the right to accept, refuse or amend the articles, and put other alternatives, but it was necessary to work within the definite framework provided by the document referred to. The session should not consist simply of general statements.

80. The Delegation of Thailand agreed with many previous speakers that the definition of TCEs should not be too strict or too rigid, but should provide a general and open framework, and it should include both tangible and intangible cultural heritage as defined by other organizations such as UNESCO. The Delegation appreciated the usefulness of WIPO/GRTKF/IC/12/4 (b) and WIPO/GRTKF/IC/12/4 (c) prepared by the Secretariat. In spite of the rich diversity of views and policies expressed by Member States and representatives of accredited organizations, Thailand noted with satisfaction that the extractions in WIPO/GRTKF/IC/12/4 (b) made it easier to see the conceptual framework of the subject in a clearer and more structured manner. The Delegation thanked Italy for revisiting Thailand's views on the need to have a gap analysis of the existing IP instruments, and the Delegation also thanked the Secretariat as well as all contributors to the document for their work and the views expressed. Like many countries and accredited representatives of Indigenous organizations, Thailand attached great importance to the involvement of cultural communities and to their capacity-building so as to enhance their ability to benefit from TCEs protection. In this connection, Thailand had been able to organize a number of national workshops and discussions on TK and TCEs under the auspices of Ministry of Culture and Ministry of Commerce, involving provincial/local universities, local scholars and researchers. In March 2008, Thailand would organize a sub-regional workshop with the support of UNESCO on the conservation of intangible cultural heritage in Asia, which was hoped would deepen understanding of the concept of TCEs in Asia. Finally, the Delegation reiterated the position expressed by its Ambassador that it would like to see some kind of a "roadmap" which would facilitate the progress of Committee, under the new mandate, and that the Committee would be able to move towards an achievable outcome in the future.

81. The Delegation of the United States of America had listened carefully to the excellent interventions of other delegations. In a spirit of deepening and enriching the discussion, the Delegation wished to open a dialogue on various questions and issues as they presented themselves in the deliberations. The United States of America noted that a number of delegations had pointed to the important role that customary law played in defining TCEs. For example, the Delegation of New Zealand, in calling for a dynamic definition of TCEs, had agreed with the Delegation of Ethiopia that any definition of TCEs "should be self-definition from TCE holders and should be informed by customary laws relating to TCEs." The Delegation of New Zealand also had helpfully shared some customary terms and conditions with the Committee. Against this backdrop of Member State interest in the role of customary law in defining TCEs, the United States of America would be interested in learning of the status of WIPO's ongoing study of the role of customary laws and protocols of

Indigenous and local communities in relation to the protection, preservation, and promotion of TCEs.

82. The Delegation of Nigeria supported the position presented on behalf of the African Group. On TCEs, clear guidance on how the Committee should work was needed. It was fine to present various views on this issue, but at the end of the day it was necessary to have a text for decision. It was not possible to get it completely right at the beginning. As for the definition, of course it was impossible to get one definition that would satisfy everybody, or satisfy every region. But one could have a definition that would provide a focus. For us from Nigeria in particular and throughout Africa, the issue was how our own folklore would be preserved and then in preserving it how to enhance the capacity of the local people to understand it. The younger generation was more interested in what happened outside their areas. Nigeria did not have an overall law that concerned TK or folklore, but it did have piecemeal provisions in various laws.

83. The representative of the American Folklore Society (AFS) stated that, from long experience, it was impossible to have an entirely precise definition of folklore or TCEs, given the complexity of local traditions. In that context, the AFS congratulated the Secretariat on having created, after study and consultation, a definition of TCEs that the AFS believed was adequate as a set of general principles delineating the subject matter. That seemed adequate, given that the definition's final point left considerable responsibility to national and regional expertise. Finally, by way of example, a United States of America law from 1976 contained a definition of folklore. It too was general and enumerative. But it had provided the basis for a very successful organization in the US Library of Congress, the American Folklife Center. The point was that definitions would not be complete, but they could be sufficient as a basis for progress.

84. The representative of the Ibero-Latin-American Federation of Performers (FILAIE) expressed his gratitude for the considerable work done by the Secretariat to provide exhaustive and detailed documents on the different positions held in relation to the subject under discussion, without which it would be impossible not only to make progress with the work, but also to reach relevant conclusions. FILAIE considered that the problem in reaching specific timely conclusions on TCEs was perhaps due to the mandate granted by the General Assembly to the Committee in terms of the authority to analyze the problem in accordance with the following parameters: A binding international instrument or instruments; Authoritative or persuasive interpretations or elaborations of existing legal instruments; A non-binding international instrument or instruments; A high-level political resolution, declaration or decision, such as an international declaration espousing core principles, stating a norm against misappropriation and misuse, and establishing the needs and expectations of TCE/TK holders as a political priority; Strengthened international coordination through guidelines or model laws. The broadness of the mandate was what was preventing the Committee from moving in the right direction, since various ways or means were being put forward for consideration. FILAIE had detected the political will on the part of States to give protection to TCEs, but regretted the vicious circle which at times ensued or the disparity between criteria at the time the right approach was chosen. The Delegation therefore hoped that the Member States would have the wisdom to reach an agreement on choosing a definite path leading to effective international protection for TCEs, since they were cultures and communities in a precarious position and which were very likely to disappear, thereby depriving the international community of important cultures and knowledge created by their ancestors. That wisdom could not be lost and required urgent protection.

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

85. The Delegation of Italy referred to a statement made by the Delegation of Panama that TCEs were collective works that were expressions of a community. So, one should speak not of beneficiaries but of rights holders or holders of collective works. It was a generally accepted principle that there were collective works. It was possible to have collective works whose holders were communities. These communities had produced cultural works but these should not necessarily be confined to Indigenous communities, they should cover all the communities in Europe, as there were many local communities and villages which had their own traditions and their own folklore, and these communities too should benefit from the protection of a possible international instrument.

86. The Delegation of Japan believed that reaching a mutual understanding of this fundamental Issue should be a high priority, because this Issue had the strong interrelationship with other issues. Japan had previously pointed out some problems regarding "communities" that were not ethnic or kinship based, such as certain religious groups. The Delegation of the United States of America had also pointed out some problems in defining beneficiaries of protection of TCEs. For TCEs existing beyond their original geographic location, what would constitute an identifiable beneficiary group? Did an entire national population qualify? Did it need to be an ethnic group? The Delegation of Italy had also stated that there were many local communities which were not necessarily Indigenous but that had their own TCEs in Europe. These questions remained unanswered by the Committee. Therefore, Japan believed that a sustained and concrete discussion was essential for constructing a common understanding of these matters through a more concrete, focused and fact-based approach.

87. The Delegation of New Zealand addressed an assumption that beneficiaries or rights holders were individuals. They might well be individuals but Indigenous peoples were responsible to a collective. There should be inclusion of this particular notion of collective responsibility and community obligation. This had also been mentioned by the Delegation of Italy and by some of the observers. In regard to Maori special tattoos, which were severely endangered as a TK form and also as a TCE, men in Germany, Italy, Denmark and Britain wore these tattoos on their faces and there was no way of controlling or challenging this. However, this Committee might at some stage enact or enable some process or instrument through which such offences could be addressed.

88. The Delegation of Panama said that it agreed with Article 1 of the substantive provisions contained in document WIPO/GRTKF/IC/12/4 (c) relating to protected subject matter, since despite the fact that the list was general, the possibility existed that the specific choice of terms characterizing protected material could be determined in the regional and national sphere, and so that was an excellent basis for work in order to make progress with the efforts undertaken by the Committee.

89. The Delegation of Nigeria noted that TCEs were unique among local communities and Indigenous peoples and it was known which belonged to whom. Community leaders often held heritage goods for the entire community. When talking about beneficiaries, one was talking about rights holders. One still had to refer to the situation at the local level and at the community level. How did this level address these issues? One could not do at this superstructure something that was different from the local setting so what was important here was to go backwards to what already existed in the local setting. But overall what was important as how to use the benefit that would come out of using TCEs and tradition to

promote and develop and innovate ideas in the local communities. How could one use the products of TCEs to enhance local capacities at the local community and Indigenous level.

90. The Delegation of India believed that protection of TCEs should benefit the communities who generated, preserved and transmitted this heritage in the traditional and the inter-generational context which were associated with them and who were identified with them. Protection should accordingly benefit the traditional communities themselves that held TCEs in this manner as well as recognized individual knowledge holders within these communities and people. It was also possible that holders of this heritage might not get identified at the individual or community level. In such cases, there would be a role for a national competent authority. Issues such as multiple ownership at individual, community or country level would need a mechanism for a resolution and apportionment of benefits. Further entitlement to benefits of protection should as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples.

91. The Delegation of Canada stated that how the Committee defined the term "community" was likely to influence how it defined the nature and scope of protectable subject matter and might raise other policy considerations such as the promotion of cultural diversity. In Canada, there were potentially hundreds of Indigenous and non-Indigenous groups who might be considered a "community" for the purpose of holding a right in a TCE. Many of these were immigrant communities. Many of these communities continued to practice their TCEs. Canadian participants in the WIPO's FFMs had observed that there were also "local communities" in Canada such as Hutterites, Mennonites, Amish, trappers and hunters. Thus, Canada's previous comments on this Issue had been premised on the fact that all communities produced what some may describe as TCEs and, for the purpose of analysis, should be considered potential beneficiaries and rights holders. One additional issue, raised in particular in the Indigenous panel, was what should result, for example, when TCEs were shared between various communities, even in minor variations. In light of the above, Canada recognized that Member States required some flexibility in how they might wish to define beneficiaries and rights holders. At the same time, the term "community" could be flexible to a point that it might need to be circumscribed in an appropriate manner.

92. The Delegation of the Islamic Republic of Iran was of the view that the right holders of the TCEs could be individuals, groups, families, local communities, tribes and nations. The rights of these peoples should, however, be considered within the framework of the rights of society. In this regard, national legislation was a crucial element. The rights of local communities should particularly be observed.

93. The Delegation of the United States of America agreed with the Delegation of Japan that this Issue should be one of the highest priorities of the Committee. As it read the "factual extraction", consensus on this key Issue had yet to emerge. As the United States of America had previously pointed out, the Issue of beneficiaries encompassed a web of interests, rights holders, and many potential stakeholders, including states and their nationals, immigrant communities, governmental authorities, Indigenous peoples and traditional and other cultural communities, subject matter experts, and cultural institutions. In a world where individuals and groups readily crossed national borders and geographic boundaries, the inherent problem of defining beneficiaries of protection for TCEs/EoF was made all the more difficult.

94. The Delegation of Brazil understood that the extractions compiled in WIPO/GRTKF/IC/12/4 (b) provided interesting inputs but they pointed in different directions.

It was important to return to the idea of a roadmap, as proposed by the African Group. In addition to a roadmap, additional technical support from the International Bureau was needed. There were many interesting contributions, and one would find considerable convergence. For example, with regard to the definition, most believed it was important to have a definition. Most recognised it was impossible to have a perfect and precise definition, but a general one would be feasible. Of course, the diversity of stakeholders and their special nature, including Indigenous communities which often were cross border entities and which had special relationships with the respective national states wherein they live, made this a very complex Issue to deal with. Therefore, notwithstanding the usefulness of the document, the discussion needed more structure and support. In the course of the discussions, the Delegation would be interested in the comments of the International Bureau on each particular Issue on the basis of the expertise that it had and perhaps the Bureau could provide a little extra information. For example, on the relevance of existing treaties to these particular questions. This could enrich the debate and might help to organize the contributions or at least identify clusters of views or tendencies of participants. The International Bureau could perhaps also indicate possible courses of action or options on particular issues. The Delegation explained it was seeking an evolutionary process going beyond mere learning so that there might be some concrete progress. This would be important for the roadmap.

95. At the invitation of the Chair, the Secretariat took the floor. In relation to the intervention that had just been made by the Delegation of Brazil, although it might not necessarily meet exactly what the Delegation of Brazil had in mind, the Secretariat wondered whether one contribution that the Secretariat could make, would be to prepare for the next session a gap analysis. A number of delegations had raised this general point. Such a gap analysis might have to set out quite clearly and simply what was already protected, and, secondly, should point out, again as simply and clearly as possible, what gaps existed in the existing legal mechanisms and, in so doing, should refer as much as possible to specific examples and experiences in addressing those gaps. Thirdly, perhaps the gap analysis should set out, in the most subjective way possible, some of the options that existed and that had been discussed for addressing the gaps. One might imagine that the options would fall into two categories. First, legal options that existed at the international level as well as at the national level, and, second, capacity-building measures which a number of delegations had referred to. This could be considered complementary to what the Delegation of Brazil had proposed. The gap analysis would aim to be shorter rather than longer as a document. It might help to focus the Committee as a way forward in trying to find solutions for the future.

The Chair suggested discussing the Secretariat’s proposal at a later stage to enable participants to reflect on it.

96. The Delegation of Brazil stated that it still wished to give the Secretariat an opportunity to provide its own opinion on the issue that was being considered. The Secretariat could make comments or observations based on past knowledge or past research and the accumulated knowledge that it had on the issues from its own perspective.

97. The Chair believed it was reasonable to give the Secretariat some time to respond and it was necessary to see whether other Member States were in agreement with this proposal.

98. The Delegation of India stated that, in support of Brazil’s proposal, it would be useful for the Committee to understand the convergences and divergences, the issues on which there was agreement and issues which needed to be further clarified. It was necessary to reflect on all that had been said and to explore the possibilities of coming to some conclusion at the end,

so that there would be a collation of convergences and an identification of issues where there was a gap and exploration of possibilities for bridging those gaps. The Secretariat should make such an analysis.

99. The Delegation of Brazil stated that those who should benefit from protection or those who should be the beneficiaries of some defensive form of protection, whichever perspective one would take on this issue, should be the local or Indigenous communities who were the holders of the TCEs. This was easier said that done because one had to figure out a way of defining beneficiaries in terms that could be acceptable to the broader membership of this organization and that could be operational in terms of a multilaterally agreed guideline or instrument. This was not an easy Issue, but the Committee would benefit from expertise and comments coming from the Secretariat on the Issue of how to define these beneficiaries. Certain principles enshrined in the CBD were of relevance. They did not exactly necessarily define the beneficiaries but they did indicate that any commercial forms of exploitation or appropriation of TCEs, through, for instance, some IP type of mechanism, should involve the PIC of the communities and should include some sort of mechanism for the fair and equitable sharing of the benefits that may arise. Linking PIC and ABS concepts to the discussions in the Committee would be worth exploring further. This would entail some sort of communication between two international treaty systems, the IP treaties on the one hand and the CBD on the other.

100. The representative of the Indigenous People's Council on Biocolonialism (IPCB) stated that since the present discussion concerned TCEs, a distinction needed to be made from discussions in the CBD which concerned GR and associated TK specifically. This topic was much broader and she agreed that TCEs, when originating from an Indigenous community, belonged to that community. Indigenous knowledge and TCEs should be elaborated within a self-determination and human rights framework in a manner that asserted and protected the tribal domain in which the IK or TK was inalienable. Indigenous peoples already had their own laws and customs governing their TCEs and so true protection really needed to look at how UN bodies, governmental states and industry should recognize and protect those TCEs under *sui generis* systems in a way that was consistent with international human rights law.

101. The Delegation of Brazil responded to the previous intervention by stating that it was necessary to be clear on the concepts that were being discussed. In the last intervention, for example, there had been a reference to TCEs and to TK and some participants had indicated that there was a need to make a clear distinction between the two. From an IP perspective, the Delegation stated that it might make sense to take TCEs, on the one hand, and TK, on the other, because to a certain degree one could say that TCEs were the expressions, the concrete expressions of a cultural traditional heritage that belonged to an Indigenous community. In a similar way that a work of an author was the expression as well of his creativity and was therefore protected through non-patent IP mechanisms, usually authors rights or copyrights or even trademarks and such other IP rights that would protect the expression of something. TCEs should be looked at in the same way as a work of an author was looked at and protected or safeguarded from being protected unduly through use of copyright, trademarks or designs or all those IP mechanisms that tended to deal with the expressions of creativity, in the way they were concretely expressed. With the knowledge part of it, the TK was, there seemed to be a relationship with the protection of ideas, it was the content part of it, and, in IP, the content part of it, the ideas were usually protected through patents and there were different criteria to protect them. There was an examination process, there were substantive patentability criteria. For expressions, there was no examination process, but for ideas there was and TK could perhaps be equated to an inventive idea or an idea that could contain

inventive or creative elements in the same way as an invention. So perhaps this distinction might be useful in the sense that one was looking at certain IP mechanisms, treaties or provisions to see if they might be useful or not in the protection either of TCEs, on the one hand, or of TK, on the other hand. For this reason, TK was usually taken in association with GR, for example, because TK and GR were often related to patent issues and then there was the idea of a disclosure requirement, for example, which dealt with TK and not TCEs. These types of distinctions might clarify minds and perhaps could bring some more structure and order to our discussions. Here was where an expert opinion might be of help to test whether these concepts made sense to IP specialists because one was trying to bridge two different worlds. On the one hand, one had the concerns of those who dealt with the protection of the heritage of Indigenous and local communities but not necessarily IP protection. It was the protection in a conservationist sense, in the way that UNESCO protected works of humankind. And then there was another world which was the protection of IP as such under the strict legal formalities of that particular subject matter which was the business of WIPO. So one had to bridge these two different worlds and see what was possible to achieve.

102. The representative of the Ibero-Latin-American Federation of Performers (FILAIE) stated that Article 1 of WIPO/GRTKF/IC/12/4 (c) seemed good and one should always bear in mind that when a specific case was not included, the legal technique used was that of an analogy. On beneficiaries, he wished to add to the first paragraph of Article 2 the expression "which are creators thereof". In this way, Indigenous peoples would have their acts of creation or of creativity recognized, and that would eliminate any possible discrepancy that might arise within certain communities who were not located or living in a specific territory but scattered between several states or regions. There was a link being made between them and the act of creation and that gave the community concerned a legitimate right to protection. On the basis of that same philosophy, Article 2(i) needed to be modified because one needed a reference to the community having ownership and seeing that their ownership was granted. This was counterproductive. They already had the ownership and therefore this part of the Article should be redrafted so that it read something like "so that their ownership is recognized in accordance with customary law and practice".

103. The Delegation of New Zealand referred to the statement made by the Delegation of Brazil in relation to the differences between TK and TCEs and the relevant IP rights which would be relevant when particularly looking at the concepts of PIC and ABS. TCEs sat outside of the ambit of the CBD. However, it did not mean that the concept of PIC and ABS would not apply equally in the context of TCEs as they would or should in relation to TK. The Delegation disagreed that when talking about TK, one was talking predominantly about patents and the use of biological and genetic resources. TK existed in relation to cultural heritage, languages, knowledge systems, transmission of knowledge systems, and art. The comments from the Kanuri Development Association (KDA) tried to clarify the point that the concepts of PIC and ABS were broader than the scope of the CBD.

104. The representative of the Assembly of First Nations (AFN) was concerned at the amount of time taken to move forward but was pleased that progress was being made. With respect to TCEs, the current legal regime did not go far enough. In the Canadian context, TCEs had been very important in ensuring that many first nations groups were not assimilated in Canada. TK and TCEs were a tool that had been utilized by communities to ensure that their histories remained in tact. It was important that the Committee acknowledged that. Regarding human rights, rights to TCEs were actually the rights of the peoples which were broader than what any human rights instrument could give to any Indigenous community. TCEs should be held by the Indigenous collective as a right and that should be held in

perpetuity as a property right. TCEs and cultural knowledge were essential for the survival of many Indigenous communities.

105. The Delegation of Brazil was basically in agreement with what had been stated by the Delegation of New Zealand in that PIC and ABS should also apply to TCEs even if TCEs lay outside of the CBD. The Delegation also agreed that TK should be considered not as TK as it related to GR as per the CBD.

106. The Delegation of India stated that TCEs were a unique heritage, with certain attributes which were similar to the familiar features of copyright works and geographical indications. The protection should be unlimited so long as the agreed criteria were met. The purpose was not to suffocate this heritage but to promote and blossom it. Any instrument should provide for legitimate limitations and exceptions, so that TCEs could be used. The only protection that one was seeking was against unfair commercial exploitation, misappropriation and unfair advantage to the detriment of the holders of this heritage.

107. The Delegation of China noted the different approaches taken by Members to the relationship between TK and TCEs, i.e. some viewed TK in a broader way as comprising TCEs, while others saw it more narrowly by taking TK and TCE as two separate notions. In the view of the Delegation, a differentiated approach might be more conducive to the deliberation of the Issue since otherwise the Committee would not have compiled separate sets of documents in relation to relevant issues, nor carried out its work accordingly. In this respect, it said that in principle it shared the views of the Delegation of Brazil. As regards the demarcation of the scope of protection, it believed it would be useful to extract the elements showing the differences between TK and TCEs.

108. The representative of the Tulalip Tribes responded to the comment made by India on India's understanding of TCEs. The Tulalip Tribes were present to protect their Indigenous knowledge and cultural heritage. In this forum, there had been discussions of customary law and PIC and he was confused as statements were made that construed cultural heritage as something that was within the national system or part of national heritage. There might be knowledge that was part of the national heritage. But, the purpose here was to get recognition that there was customary law that applied to the Tribes' knowledge system which was maybe outside the domain and the logic of the western system. And so that there needed to be negotiations on how that knowledge was recognized within the western system. There was a need for different regimes to apply to Indigenous knowledge versus non-Indigenous knowledge that may also be traditional, because again the Tribes' rights to control their knowledge came from their heritage and from their governance. And certainly within the United States of America this was recognized. The Tribes had a government-to-government relationship with the nation state, and they reserved the right to manage their knowledge under their own customary laws.

109. The Delegation of India did not believe that anything it had said earlier contradicted any of the other participants' statements. It was necessary to look holistically and to find the best modality to protect, preserve and promote TCEs.

<u>Issue III: What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?</u>

110. The Delegation of the United States of America expressed the view that existing systems of IP protection might be used to address some of the actual needs of communities, including their economic and non-economic concerns related to qualifying TCEs/EoF. The objectives of the IP protection system might therefore be applicable to community-based as well as individual-based creativity. The Delegation welcomed a deeper discussion among the Member States on the application of existing IP rights to achieve the goals of economic, cultural, and information policies at the national level. It would also welcome a deeper discussion, and exchange of information and views, on the use of existing domestic laws, along with the use of customary law, and the complex interplay of customary law and IP, to achieve these related objectives.

111. The Delegation of Japan stated that reaching a shared understanding of the fundamental issue regarding objectives should be a high priority, as this issue had strong interrelationship to others issues. Prior to determining whether additional IP protection or *sui generis* protection should be provided for TCEs and whether such enhanced protection should take the form of an economic or a moral right, Member States should agree on the objectives which were to be pursued in protecting TCEs. A consensus on the objectives might also inform a discussion on whether existing mechanisms could be used. If the purpose of giving IP protection to TCEs was to correct the inequities in economic development or to ensure sustainable development of certain communities by providing new financial resources, a discussion should be held in the first place as to whether or not IP protection of TCEs would be an appropriate way to achieve this purpose. The Delegation of Japan added that protection of TCEs was not simply a matter of economic policy, since its impact on cultural development was quite large. It recalled that the main purpose of an IP protection system was currently to give incentive to creators by protecting their creations and to vitalize culture and society. In this context, the right for protection should be granted for a limited period of time only, in order to encourage use by third parties for further development as well as to balance the interests of right holders and public interest. Taking the viewpoint of the public interest, the Delegation added that it was inappropriate to grant an IP right that would remain valid forever since this would unfairly limit the scope of public domain. As to whether TCEs/EoF should be protected as moral rights, taking into consideration values that had long been fostered in local communities and indigenous population, the acts involving moral rights infringement had yet to be clearly defined. Use of TCEs/EoF that would provoke emotional suffering upon a community should be refrained in the same way as derogatory expressions against races, religions or sexes. However, the Delegation of Japan highlighted the fact that in attempting to establish any system of IP rights or similar rights in order to deter such acts, unnecessarily rigid regulation could harm freedom of speech or cultural development. Protection by civil law or other general laws might be provided against serious moral rights infringements, be IP right protection available or not. The Delegation of Japan believed that a sustained and concrete discussion was essential in order to build up common understanding on these matters.

112. The Delegation of India thought that the protection sought for should be assessed by the various characteristics of TCEs that required protection, the scope of protection and the modalities for enforcement so as to ensure that misappropriation would not take place. It believed that only then could an instrument reflect adequate provisions for fair use and promotional protection of these various attributes of a cultural heritage. In conclusion, the Delegation believed that the scope and modalities of protection should enable holders of TCEs to derive both economic and non-economic rights from their assets and heritage.

113. The Delegation of Brazil recalled that much of what was under consideration would depend upon the basic definitions of the subject matter and the systems of protection that the Member States would decide to establish. The Delegation highlighted three elements related to the objectives that should be taken into account. The first one, as it had been already mentioned by the Delegation of India, aimed at preventing and curbing misappropriation. The Delegation of Brazil suggested that this objective could be dealt with by mainstreaming the concept of PIC as an integral element of the IP system and making it equally applicable to the protection of TCEs. Giving indigenous or traditional communities a means of ensuring that their consent would always be searched, or looked for, or obtained, prior to any action that sought to achieve the assertion of an IP right over any TCE, would go a long way towards the defensive objective of avoiding misappropriation. Due respect for the moral and spiritual values of traditional and indigenous communities was the second element. The Delegation was of the view that this aspect could be looked at in the light of the Berne Convention's provisions on the author's moral rights. It recalled that those rights were permanent and could not be alienated from the original holder, not even through commercial arrangements. In the same way as the Berne Convention recognized the moral rights of authors, the respect for the moral, spiritual or other values of the traditional indigenous communities could be recognized and made applicable throughout on a permanent basis. The Delegation of Brazil added that this principle would not need to be tied to a specific term of protection but would be implemented as a basic right preventing certain acts, for example those that might encroach or hurt the moral and spiritual value of TCEs. The third element related to objectives for protecting TCEs referred to the possible positive measures that would accommodate protection of TCEs. There were two possibilities. The economic option would be of benefit to the indigenous communities and would derive from IP that would be asserted on their TCEs with their PIC by means of an ABS type of regime. This option would contemplate benefit-sharing, accruing to the indigenous or traditional communities a certain percentage of the commercial profits or gains made by third parties from the exploitation of their TCEs with their PIC. The other option would be that the traditional or indigenous communities became themselves holders of IP over their own TCEs. The Delegation felt that both economic and moral benefits should accrue to the traditional or indigenous communities from any commercial use or exploitation of their TCEs and that there should be an international system to help them monitor the use of their TCEs and ensure their PIC.

114. The Delegation of the Islamic Republic of Iran believed that the protection of TCEs should aim at the preservation of the economic and moral rights of right holders. In this regard, the legal binding instrument or instruments, which should incorporate *sui generis* regimes as well, would have to contain the following elements: preservation of moral and economic rights of local communities, respect for the spiritual and intellectual assets, respect for prior consent and strengthening of the innovations developed by the communities.

115. The representative of the Assembly of First Nations (AFN) reacted to a comment made by the Delegation of Japan which had stated that allowing some use of TCEs was in the public interest. He cautioned that a lot of things had been done in the name of the so-called public interest that did not have the most positive impact on indigenous peoples. He was wary of anything being done in the name of the so-called public interest and recommended that, if the Committee wished to look at this aspect, a detailed definition of what public interest meant be developed or, even better, a study be done on the public interest issue.

116. The Delegation of Egypt believed that this Issue had a number of facets. It acknowledged that many things needed to be said, although a lot had been said already in terms of religious law and morality. But for the sake of precision and mutual understanding,

it was necessary to recognize seven or eight advantages that could arise from protection. The Delegation of Egypt said that unlawful use of TK should be prohibited, that the rights holders should have the possibility of benefiting from the protection on the basis of PIC and that everybody should benefit from such knowledge. Benefits referred not only to the monetary benefits that should be shared with the indigenous peoples, but also to technology transfer. Guaranteeing technological transfer was of essential importance, as TK should also be disseminated.

117. The Delegation of Panama considered that the objectives in relation to the protection of TCEs/EoF as set out in document WIPO/GRTKF/IC/12/4C were comprehensive. The Delegation emphasized the social and cultural values of indigenous cultures and the need to provide social justice for such cultures and local communities. It believed that much remained to be done in reviewing the document. Nevertheless the Delegation was pleased by the document prepared by the Secretariat, since it broadened the scope with respect to the real and specific aims of the protection of TCEs/EoF. The Delegation expressed its appreciation for the comments made by the representatives of indigenous and local communities in relation to protection of TCEs/EoF.

118. The Delegation of Italy commented on an earlier intervention on economic and moral rights. Regarding moral rights, protection already existed under the Berne Convention, as had been mentioned by the Delegation of Brazil. As far as patrimonial and property rights were concerned, the Delegation of Italy was of the view that the *sui generis* rights included in the draft document were presented in a quite simple form and without reference to all the various aspects and nuances. As far as economic and IP rights were concerned, the Berne Convention provided for different types of economic rights, such as the rights of reproduction, broadcasting, dissemination and adaptation. Since these matters were very complex, the Delegation of Italy considered that to refer in general terms to ABS was an over-simplification and did not reflect all these various aspects and nuances. It added that before starting to imagine the type of rights to be granted, it was necessary to think deeply about this matter.

119. The Delegation of New Zealand took the comment made by the Delegation of Italy further and stated that the question was even more complex because, in the process of analyzing and looking at existing moral rights, the question should be asked as to whether existing moral rights were sufficient when looking at the customary values and protocols and objectives applicable to TK and TCEs. It was, therefore, necessary not only to analyse the existing provisions, but also to look at any gaps that could be found between the customary laws, protocols and values applicable and the existing moral rights and other types of rights, such as IP rights.

120. The Delegation of Morocco acknowledged that the definition of subject matter was a very complex multi-faceted issue going well beyond national borders. It commented that folklore and TCEs were very difficult to encapsulate in a text and to define. Shortcomings needed furthermore to be identified. Document WIPO/GRTKF/IC/12/4(c) was an important one. Knowing that protecting TCEs would have as first beneficiaries local communities and indigenous peoples, States had an important role to play in the development and promotion of TCEs and folklore, and that States must propose mechanisms in this direction. It noted that pages 18, 23 and 27 of document WIPO/GRTKF/IC/12(4) had already been commented on several times. The various ramifications all the aspects had to be borne in mind beyond the fact that economic and moral rights were influenced by these objectives. Illicit and unlawful use, as well as arbitrary use, of TCEs should be prevented in order to secure the well being of

indigenous communities. PIC and ABS were essential as well as document WIPO/GRTKF/IC/12/4(c) as a whole.

Issue IV: What forms of behavior in relation to protectable TCEs and EoFs should be considered unacceptable and illegal?

121. The Delegation of Norway stressed that the work of the Committee had an international dimension. There should nevertheless be flexibility for national and regional solutions to preserve, promote and protect cultural diversity. Regarding Issue Four, the Committee should focus on reaching a consensus on what could be the core of *sui generis protection* of TCEs. This was closely related to the question of what constituted unacceptable use: be it misappropriation, misuse or disrespectful use. Further clarification and guidance was needed on this. A focus on what in fact constituted misuse or misappropriation would also facilitate the promotion of respectful use of TCEs, as well as ensuring the proper attribution of IP rights. It was hoped that the discussions might provide a basis for further identifying some common ground on the core issues, and toward a balance between competing views and expectations in relation to TCEs.

122. The Delegation of Canada stated that "misappropriation" continued to be expressed as a prime objective of the protection of TCEs although the term was complex and there was a lack of consensus as to its definition. The Factual Extraction noted that many delegations had referred to the need to protect TCEs from behaviour such as "distortion", "disrespect", "denigration", "piracy", "copying", "unauthorized collection", "exploitation", "disclosure", "abuse", "unfair use", "failure to pay equitable compensation" and "commercialization". Canada had previously stated that "communities and individuals around the world have historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another". To put it another way, everyone learned from others. It would be useful to be able to articulate what distinguished "acceptable appropriation" from "misappropriation". For example, was the situation where TCEs were used as a source of inspiration, and where there was never any intent to show disrespect to the originating community, a form of acceptable appropriation or misappropriation? Specific practical examples of what could be considered "misappropriation" in relation to TCEs would help Member States define the scope of protectable TCEs.

123. The Delegation of Japan believed that more work remained to be done to identify specific forms of behaviour regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities with respect to their TCEs. To advance a sustained, focused and robust discussion of these issues, the Committee should explore the broad range of behaviours regarded by indigenous peoples and traditional and other cultural communities as unacceptable or illegal, including many examples already identified in the Committee's documents. Building on such a fact-based foundation, the Committee should deepen its understanding of these concerns by examining and discussing in detail existing mechanisms, including legal, both IP and non-IP and non-legal measures. Japan supported the comments made by Delegation of Canada on the complexity of defining "misappropriation", and the comments made by the Delegation of New Zealand on the complexity of defining "adaptations" and "derivatives" of TCEs at the last session. Japan believed a sustained and robust discussion was essential for constructing a common understanding of these matters through a more concrete, focused, fact-based approach.

124. The Delegation of Brazil stated that, beyond its written comments included in the Factual Extraction, the question embodied in Issue Four posed a problem for it because if the TCE was protectable under current IP treaties then the types of behaviour considered unacceptable or illegal were probably not the ones that were currently considered unacceptable or illegal under existing IP treaties and national laws. The whole issue was to what degree existing TCEs were protectable under existing IP treaties and national laws. And the question was whether most TCEs were not really protected or protectable as such, or whether there were difficulties in protecting them because of the particular nature of these works. They were not works of authorship as such. In response to the Delegation of Italy, the Berne Convention dealt with literary and artistic works that could be identified with a particular author. TCEs did not have a particular author that could be the right holder under the Berne Convention because they were usually collective works which were not identified necessarily with a particular person. TCEs were the heritage of a particular community, they were trans-generational and had evolved during the course of time, and the origins of these works might have been lost in the past. Therefore, much of the TCEs generated by local and indigenous communities would not be covered by the Berne Convention and could not, therefore, be protected by it. So the question in Issue Four would not apply to those TCEs that were outside the scope of existing treaties. TCEs that were not currently protectable should somehow become protectable through the work of this Committee against acts of misappropriation even if the misappropriation was performed through a legal act, for example, even if someone appropriated this work by means of a work that was covered under existing IP laws and treaties. How could one do that? Everything hinged on the concept of PIC. If one made protection under existing treaties conditional upon of any work derived from or directly based upon TCEs conditional upon the PIC of the local or indigenous communities, then there would have been a fundamental step towards preventing the misappropriation of TCEs that were currently not protectable under existing IP treaties, which would be the bulk of TCEs that existed. Therefore, the question should perhaps have been posed in a slightly different way because as it was now there was an obvious answer that if it was protectable under existing laws then what was unacceptable or legal was whatever the law stated currently was unacceptable or illegal for any other kind of similar work that was protectable. The challenge was how to make something that was currently not protected protectable against misappropriation. The comments of the Secretariat would be appreciated.

125. The Delegation of New Zealand asked how one would protect facial tattoos, a form of TCE. In relation to the notions of collective and individual responsibility and ownership and misappropriation, one could not be a Maori on one's own. One could not carry those responsibilities and those relationships alone. The Delegation displayed a book on traditional Maori facial design and referred to the responsibilities vesting in Maori to ensure that its contents were not copied and used disrespectfully.

126. The Delegation of Italy stated that in order to address the concern raised by the Delegation of Brazil, the protection of the Berne Convention at present was limited but in theory this was a type of protection that was possible. This was the case because the Berne Convention provided protection for collective works and works by anonymous authors. So TCEs could be protected in theory. As to what types of acts were unlawful, this depended on the types of rights that were recognized. If one did not know what types of rights were to be recognized, then one could not know what types of acts would be violating such rights. It was important, therefore, to reach agreement on these acts. To know what types of acts one was talking about it was necessary to return to PIC and benefit-sharing. What these meant were complex questions. For example, if one lawfully bought an African mask and then sold the mask in Europe, was this sale legal or not? If one purchased a compact disc of folklore music

and then broadcast it, was that legal or illegal? These were complex issues and it was necessary to look at these matters in their totality. Without doing so, the Committee should not simply adopt a *sui generis* solution.

127. The Delegation of the United States of America believed that the Committee had already identified a broad range of behaviours regarded by indigenous peoples and traditional and other cultural communities as unacceptable or illegal. On the basis of a review of the Factual Extraction, in the view of the United States of America, what was needed was a sustained and robust discussion of these behaviours. Building on such a 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 IPR and non-IPR) 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.

128. The Delegation of Brazil believed that the protection provided in the Berne Convention was very limited for protecting TCEs. This protection was usually related to the existence of a particular living author and even the term of protection was associated directly with the existence of such an author, because it was calculated on the basis of the span of his life plus fifty years after his death. There were not particular authors when discussing TCEs so there was no basis for calculating the term of protection. When the Berne Convention spoke of collective works it referred to the collective works of living and known authors who had joined each other in a collective effort. It was not the work of unknown authors and the term of protection under Brazilian legislation would be the life of the longest living of these authors plus fifty years. So this provision did not really provide a way for dealing with works that had no known author or known living author that could identify himself with the unique work. Often TCEs were not necessarily unique works. There was the issue of originality. Would this really apply to the kinds of works one was talking about, in other words, works developed through several generations without a particular known author who was definitely not living anymore. The Berne Convention was not particularly helpful as it stood. And this was why there was an interest in developing something that could deal with the issue. The Berne Convention was also insufficient because moral rights under the Convention depended on the existence of a particular author. An anonymous works sounded very much like an orphan work which in many cases would not enjoy protection and would be part of the public domain. Under Brazilian law, it could happen that an orphan work or an anonymous work might be protected but the right holder would be the publisher of the work because the author was unknown. This was not helpful to the interests of the indigenous communities and local communities who were the creators of the TCEs.

129. The Delegation of China considered that at least the following acts should be regarded as unlawful and unacceptable: (i) unauthorized copying, publication, adaptation, broadcasting, public performance, distribution and rental of a TCE and its derivations; (ii) use of a TCE without indicating its source of origin; and (iii) distortion, derogation, mutilation, defamation and insult of a TCE. In the meantime, caution would be needed in dealing with the issues related to adaptation and other derivations. Second, the Delegation stated that the above mentioned issues mainly concerned the scope of protection, and were relevant to Issue Three "Objectives of Protection". In its view, objectives of protection should include both moral and economic rights. It suggested that as Issue Three was also related to the nature of the right concerned, the question of how such a right should be determined, i.e. as an exclusive

right, a right to prohibit or a right to remuneration, merited prudent consideration and analysis.

130. The Delegation of Egypt considered that the discussions were circular and were addressing questions previously discussed. It was clear, however, that the focus was on the protection of collective works and protection for communities. TCEs should be protected against illicit use to strengthen communities and their creativity and creative capacity. Hence, protection was a way of helping these communities to further develop and enhance the culture. These communities, who were the authors and creators of these expressions, should decide what they understood by the mutilation and illicit and degrading uses of the expressions. Of course, there were practices that were considered as violations, unlawful use, unlawful acts, and pirating their works and when benefits or royalties or payments were not paid to the right holders. This discussion required specialist knowledge. There were scientific methods to establish a definition and it was necessary to arrive at a working definition.

131. The Delegation of Sudan stated that in certain very large countries it was difficult to determine the identity of an indigenous people because of the distances involved in the country. The way in which these communities had moved about in the country could change the situation. In Sudan one could examine the manufacture of perfumes. This was an industry foreign women made use of under the pretext that the information concerned was in the public domain. Now, this was a problem for Sudan which affected the cottage industries which were most of the production in the country. Could this kind of TCE be protected because the authors were known? Was it necessary to be working on the basis of a new instrument entirely?

132. The Delegation of the Russian Federation stated that face painting had to be understood within its context as an element of traditional culture within a particular traditional environment. These tattoos had in traditional life a meaning, were a sign, a kind of dialogue expressing feelings, intentions and message. It made sense when they were seen by people initiated into this traditional system, when there was a response, when it became a kind of live dialogue, a part of traditional life. So, traditional culture was a variety of artistic expressions which might exist within a respective, concrete, motivated and meaningful system. Material and intangible samples of traditional culture might be collected, described, registered, archived, distributed and used as such in the context of traditional life or their copies might be used for other purposes (such as industrial, commercial, etc). That was not necessarily appropriate use. An image from traditional culture with its specific meaning was so fragile and so easy to be vulgarized. An ethnic community owning this traditional expression must have the right to accept or refuse any use of it other than appropriate use in its traditional culture and life.

133. The Chair invited the Secretariat to respond to some of the questions that had been raised. The Secretariat stated that the example raised by the Delegation of Sudan was a very interesting one and that the Secretariat could provide some contours of an answer. There were several different forms of existing IP law that might apply or might be used to apply the example. In the first place, one might consider using some form of trademark protection in relation to the particular product to distinguish it from other similar products. Second, one could apply industrial design protection to the container in which the product was kept and, third, there were a series of provisions relating to unfair competition that might be applicable. Trade secret protection, for example, might be useful. Trade secrecy was commonly applied to the ingredients of products like perfumes or other beverages. There were in addition a series of provisions in IP law dealing with misleading origin. So if there were, for example,

indications on a product that its origin was Sudanese, but in fact the origin of product was not Sudan, then that generally speaking was a violation of the provisions of the Paris Convention on unfair competition. These were some of the existing forms of IP protection that might be applied in those circumstances.

134. In response to the points raised by the Delegation of Brazil on the Berne Convention, the Secretariat provided some brief information on Article 15.4 of the Convention. This Article provided protection as copyright works for works which were unpublished and of unknown authors. An "unpublished" work had a very specific meaning under copyright law. The origins of the Article could be traced back to 1963 when there had been an African Study Meeting on copyright held in Brazzaville. The Article had been added to the Berne Convention shortly thereafter, in 1967. The works covered by the Article were protectable internationally as copyright works. They were also protected internationally through the TRIPS Agreement because most of the Berne Convention had been incorporated into TRIPS. The discussions that led to the incorporation of this Article in the Berne Convention made clear that it had been intended to protect TCEs (or, expressions of folklore). The word "folklore" was not used in the actual text of the Article for various reasons but the Article aimed at the protection of TCEs. India and Bolivia had, amongst others, been very active in those discussions at that time. From the perspective of those who would argue for the indefinite protection of TCEs, a disadvantage of Article 15.4 was that, under Article 7.3 of the Berne Convention, once the work was "lawfully made available to the public", and again this term had a specific understanding in copyright law, the period of protection would expire after 50 years. On the other hand, the 50 year term in the Convention was only a minimum term and Member States could in their national laws provide for a longer term (Article 7.6). A country could therefore, in theory, provide for a hundred year or even a thousand year term for works under Article 15.4. However, in international situations, the "comparison of terms" provision in Article 7.7 of the Convention would apply. This meant that (i) the duration of protection was governed by the term in the country where protection was claimed, and (ii) however, if the term in that country was longer than the term in the country of origin of the protected work, then the shorter of the terms would apply (i.e., the shorter term applicable in the country of origin). So, if country A had in its national law provided, for example, a two hundred year term for Article 15.4 works, and it sought to protect these works in country B which had a shorter term (for example, the minimum of 50 years), then the shorter term applicable in country B would apply. Conversely, if country A had a 50 year term and country B a two hundred year term, then the 50 year term would still apply. Under Article 15.4, States making a designation of a competent authority under Article 15.4(a) should notify all other States party to the Convention through the WIPO Secretariat. To date, only one State, India, had done so.

135. The Delegation of New Zealand supported the Delegation of the Russian Federation's intervention because it was true that the cultural context and the customary laws, practices and values associated with TCEs took them outside of the realm of existing copyright considerations. It had consistently been said that there was no particular author when it came to TCEs. In New Zealand, the majority of the indigenous local communities could readily identify an author for TCEs and that was not the issue. The issue was rather that these authors were using TCEs to which collective responsibilities, customary laws, protocols and values applied. Or, the author had long passed away and those customary laws, protocols and values should apply beyond the duration of the copyright term. Perhaps what was needed was an extension of moral rights to include those customary laws, protocols and values that were currently not within the framework. The issue of the public domain had also been raised. Just because a copyright work was made accessible in a store, in a library or on the Internet

that did not do away with the rights of the copyright owner, and similarly there were a series of customary laws, protocols and values that the communities felt should apply beyond the public accessibility of the TCEs. The gap was ensuring that those customary laws values were activated. The Berne Convention, although helpful in some cases, did not assist in cases where there was both a copyright owner who was well alive and there was a series of collective responsibilities that needed to be taken into account as well.

136. The Delegation of Algeria, on behalf of the African Group, wished to comment on Issues Two and Three together. On the question of beneficiaries of protection, indigenous communities and local communities were the first people one had in mind. After all, it was they who had created, preserved and transmitted the TK. There was another question related to this and that was the role of the State. Although the protection extended to the communities concerned, the State did still retain a role. Article 2 in WIPO/GRTKF/IC/124/(c) was sufficiently flexible to reconcile the two concepts. Regarding the objective of protection, any protection of IP had two basic objectives: first, to grant rights and, second, to prevent any illegal use or exploitation. When talking about TCEs, this same framework applied. In other words, for TCEs objectives would relate to the use or exploitation of the cultural expressions of indigenous and local communities and to the prohibition of any illicit or illegal use. There were other objectives which could also be included, such as the promotion of creativity and innovation, promoting and protecting culture diversity and mutual benefit-sharing.

137. The Delegation of Italy stated that one could always discuss interpretations of the Berne Convention. What the Secretariat had said was agreed with. Before discussing other hypothetical systems of protection, it was necessary to think very carefully about the opportunities offered by the Berne Convention for protecting folklore with a few tweaks and modifications. History did frequently repeat itself. One had TCEs which were collective works of which the authorship was unknown. As was being discussed in copyright circles, on the Internet there were also works being created collectively and many works on the Internet did not have clearly identifiable authors. What was the difference between the position of this kind of work and the position of TCEs? If one could protect works on the Internet then one could imagine the possibility to protect TCEs with the few adjustments of existing law. With reference to the Delegation's earlier remarks about masks, the Delegation clarified that it had addressed economic issues and not spiritual issues for which it had the greatest respect. African art had been the inspiration behind much European art.

138. The Delegation of Thailand believed that, subject to a formal analysis, the Berne Convention would not be adequate for the protection of TCEs against unacceptable behaviors which were wide-ranging and diverse. Their protection should, therefore, cover economic, moral and cultural rights, as well as the related aspect of cultural dignity. For economic rights, unacceptable behaviors should include unauthorized use, distortion and failure to share benefits on the agreed terms. Moral, cultural spiritual rights should include insensitive and disrespectful use or exploitation, mockery and disrespect by outside parties, whether intentionally or unintentionally, and which caused damage to the communities. In view of the above, the Delegation hoped that the instrument that this Committee would produce would be able to address and protect these rights.

139. The Delegation of Panama stated that it would examine the Berne Convention in more depth. The Delegation shared the opinion expressed by the Delegations of Brazil, the Russian Federation, New Zealand and Thailand. They had stated that in dealing with TCEs it was quite possible that the Berne Convention would not apply. It seemed that what characterized

collective rights was not necessarily collectivisation in the creative process but rather in ownership. The date of origin of the creative work was not known. The subject being protected was ancestral and, while it could be innovative, it had this traditional character and had necessarily to have this link with tradition. Generally speaking, one was speaking about oral transmission where the author or creator had not been identified and could not be identified. The right holders had to be those who processed this knowledge or cultural expression of a traditional nature, and, generally speaking, TCEs were passed on orally. The Delegation agreed with the Secretariat that provisions of the Paris Convention could apply, especially those dealing with unfair competition and false indications of origin.

140. The Delegation of El Salvador reiterated the view put forward by the Delegation of the Russian Federation that the definition of TCEs should include reference to disciplines such as anthropology. On the question of beneficiaries, the Delegation pointed out that although there were expressions belonging to a whole community or locality, as in cases related to language, construction techniques, food or drug production, there also existed expressions whose authors were a small group such as music and dance ensembles, as well as cases in which individuals were the unique exponents of a tradition. For this reason, the beneficiaries should be those persons who were not only heirs of a tradition but were responsible for passing it on and expressing it. The Delegation supported the proposal for a gap analysis corresponding to the need for a *sui generis* instrument for protecting TCEs, while recognizing the work done by other bodies at the international level.

141. The representative of the Tulalip Tribes did not believe that there was a unified indigenous position on the proposed gap analysis, but it was necessary that indigenous views were taken into account. He suggested that the gap analysis should include an analysis of the UN Declaration on the Rights of Indigenous Peoples to see whether any gaps in its recognition and implementation could be found. The representative referred to a discussion on how to reclaim or bring into the IP system TCEs that did not have clear authorship and shared his experience with the Native American Graves and Repatriation Act, 1990, which concerned the encountering and discovery of human remains and cultural objects in fieldwork. When a discovery occurred, the Act imposed a duty of care and due diligence to people who wished to make use of the object or collect it. This entailed making tribes in the area aware of the discovery and ascertaining whether there was an owner. This Act allowed tribes to claim the discovered object as their property under the condition that they would have to present evidence of cultural affiliation with that object. So a mechanism existed in the United States of America, but it was not an open-ended process. For tribes, it remained very difficult to show cultural affiliation because of the passage of time. The representative did not believe in abandoned property or lost property or in cases where a certain property could be claimed as part of the national heritage when no descendant could claim the said property. Traditional objects were created under a customary system and had a specific purpose and obligation that were tied to them which remained for as long as the related tribe had a continuing existence and governance in which those rules and customs existed.

142. The Delegation of Indonesia believed that discussing the possible outcomes of the work of the Committee was useful as long as there was no repetition of what had already been stated in the factual extractions and in reports of the sessions. The Delegation raised a concern as to the progress the Committee was making. On the issues under discussion, the definitions of TK and TCEs should remain as flexible as possible and the Delegation commented that it was not clear whether the existing IP system was sufficient to protect TK and TCEs. In Indonesia, when the author of a TK or TCE was unknown, the State would own the copyright and would be responsible for managing cases of commercial misappropriation

and exploitation. Nevertheless, the Delegation believed that the moral and economic rights of indigenous peoples and local communities who were the owners as well as the custodians of their TCEs and TK should also be respected and that the Committee could agree on the importance to include PIC and ABS in the protection of TCEs and TK. The implementation and regulation of these rights as well as the application of PIC and ABS, however, should be left to the national authorities and only the broad principles for the protection of TCEs and TK should be agreed upon at the multilateral and international level. The Delegation proposed to move the discussion towards stipulating a future roadmap, as it had mentioned in the tenth session. In conclusion, the Delegation expressed its position that it could not accept the notion that TK and TCEs were public domain materials as these were also intellectual creations that should be protected.

143. The Delegation of Brazil thanked the Chair for holding consultations in relation to its proposal. It agreed with the Chair on the way in which he wished to manage questions raised by delegations to the Secretariat. The Delegation believed that the discussions were useful so as to cover the substantive matters in detail. Concerning the proposal to undertake a gap analysis, the proposal should be further explored or developed as it believed that it was an important initiative, which should have been undertaken at the beginning of the Committee's work. Other delegations and observers were encouraged to properly discuss and consider the proposal. The Committee was in need of new ideas and new initiatives that could help it to move forward, despite that delegations and observers might not fully agree with all the specific issues or might have some doubts on their viability. The Committee should look at the issues without prejudging the outcome. It referred to a relevant example provided by the Delegation of Italy which demonstrated the difficulty and the number of options that existed and that should be explored for the protection of TCEs. Should one wish to seek the positive IP protection for TCEs, one should address issues such as how could rights be managed after a subsequent purchases of a particular good. Protecting TCEs under the IP system would mean that the TCEs would become marketable. Those who sought for positive protection would have to accept the idea that their TCEs could become marketable goods. The concern of whether rights were exhausted once a product was sold could be regulated under the IP regime through, for example, certain provisions on the exhaustion of rights. The Delegation also referred to the International Treaty on Plant Genetic Resources for Food and Agriculture which recommended the establishment of standardized, mutually agreed terms or contracts in which certain obligatory clauses and conditions related to genetic resources would apply. These conditions stipulated that free access to genetic resources should be ensured notwithstanding any commercial deals since the transfer of genetic resources could also entail the transfer of the commitment to provide access to these resources. While bearing in mind certain specific clauses on IP rights that may exist, these mutually agreed terms was one possibility to regulate the IP rights of indigenous communities in the trading and commercial activities of their TCEs. The Delegation believed that TCEs as the formal expression of a tradition should be considered in the same way as formal expressions of creativity under copyright. The Committee could then make progress and consider, for example, the creation of a multilateral register of TCEs for the purpose of making available information on what were TCEs and who they originally belonged to. In addition to the option in the International Treaty already mentioned, the Committee should look at other existing agreements that dealt with the expressions of creativity. These included the Berne Convention, the Madrid system for trademarks and agreements dealing with industrial designs and unfair competition. For example, a TCE could be used as a trademark or a trademark could borrow from a TCE. The Delegation referred to cases where Maori tattoos had been used by commercial airlines. The Delegation supported the proposal of a gap analysis. A gap analysis could lead to a course of action that required adjustments or amendments to existing treaties so as to accommodate the

specificities of TCEs. Another option was to consider existing provisions on GIs in the TRIPS Agreement for TCEs, as it believed that these could help in developing a viable system for the protection of TCEs. The Delegation understood that the concept of GIs provided IP protection to goods that were produced under certain traditions and that originated in a certain locality. This could be viable solution for TCEs as it would have two vectors which included the identification of the way in which that good was produced and the locality from where it came from which could be linked up with the idea of creating a register. The creation of a register was also part of a recent ongoing negotiation process at the Doha Round of the WTO. Several possibilities were available for consideration for the register. For example, TCEs that were fed into the register could have legal effect in countries worldwide. They could be used as evidence to illustrate that a particular TCE originated from a certain community and should not be used in other countries unless these communities were consulted. The system applied to GIs and the type of register that had been discussed at the WTO were tools that could be adjusted to TCEs, and which should be explored. The Delegation wished to listen to reactions from the Secretariat and the Member States on that matter.

144. The Delegation of New Zealand responded to the statement made by the Delegation of Brazil regarding tattoo designs on aircrafts. The case had been resolved sensitively and well. The Delegation also commented on the remarks made by the Delegation of the Russian Federation regarding the de-contextualization of Māori facial designs when worn by Europeans. To a Maori observer such acts would remain offensive. The Delegation stated further that the recording and documentation of TK and TCEs were important and contentious issues and referred to the proposal put forward by Brazil on the creation of a register of TCEs. The documentation of TK and TCEs could be useful and essential for preserving and promoting the use of TCEs and TK. The IP implications, however, would depend on (i) the nature of the TK and TCEs to be documented or recorded as distinct IP issues would arise; (ii) the purpose and objectives for documentation, for example, positive and/or defensive protection of TK and TCEs; (iii) the way in which documentation would be undertaken, from mere lists to full copies of music and/or knowledge systems; (iv) the type of information about TK and TCEs to be recorded; (v) by whom the documentation would be undertaken (whether, for example, by communities, museums, universities or government agencies); and (vi) how access to and control over the documentation would be managed. Some Member States were deeply suspicious of documentation, while others perceived registers and databases as a potential solution for IP protection of TK and TCEs. Some indigenous and local communities did not wish to record and document their TK and TCEs. In New Zealand, some Māori organizations and individuals had expressed serious concerns related to the creation of registers and databases of their TK and TCEs. These groups and individuals perceived registers and databases as potential risks of further misappropriation and misuse of their TK and TCEs. Although there were potential benefits in recording and documenting TK and TCEs for revival, preservation and promotion purposes, the Delegation had consistently heard that when possible, recording and documentation initiatives should be conducted within the appropriate cultural context and be managed by the communities who were the holders of these knowledge and cultural expressions. This would reduce the risks of misappropriation and misuse, provide for community access, and assist in the transmission and promotion of the TK and TCEs, in accordance with the appropriate customary laws and protocols. What was needed from States, universities, and research and development firms was support and respect for these communities recording initiatives, as well as the building of healthy and balanced relationship structures for knowledge holders and their communities to feel comfortable in sharing their knowledge outside the cultural context and, therefore, allowing it to flow out into broader national, regional, and international outcomes, such as the assessment

of prior art by patent examiners. The Delegation was open to discuss these issues and concerns further within the Committee.

145. The Delegation of India thought that certain similarities between IP instruments, such as copyright, trademarks, designs and GIs, had led the Committee to discuss whether those instruments were appropriate for the protection of TCEs. Studies on the applicability of these instruments to protecting TCEs could even be found on the internet. Although there were similarities and there could be a possibility to protect some aspects of TCEs using these instruments, TCEs should be regarded as the expression of a tradition which influenced the daily life of a community and which had evolved over time and been nurtured, preserved and sustained. In cases where the creator or author of a TCE was unknown, the TCE could still be identified to belong to a community, region, or country. It was imperative to protect TCEs and to prevent misappropriation. However, what would the criteria be for defining and protecting TCEs? What would the instrument look like? The Delegation believed that there was a need to provide for modalities of unlimited protection which would include limitations and exceptions that were reasonable so that the TCEs could be made use of in a legitimate manner. Both economic and non-economic rights should be for the benefit of the community or the country where the TCEs originated. Having said that, the Delegation supported the suggestion of the Delegation of Indonesia to structure and focus the Committee's discussion so as to move forward. Bearing this in mind, the Delegation saw the proposal made by Secretariat to undertake a gap analysis as a very eminent one.

146. The Delegation of Algeria, on behalf of the African Group, confirmed that the Delegation of Kenya would represent the African Group on the Advisory Board of the Voluntary Fund. On TCEs, the Delegation reminded the Committee not to be repetitive but to advance its discussion so as to achieve a means for protecting TCEs and the rights of indigenous and local communities. The African Group had prepared a document which included the Group's recommendations and proposals on how to move forward. The African Group supported both the proposals made by Brazil and the Secretariat. The Committee had been examining existing international instruments and their feasibility to protect TCEs, identifying gaps and discussing whether there was a possibility of amending these instruments or their provisions for the adequate protection of TK and TCEs. This was one of the areas where the Secretariat could provide the Committee with its expertise for the purpose of having a fuller picture of the various issues at stake. The African Group called for a larger contribution from the Secretariat which could result in a consolidated summary or proposal that the Committee could further work on. This was needed as the Committee risked returning to the beginning of the process where questions such as what were TCEs and were existing instruments not sufficient to provide protection had been discussed and written about. There was already an agreement that there was a need for a new text and there was already a commitment by Member States to work towards a means for protecting TCEs and TK, whether through an instrument or several instruments and whether binding or non-binding.

Issues V: Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?
Issue VI: For how long should protection be accorded?
Issue VII: To what extent do existing IPRs already afford protection? What gaps need to be filled?
Issue VIII: What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?
Issue IX: Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
Issue X: How should foreign rights holders/beneficiaries be treated?

147. The representative of the Bethechilokono Governing Council (BGC) intervened on the comments made by the Delegation of New Zealand regarding documentation or non-documentation of TK held by indigenous peoples. With reference to articles 13.1 and 13.2 of the Declaration on the Rights of Indigenous Peoples, the Committee should bear in mind that if indigenous people were to agree to have their TK documented, this should be done in the language of the indigenous people concerned. The BGC had translated WIPO/GRTKF/IC/11/5(c) and WIPO/GRTKF/IC/11/4(c) to sensitize the indigenous people of Saint Lucia on the important issues of the protection of the TCE/EoF and the protection of TK.

148. The Delegation of Canada referred on Issue seven to statements that both IP law and non-IP laws and policies could protect TCEs, depending on the objective of protection. The factual extractions as set out in document WIPO/GRTKF/IC/12/4(b) showed that many delegations were of the view that IP law could help creators protect the commercial aspects of their works. Other delegations had also noted that there were other laws that might be available to holders of TCEs. Others had pointed to such general legal concepts as contract law, unjust enrichment, fraud and unconscionable conduct. The Delegation of Canada saw some merit in the gap analysis proposal put forward by the Secretariat and looked forward to discussing it further.

149. The representative of the Max Planck Institute for Intellectual Property, Competition and Tax Law wished to draw to the Committee's attention that its book "Indigenous Heritage and Intellectual Property", which had been published in 2004 and was about to come out in its second edition, contained the kind of "gap analysis" being discussed.

150. At the invitation of the Chair, the Secretariat took the floor to respond to questions posed by the Delegation of Brazil. The first question had been whether geographical indications (GIs) could be useful for TCEs. The short answer was yes, but some elaboration was needed. First, there was a difference within the world community as to the form of protection that might be best deployed to protect GIs. However, authentication marks had been used very successfully by a number of indigenous communities throughout the world, and the Secretariat had quite extensive documentation on these examples. On GIs more generally and on the basis of the definition provided in Article 22.1 of the TRIPS Agreement, there was no reason why GIs in principle could not be used successfully as a means of protection for TCEs. Moving to the second question that had been asked on the utility of a register for TCEs, the Secretariat pointed out, first, that article 7(b) of the draft TCE provisions themselves in document WIPO/GRTKF/IC/12/4 (c) foresaw or envisaged a form of a register for TCEs/EoF. That particular provision foresaw the use of a register at the national level, and, if going down this track, one would need to elaborate some form of international mechanism or register of the type, for example, that might exist under the Lisbon

Agreement for appellations of origin where there was a procedure for registration and for giving the possibility for States to state their view with respect to a particular registration sought. There would need to be an international mechanism foreseen for the acceptance of the registration of any TCE, if such a register were established. The Secretariat then made two further points. First, examples of the use of GIs to protect TCEs were documented in the Secretariat's publication "Consolidated Analysis of the Legal Protection of TCEs/EoF" (2003). Second, in relation to registers and, therefore, the question of formalities, there might be a certain reticence among indigenous peoples in relation to formalities. However, indigenous peoples would speak for themselves on this point.

151. The Delegation of Egypt commented on issues five and six. Recalling that exceptions to protection were guided by the principle of fair use, the protection of TCEs should in no case affect the use or transfer of TCEs. On the other hand, the Delegation believed that provisions should be made for exceptions as far as non-commercial use of these was concerned, such as research, health or private use by the holders of these TCEs, including bookshops. On issue six, the Delegation was convinced that this protection should not go hand in hand with any particular length of protection, as it believed that these TCEs expressed the very essence of the identity of the peoples who held them.

152. The representative of the Saami Council supported the proposal that the Secretariat would before the next session analyze where there were convergences of views and put forward some concrete language to be reached on a few issues, such as the forthcoming African proposal and gap analysis. He joined his colleague from the Tulalip Tribes in saying that such an analysis should not only focus on the traditional conventions of IP and how they had been implemented but also needed to take into account issues such as customary laws and the rights of indigenous peoples, particularly as defined in the UN Declaration on the Rights of Indigenous Peoples. He expressed his willingness to engage with the Secretariat and asked the Secretariat how it perceived and analyzed the compliance of the draft objectives and guidelines with the relevant provisions in the newly adopted UN Declaration, particularly with reference to beneficiaries and right holders.

153. The Delegation of Australia stated that Australia had a newly elected Government, and a decision as to whether to introduce legislation to give indigenous communities legal standing in certain circumstances to safeguard the integrity of creative works that embodied traditional community knowledge had not yet been made.

154. The Delegation of Nigeria commented on what had been mentioned by the Delegation of Brazil concerning exhaustion of rights using an IP model. The Delegation of Nigeria expressed concerns that IP models be transposed onto discussions concerning TCEs. Regarding TCEs-related products being marketed, the concern that was involved was not so much related to the products themselves, but to the TCEs on which those products were based without reference being made to the traditional holders. In that context, the Delegation said that it would not have any problems with the copyright model being adopted when analyzing the kind of situations that would arise where marketable goods that had TCE content would not be said to be an infringement. It also addressed the question of using registers and agreed with the Secretariat with the fact that many communities would not be comfortable with registration, knowing that its inclusion would introduce a level of formalities. Using registers of some kinds of TCEs could be considered, for instance, in cases of outright prohibitions, but there were other areas where registers might not be helpful. It would be a good idea for the Secretariat to further contribute on a gap analysis, but it acknowledged at the same time that a lot of analyses had been done in other forms by other groups and that these analyses should be

taken into account. The Delegation agreed with the previous statement of the African Group that asked that the gap analysis would not leave out other aspects to be dealt with. It recalled that initially many issues had been put forward for discussion and that some convergence seemed subsequently to have been reached when the ten issues were identified. Answers should be provided for the ten questions and it was not necessary to go back to a very narrow gage when conducting a gap analysis. Any gap analysis should be broad-based and should provide some solutions and ways forward as far as the other nine or ten questions were concerned.

155. The representative of the Tulalip Tribes commented on one of the points raised by the Delegation of Egypt on exceptions and on registers. According to his understanding, the Delegation of Egypt had expressed concerns about the granting of exceptions but had said that there was no problem if fair use was applied. The representative underlined that fair use had to be very carefully crafted when it came to traditional and indigenous knowledge and recalled an earlier statement made by the Tulalip Tribes on July 9, 2003. Violations of customary law were not only offensive, but potentially dangerous and harmful to tribes, since customary practices and laws had spiritual force, with potential physical repercussions. The representative put forward an example that could be found in Australia. As long as a particular aboriginal painter was alive, it was permissible to take photographs and show photographs of that painter. But once that painter had passed away, those photographs were not allowed to be shown any more. The Australian library system, including in New Zealand, withdrew these materials from general circulations and allowed access only with formal authorization from the indigenous group concerned. Fair use must be very carefully crafted in close conjunction with indigenous peoples and local communities and with their PIC. Extensive comments had been made in 2006 on these issues already. On the issue of registers, he pointed out that there had been extensive work done under the CBD covering many of the issues that had been discussed. He referred in particular to two reports produced by the CBD Secretariat, namely UNEP/CBD/WG8J/4/INF/9 and UNEP/CBD/WG8J/5/3 Add 2.

156. The Delegation of Brazil wished to clarify a particular aspect of its previous interventions. Its position with regards to document WIPO/GRTKF/IC/12/4 (c) was that protection of TCEs should not be conditional on any formalities and thanked the Secretariat for its previous comments on that aspect. What the Delegation of Brazil had in mind was to build upon the discussions going on GIs within the TRIPS Agreement context in order to address the international dimension of protection of TCEs, but not necessarily to use registers as a prerequisite for protection. The Delegation said that the most pressing problem was to ensure protection of TCEs by third countries. It recalled that countries of origin had usually adopted a regime of protection already applicable and had a deeper knowledge about the type of respect that should be granted and the fair use that could be made of its TCEs. Abroad, however, those same TCEs were not well-known, and they were not taken into consideration by the international IP system. The Delegation of Brazil flagged the idea of an international register in relation to TCEs only, since its position on TK would be different in this respect. It referred to the considerations and concerns made by the Delegation of New Zealand that would apply in the case of TK. It believed that a single and centralized database accessible to all would not expose TCEs to the same degree as TK. It believed also that an international register facilitating protection of TCEs, especially in other countries, would not be incompatible with the idea that protection should not be conditioned upon registration or any formality.

157. The Delegation of the Islamic Republic of Iran stated that the protection of TCEs should not be limited to a certain period of time, since TCEs passed from generation to generation. TCEs should therefore be protected as long as they continued to exist. Taking into account the specific criteria of TCEs and also the characteristics of current international IP law, the current IP system did not provide proper protection for TCEs. The Delegation supported therefore the creation of a *sui generis* system, which might take advantage of some elements of the current IP system.

158. The Delegation of Indonesia was of the view that GIs could not be easily applied to TCEs, given the conflicts of interest that would arise when communities members moved from one territory to another. When dealing with TCEs, focus was put on human creations, knowledge and cultural expressions, while GIs were mostly related to agricultural products. The Delegation added that even if a list of TCEs were to be set up, this would be complicated and require substantial efforts. The proposal put forward by the Delegation of Brazil regarding the identification of convergences was good since it reflected a positive approach highlighting convergences rather than differences. The Delegation also believed that the registration of TCEs could be problematic for the Indonesian people since it would add formalities. The Delegation of Indonesia also agreed with the Delegation of New Zealand that TCEs registration had to take into account the IP implication of documenting TCEs.

159. The Delegation of the United States of America said that it was ready to enter into a deeper discussion of all of the issues related to the protection of TCEs/EoF. Recognizing nonetheless that there were many important issues before the Committee, it discussed the remaining issues collectively. As many delegations, it said that it was premature for the Committee to undertake discussion of exceptions and limitations related to the protectable aspects of TCEs/EoF. These issues, as currently framed, might tilt in a particular policy direction that was not warranted at this stage of the Committee's deliberations, since there was no consensus on the outcome, or outcomes, of the Committee's work. It added that a discussion on such an issue might have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the Committee. The Committee was an excellent forum to exchange views on successful experiences at the national, regional and local levels on the protection, promotion and preservation of TCEs/EoF. With respect to issue seven, the Delegation believed that, in a spirit of enriching, deepening and intensifying the discussions of the Committee, Member States should continue to bring to its attention their experiences under domestic law, including proposed legislation, as suggested by the Delegation of Australia, to address the issues and concerns under consideration in the Committee. It noted that the issue of the existing protection for TCEs/EoF under existing law, including any gaps in such protection, would constitute a new proposal before the Committee and that the Secretariat would prepare a document discussing protection for TCEs/EoF at the international level. It looked forward to the discussion of this proposal.

160. The Delegation of Algeria, on behalf of the African Group, commented on issues five to ten. It reiterated some elements included in the African Group's proposals made on those issues. With regard to exceptions or limitations of the rights, it said that any protection should be based on the overall balance between the holders of the rights and third beneficiaries. Those exceptions should aimed at non-commercial uses as such as teaching, research or personal and private use. It referred to the list of those limitations submitted in writing. On the term of protection, protection should not be limited in time in view of the intergenerational nature of TCEs, as long as such TCEs remained integral to the collective identity of the traditional holders, since this would be the reason why such protection would

be granted in the first place. Concerning the scope of protection already provided by existing international instruments, they could be taken into account as long as Member States would be ready to amend those instruments in order to accommodate TCEs. The existing IP system did not recognize, for example, community and intergenerational ownership and provided protection for limited duration, as it did not take into account the characteristics of TCEs. Those were the reasons why the Committee had engaged in discussing ways towards a new international instrument or new mechanisms aiming at protecting TCEs. Concerning the illegal use of TCEs and how the protection should deal with it, the African Group had already stated that appropriate civil and criminal sanctions should applied to any behaviour or act considered to be illegal or infringing protection, at national, regional and international level. Protection should be provided at those levels at the same time, since there were discrepancies between protection provided at the national and international level. Providing international protection should be the necessary complement to protection provided at national and regional level. Two African regional organizations had already adopted protection instruments of TK and TCEs at their level. Those instruments should constitute a step towards protection at the international level.

161. The Delegation of South Africa supported the statement made by the Delegation of Algeria on behalf of the African Group and called upon the Committee to increase the momentum of its work. The Secretariat should incorporate and consolidate the comments made by the African Group in order to allow the Committee to work towards achieving its mandate successfully. It noted that the Secretariat had already started with the task of identifying the key issues through which the factual extractions had been organized. The Delegation was encouraged at the quality of the analysis and the sharp convergence of views and narrowing of the divergences that the factual extraction reflected. It expressed support for a previous intervention made by the Delegation of Nigeria which had recommended that the Secretariat not limit its analysis to issue seven only, but that it provide an analysis on all ten issues and make recommendations on how the Committee might return to document WIPO/GRTKF/IC/9/4 and 9/5 in light of the clarity that had emerged through the compilation of the factual extractions.

162. The Delegation of Italy " recalled that the Delegation of Slovenia, on behalf of the European Community and its Member States, had already stated that to a great extent TCEs were part of the public domain in Europe. The Delegation of Italy added that the question of the length of protection would depend upon the type of protection to be provided. If a particular TCE would be protected as a trademark, for example, the length of protection applicable would the length applicable to trademarks. Once protection was exhausted, the work concerned fell into the public domain and became available for use by everybody. The Delegation added that world culture had developed in this way, with cultures from various parts of the world meeting each other and overlapping. Trying to contain and put cultures inside some kind of formal container, so that one culture would remain separated from another, would be very dangerous. The preservation of cultures, on the one hand, and the dissemination of culture, on the other, posed different kinds of problems. Protecting the environment and setting up educational policies which would enable cultures to be transmitted and languages to be protected was one thing; the diffusion of communities' and countries' cultures was another. The latter objective was expected to encourage the former, and it should not put cultural development in jeopardy.

163. The Delegation of Brazil recalled that the Committee was not an advisory committee or a forum limited to the exchange of national experiences or updates on the evolution of national legislations. It reminded the Committee that all members of WIPO agreed in the

General Assembly of 2007 that the Committee was a fully fledged WIPO body with a broad mandate to specifically address the international dimension of the subject matter under review, without prejudging any outcome. Seeking out convergences of views should be at the core of the Committee efforts.

164. The Delegation of Guinea expressed concerns regarding the limitation of protection to be granted to TCEs and TK. A short or medium-term limitation would be likely to undermine the protection efforts, the aim of which was above all to allow indigenous people to take the best advantage of their works in *inter alia* financial terms. The legal texts adopted recently by the Member States of OAPI could be adapted to the international context. In terms of industrial property law, including patents and industrial designs, the duration of protection varied from 15 to 20 years. This duration was fair enough, owing to the momentum of innovation, as a result of which new works were supposed to be produced within that period. By contrast, such limitation of duration was not obvious in relation to traditional works, which developed slowly or were even stagnant. Consequently, a limitation in the duration of protection of traditional expressions might represent an opportunity for private corporations, already likely to engage in unfair competition, to use the TK and TCEs of indigenous peoples fully legally by means of modern technologies that were not available to those peoples. The Delegation of Guinea suggested that a *sui generis* system be developed.

165. The Delegation of Japan said that it was premature for the Committee to undertake a focused discussion on exceptions and limitations. Since there was no consensus on a rights-based approach to TCEs, 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 any perceived gaps, including appropriate and applicable exceptions and limitations. In discussing exceptions and limitations, consideration should be given to the balance between the interests of rights holders and public interests, although such balance might vary, based on the form of protection and the scope of illegal acts. On issue six, the Delegation believed that it was premature to address the issue of the term of protection, given that it would depend on the type of protection provided to TCEs. The appropriate term of protection could be influenced by a number of factors, such as the objects of protection and the scope of the subject matter to be protected and the applicable exceptions. On issue seven, the Delegation of Japan stated that there was to date been no IP system around the world that extended direct protection to overall TCEs. In certain limited cases, however, TCEs were protected under existing systems such as copyright law, trademark law or law systems preventing unfair competition. However, protection under copyright law required a certain level of originality and the copyright holder was presumed to be an individual. Although there were systems of joint ownership of copyright or copyright owned by legal entities, it was not foreseen that a community would directly become a copyright holder. Performance of a TCE could be subject to protection by neighboring rights, even if the performed TCE itself did not qualify as a copyrighted work. Term of protection was limited both for copyright and neighboring rights. The Delegation of Japan added that trademark rights were aimed at protecting signs used for goods and services by entrepreneurs, but not cultural expressions such as TCEs. The indirect protection of TCEs under the trademark regime might be possible. More specifically, a brand could be established using the trademark of the group to which particular TCEs belonged, provided that the group applied for registration of the mark under the trademark regime. In addition, with regard to protection of moral rights, copyright law could provide moral rights protection where the TCEs qualified as copyrighted work. Civil law and other general laws might also provide protection in cases of serious moral right infringements. 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. 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. Both IP and non IP laws and policies could protect TCEs, depending on the pursued objective. Therefore, an analysis of potential gaps in the current system would advance the work of the Committee to the benefit of all Member States and observers. It was premature to address issue eight related to sanctions or penalties. When discussing what sanctions or penalties should be introduced, a fair balance had to be kept between the protection of TCEs/EoF and the protection of public domain under the IP systems and other laws. Discussion based on factual information about what damage had been caused by what would be identified as illegal acts was essential. On issue nine, the Delegation of Japan believed that a focused discussion on TCEs required careful consideration of both national and international aspects of the complex issues dealt with by the Committee. Before discussing ways for addressing this issue internationally, discussions should be held on existing domestic solutions where their limits lie and the extent to which contractual mechanisms were able or not to address this issue. On issue ten, it was also premature to address the issue of the treatment of foreign rights holders and beneficiaries. It was not helpful at this stage for the Committee to undertake a focused discussion on the treatment of foreign rights holders and beneficiaries, and the Committee should concentrate its efforts on engaging in sustained and concrete discussions on the fundamental issues that it mentioned.

166. The Delegation of Panama again supported the delegations that had spoken regarding the need to find *sui generis* mechanisms or instruments to protect TCEs and TK. The Delegation considered that the conventional IP system was not sufficient to respond to the protection needs in those spheres, although as had been explained by the Secretariat, a number of arrangements could be successfully used such as collective and guarantee marks for TCEs. In the international sphere, it endorsed the view of the Secretariat concerning the possibility of using certain points contained in international agreements, as was the case with the provisions on unfair competition outlined in Article 10*ter* of the Paris Convention. With general reference to Article 10 of document WIPO/GRTKF/IC/12/4 (c), concerning the relationship between IP protection and other forms of protection, preservation and promotion, Panama would opt for a *sui generis* system of protection, given the holistic nature of TCEs and TK, since the registrations of collective rights had certain general characteristics, for instance, they had no term of duration, were free of charge in the case of Panama, they did not require a legal service in the same way as conventional IP, and appeals against the registration of collective rights should be notified personally to the representatives of traditional authorities. As to the relationship between protection through the conventional IP system and other forms of *sui generis* protection, the following concepts studied by the Committee were envisaged. In relation to creation, be it for TCEs or TK, protection was generally individual in the existing IP system, although it could be collective or in collaboration, and in the *sui generis* system it was always collective. The date of origin of the creation, in copyright the work or intellectual creation, and in industrial property the idea, be it a technical or aesthetic solution, was known and in the *sui generis* system it was not known. With respect to the conditions for protection, in copyright the work or creation should be original and in industrial property it should be novel, have an inventive step and be industrially applicable for patents, and original for industrial designs. For the purposes of the *sui generis* law, the following should be satisfied: TCEs and TK had very special characteristics, including cultural identification, which was the link with the community, and “traditionality”, which referred to the method of development of the knowledge based on tradition; although it had been mentioned previously it was not necessarily old knowledge since there might have been innovations, and the community had not disappeared and continued to create knowledge based on tradition. It should be emphasized that what characterized TCEs and TK, and transformed them into the

heritage of a community was their indissoluble association with the identity of the community. In Panama, the knowledge also had to be associated with commercial use. In the IP system, the author, inventor or creator was known, although there were also anonymous works, and in the *sui generis* system the author could not generally be identified. In the IP system, the rights owner was a natural person or legal entity, and in the *sui generis* system the owner was the community that owned the TCE or TK. As to the rights applicant, that could be the owner or a lawyer, and in the *sui generis* system it was the traditional authorities. The duration of protection in the IP system was limited, except for distinctive signs which could be renewed indefinitely and in copyright there were longer periods; in the *sui generis* system protection was indefinite and depended on the nature of the collective right. As for the rights conferred in the IP system, they were generally limited and entered the public domain, while in the *sui generis* system they were permanent as long as the link with the community was maintained. In both systems, moral rights were not transferable. As to economic rights, they were freely assigned in the existing IP system, and in the *sui generis* system assignment was restricted as the link with the community and traditionality should be maintained. With respect to use and commercialization, in the conventional IP system licenses for use were granted without restriction on transfer and, in the *sui generis* system, PIC was required. Equitable sharing of potential benefits was not envisaged or considered in the existing IP system or the *sui generis* system respectively. Access to administrative mechanisms was available in the existing IP system in the form of technical and legal advice, but in the *sui generis* system it was more difficult in that conditions for the owners of TCEs and TK were not so easy. The costs of administrative proceedings and disputes were envisaged in the conventional system and were less expensive in the *sui generis* system, and in the case of Panama they were free of charge. In the IP system, knowledge was generally disseminated in writing through documentation and publications, and other material carriers; in the *sui generis* system dissemination was generally oral and intergenerational. In relation to the nature of knowledge, in the IP system, it was more formal and scientific; however, in the *sui generis* system it was informal in nature as owners generally did not have information to obtain protection through the IP system, as in the case of patents. The preservation of information in the existing system was easy and accessible through the use of databases and documents, while in the *sui generis* system information was difficult to retrieve and a lot of information was lost because its use by the actual owners of the information was discontinued. Policy objectives in the existing IP system were generally economic and in the *sui generis* system, it had been seen how many objectives had been established; nevertheless, the Delegation believed that the social, cultural and economic recognition that could involve many other objectives that had been established was fundamental.

167. The Delegation of Morocco endorsed the statement made on behalf of the African Group. Morocco's comments pertained to a number of points that had been raised. Regarding Issue 5, pertaining to exceptions and limitations, it had said already that when using TCEs and TK for commercial reasons or removing TCEs and TK from their customary contexts, importance should be placed on the economic rights, economic entitlements and payments to rights holders. Once TCEs were removed from their context, these TCEs could be used on the condition that authorization and prior consent were given by the rights holders. Thus, economic rights, be they for copies, dissemination, quotation and other elements provided for by the IP system, should be respected. This was very important for the protection of TK and TCEs and there were many instruments that could help in providing this coverage. The Committee should draw inspiration from existing IP instruments so as to move forward and reach its objectives. There were many types of exceptions which could be presented in an exhaustive list. It was possible to talk about private use, daily use, media coverage, use for educational purposes, archives, documentation centres; however, as already mentioned, TK

and TCEs had specific characteristics that set them apart from other types of knowledge. These characteristics made it possible for communities to preserve their history as these were the mirror images of the essence of the day-to-day life of these peoples. The Delegation believed that there should be no time limited placed on protection insofar as the TCEs were still alive, as these were an integral part of the existence of the communities. In the context of reducing cases of misappropriation, the Delegation referred to pages 31, 32 and 40 of document WIPO/GRTKF/IC/12/4 (c). The Delegation thus expressed its position which hinged on indemnities to be paid in cases of illicit abuse or exploitation of TCEs and TK to the detriment of their right holders.

168. The Delegation of Mexico noted that its comments were already reflected in the documents provided by the Secretariat and the Delegation commended the Secretariat for its hard work in preparing the documents. The Delegation hoped that the Secretariat would be able to continue supporting the Committee by not only providing summaries of viewpoints but also in providing a compendium, as this could help the Committee to better fulfil its mandate by arriving at a full convergence of all the viewpoints. TCEs and TK could be regarded as a very complex theme, as these covered “culture” in all of its aspects. The Delegation thought that the Committee had arrived at a certain stage of maturity in its thinking, and that the Committee should now be able to arrive at a greater convergence of viewpoints. The Delegation had not spoken before and explained that it was not because of a lack of interest but because it wished to listen to other delegations. The Delegation now wished to say that the Committee had drawn upon the various statements made on the existing gaps in international and national instruments. The Delegation had heard many delegations mentioning the shortcomings. It believed that there was no proper legal framework that could adequately protect TK and TCEs, although there were some instruments in place and some had also been used. The Committee thus functioned to explore possibilities to adequately protect TCEs and TK and identify gaps. It believed that if there were no demand for such an analysis, there would be no Committee.

169. The Secretariat responded to the question raised by the representative of the Saami Council on how it saw the relationship between the UN Declaration on the Rights of Indigenous Peoples and the work of this Committee. It briefly drew attention to two specific provisions in the UN Declaration, namely a preambular statement wherein recognition was given to the collective rights of indigenous peoples and Article 31 which, in brief, stated that Indigenous peoples had the right to maintain, control and protect and develop their IP. The Secretariat did not see any *a priori* incompatibility between the Declaration and the work of the Committee. One way of framing the relationship was to see the work of the Committee as giving specific content to Article 31 of the Declaration. What the Committee was trying to do was to arrive at an understanding of what exactly would be the IP of indigenous peoples and what would be their IP-related rights, so as to give some effective content to Article 31.

170. The representative of the Indigenous People's Council on Biocolonialism (IPCB) thanked the Secretariat for its remarks on the Declaration and stated that Article 31 did refer to IP but that the first part was not limited to IP. To that extent, it supported the statement of the Saami Council that the Secretariat conduct a thorough examination of Article 31 and the extent to which the work of the Committee was consistent with that Article and other articles that had been mentioned in its earlier interventions, particularly Articles 3 and 11 and those provisions that were related to FPIC, as it believed that these would also relate to IP and to the broader form of protection it was advocating.

171. Regarding exceptions, the Delegation of Sudan considered that there should be a certain measure of flexibility. What the Committee needed to do was to define TCEs. The Delegation raised some questions regarding the instrument the Committee wished to draft for protecting TCEs. In Sudan, some of the local communities and the communities who had lost their lands due to natural disasters or conflicts had ceased to exist, but their TCEs remained, also within bordering communities. What would happen to these TCEs? Who would become the right holders? Who would own these TCEs? In conclusion, the Delegation supported the position of the African Group.

172. The Delegation of Colombia noted it had submitted a written statement in which it had stated that in relation to the international dimension of the protection of TCEs/EoF, it had always supported the first of the options included in document WIPO/GRTKF/IC/12/6, which corresponded to the creation of "a binding international instrument or instruments". However, it wished to point out why other options were not viable, such as option "(ii) interpretations or elaborations of existing legal instruments" which stated *inter alia* that "the existing instruments on protection of copyright and performers' rights are also relevant to aspects of misuse or misappropriation of traditional cultural expressions, and such existing instruments may be interpreted or applied to strengthen this linkage". Colombia did not agree with this point in WIPO/GRTKF/IC/12/6. The extensive interpretation or application of legal systems of copyright and performers' rights, as an instrument of protection for TCEs/EoF, was not relevant. Although certain tools or legal concepts included in the systems of copyright and performers' rights could be of great use in creating new mechanisms to protect TCEs/EoF, the nature of those systems was separate and applied to specific and concrete scenarios. For this reason, it was not necessary to apply or interpret the rules relating to copyright and performers' rights to protect TCEs/EoF. In relation to the protection of copyright and performers' rights, and in accordance with the nature of TCEs/EoF, it concluded that the protection required for TCEs/EoF was not provided in terms of the following analysis: (i) Subjects of protection. The subjects of protection for copyright and performers' rights should be individualized and identified, and were characterized in that they had powers over the work or performance. For their part, the subjects of protection for TCEs/EoF consisted of communities, be they indigenous or local. It was not possible to individualize an author or authors, since the creation of that TK was attributed to the community as a collective subject; (ii) Subject matter of protection. TCEs/EoF were collective creations that were produced as a result of the contributions of the community through different generations and, therefore, were formed continuously over time. The subject matter of protection for copyright were artistic and literary works, which were produced in legal terms at a particular moment, for instance, the act of creation by its author, whereas the creation of TCEs/EoF, in general, was the product of a cultural process which could involve the contribution of various generations, which made it difficult to determine its creation; (iii) Term of protection. The term of protection of economic rights of authors or performers limited the exercise of those rights in time to the life of the author and a subsequent term depending on the applicable legislation. Once said period had elapsed, the work or performance would enter the public domain and could be used without authorization. For their part, TCEs/EoF survived for a number of generations. That being the case, it was concluded that the terms of protection of the economic rights of authors or performers would not be applicable to TCEs/EoF. The above was a general statement on the way in which Colombia considered the international dimension of the issues referring to the subject of TCEs/EoF. For a detailed examination of its position in relation to each of the ten questions raised at the Tenth Session, the Delegation invited the other Member States to examine the position of Colombia, as stated in document WIPO/GRTKF/IC/11/4 (a). It hoped that these ideas would be of great use to the other delegations. The Committee offered a unique

opportunity to establish unifying international policies consistent with the other international provisions in force. In view of the above, the Delegation invited the Committee to seek a consensus in order to establish both the instruments desired and the timeframe in which their implementation could be expected.

Decision on agenda item 8:

173. The Committee took note of documents WIPO/GRTKF/IC/12/4(a), WIPO/GRTKF/IC/12/4(b), WIPO/GRTKF/IC/12/4(c) and WIPO/GRTKF/IC/12/6. The composite decision taken by the Committee on future work on this agenda item is reported under agenda item 11.

AGENDA ITEM 9: TRADITIONAL KNOWLEDGE

174. The Chair introduced documents WIPO/GRTKF/IC/12/5 (a), WIPO/GRTKF/IC/12/5 (b), and WIPO/GRTKF/IC/12/6.

These documents were summarized in WIPO/GRTKF/IC/12/INF/2 as follows :

The Committee is currently considering the protection of traditional knowledge (TK) through two processes:

(i) consideration of an agreed list of Issues concerning the protection of TK; and

(ii) consideration of a draft set of "Revised Objectives and Principles for the Protection of Traditional Knowledge" ("Objectives and Principles").

8. The working documents on protection of TK prepared for the twelfth session of the Committee, in line with the decisions taken at the eleventh session, comprise:

WIPO/GRTKF/IC/12/5(a): 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;

WIPO/GRTKF/IC/12/5(b): the text of the draft Objectives and Principles, identical to the text that was circulated at recent sessions, in line with the decision of the eleventh session that this document "remains on the table in its existing form".

WIPO/GRTKF/IC/12/6 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.

Issue I: definition of TK that should be protected

Issue II: who should benefit from any such protection or who would hold the rights to protectable TK?

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

Issue IV: What forms of behavior in relation to protectable TK should be considered unacceptable and illegal?

Issues V: Should there be any exceptions or limitations to rights attaching to protectable TK?

Issue VI: For how long should protection be accorded?

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

Issue VIII: What sanctions or penalties should apply to behavior or acts considered to unacceptable/illegal?

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

Issue X: How should foreign rights holders/beneficiaries be treated?

175. The Delegation of Algeria, on behalf of the African Group, presented concrete proposals adopted by the Group to help the process and give a chance to make progress. As the Delegation of Brazil recalled, the mandate of this session was to make progress and address the international dimension taking into account all the different options. The mandate of this session and the next session were to work on the issues of convergence between the different groups. The Group presented its comments and recommendations on the Factual extraction concerning TK and made the following contributions on the points of convergence and divergence on the ten issues. On the issue of definition of TK, the Group recommended the Committee should have a simple, flexible working definition which should be complemented by a list of examples of what TK was. It recommended a focused member states expert team be established to work to provide an operational definition. On issue 2, it was of the view that Article 4, Beneficiary of Protection and Article 5, Eligibility for Protection of the Annex to WIPO/GRTKF/IC/11/5 (c) was an adequate basis for further work. Similarly, almost all countries which had commented on the Factual extractions recognized the economic and moral right for the protection of TK. Ownership of TK should be treated as a special category as it was not the norm. On issue 3, what objectives was sought to be achieved through according IP protection, economic right and moral right, there was general agreement for the need for economic and moral right policy objectives in varying degrees.

One member state recognized the moral right but not the economic right. Other complementarity to existing IP regime was articulated. The Group was of the view that the gap was narrower than it sounded and could be bridged. On issue 4, what form of behavior in relation to the protectable TK should be considered unacceptable or illegal, the factual extraction indicated that there was general agreement on factors considered for illegality and the forms of illegal behavior. Most delegations made reference to unfair competition as per Article 10*bis* of the Paris Convention as a basis to identify unacceptable or illegal forms of behavior. However, it added that there was a convergence of views on many issues on this topic. On issue 5, should there be any exceptions or limitations to rights attaching to protectable TK, there was a general agreement on limitations and exceptions except for a few member states. On issue 6, for how long should protection be accorded, there was agreement for a perpetual protection aside for a few member states. Objectives to be perpetual can be addressed in further discussion. Issue 7, to what extent do existing IPR already afford protection, what gaps need to be filled, most member states, including the Group, favored the development of a *sui generis* system to complement current IPR. Few member states largely favored the use of the current IP system. There appeared to be growing perception among member states of the limitation of the current IP regime and the need for an international binding or non-binding instrument. On issue 8, what sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal, member states generally agreed that sanctions should be applicable except for a few. On issue 9, which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation, there was a consensus that an international instrument was needed but there was no agreement on a legally binding instrument. On issue 10, how should foreign rights holders/beneficiaries be treated, there was agreement on the treatment of foreign right holders on the principle of national treatment except for one member state. This was the contribution the African Group thought would be considered. There were some conclusions to draw from the factual extraction as to permit this exercise to make some progress. The Group was presenting this proposal to be considered at this session and the next session to be amended of course and discussed in a way it could be improved.

176. The Delegation of Canada recognized that the factual extraction was a very useful tool in identifying and comparing the perspectives of Member States and observers, a necessary step in the process to achieving greater understanding and consensus on the work before the Committee. It had reviewed the statements consolidated in the Factual extraction and made the following general observations. First, there was a need to achieve terminological clarity of the key terms regarding TK. At the most fundamental, the Factual extraction demonstrated that there was, as of yet, no consensus as to a definition of TK. TK, by most definitions expressed in the Factual extraction, cut across different laws and jurisdictions. A number of components of TK, such as literary and artistic works, were protected under existing IP laws. Canada recognized that aspects of TK that would not properly be subject to IP protection may still be protected under other laws, for example unfair competition, trade secrets, language charters, education law and policy, and cultural property import and export legislation. The Factual extraction further demonstrated that the scope of what was, could, or should be subject to IP protection, versus protection under other laws or policies, was likely more narrow than the definition of TK per se. Canada was of the view that it was important to avoid confusion regarding the distinction between what may be a definition of TK and the scope of TK that might be subject to protection under the IP regime. Next, the Factual extraction revealed that there continued to be divergence on who should qualify as beneficiaries or rights holders of TK - for example, should just indigenous groups qualify or should other communities qualify as well. As noted in its submissions on TCEs, how the Committee defined the term “community” was likely to influence how the nature and scope of

protectable subject matter was defined and may raise other policy considerations such as the promotion of cultural diversity. There did seem to be some convergence around the concept that communities, however defined, could be collective holders of TK. For example, an indigenous group could be said to possess TK in traditional medicinal practices or in traditional songs and performances. What remained to be clarified, as raised in particular in the indigenous panel, was what should result, for example, when TK was shared between various communities, even with slight modifications. Canada had previously stated that "communities and individuals around the world had historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another". Specific practical examples of what could be considered "misappropriation" in relation to TK would help Member States define the scope of protectable TK. Finally, linked to protection was the subject of capacity. The work of WIPO and its own domestic work had highlighted the fact that individuals and communities were sometimes not aware of how to use the existing IP regime and other forms of legislation to protect and promote TK. Canada maintained that achieving better understanding and consensus on the definition of TK and the scope of protectable subject matter would help direct consensus on the remaining issues in the List of Issues. As noted by various Member States in the Factual extraction, it would be most useful to examine what TK was capable of protection under various legal and non-legal mechanisms. To that end, the Delegation saw some merit in exploring, in the context of TK, the gap analysis proposal put forward by the Secretariat under Agenda Item 8. It looked forward to discussing it when the Committee reached the appropriate time in the agenda. Canada hoped that the Committee would continue to engage in an in-depth, step by step analysis of these important over-arching issues in order to achieve greater understanding of the definition of "TK", "communities" and "beneficiaries". Furthermore, it reiterated the importance of the work accomplished on the draft policy objectives and general guiding principles. This Committee should continue its work in identifying convergence over these. Canada believed that this would help Member States reach further consensus on the matters before the Committee.

177. The Delegation of Slovenia, on behalf of the European Community and its Member States, reaffirmed its commitment to contributing as constructively as possible to the work of this Committee. It recognized the significant effort that had been put into the creation of the many documents prepared for this Committee and for the thoughtful and substantial input by the Member States, interested parties and the Secretariat as reflected in the documents. There were now enough information regarding the different views with respect to the complex and important subject matter that was being addressed. The time for information gathering may be near the end. The Committee should now ask itself what should be done with this vast body of information and focus on the major goal which is to seek practical solutions based on the information gathered. There were three crucial questions at this moment. What was the definition of TK, what objectives were to be achieved concerning protection of TK and to what extent were these objectives already achieved through the currently existing IP regimes at both international and national level. It still considered that the document relating to objectives and principles along with the comments from Member States constituted a good basis for addressing these questions. First and foremost, the definition of TK should be addressed. The definition contained in Article 3 of the Annex to WIPO/GRTKF/IC/12/5(c) constituted a workable basis for any discussion within the Committee. As already stated in their comments, in order to establish an appropriate balance between interests of TK holders and third parties, an understanding of the concept of a public domain in respect to TK needed to be achieved. In other words, in order to understand what was TK, one should first understand what was not TK. An all inclusive definition will not help identify the dividing line between TK and non-TK. If this line was not found, there would be a danger in trying to protect everything that was traditional and that of course was not the intention of the

Committee at all. Once one was satisfied by what was meant by TK, then the objectives of that protection could be addressed. There were many forms of protection that had been suggested. Defensive protection, moral rights, economic rights, protection against derogatory or offensive use. The Committee must be clear on which of this was desirable and which not. Finally, when the Committee would know what objectives it wanted to achieve it could assess the extent to which these objectives were already accomplished by existing IP regimes. Only when these three crucial questions would have been clarified would it be ready to decide on the form of protection of TK it was seeking. In considering the wide variety of Member States positions reflected in the information before the Committee a single solution in the form of a legally binding system might be difficult to realize. For this reason, the European Community had consistently stated its preference for *sui generis* models or other international non-binding options. This could include guidelines or recommendations that would offer Member States a variety of options that they could chose from in order to adapt to their specialized needs. Because of the varying needs and circumstances that existed, it believed that the final decision on the protection of TK should be left to the individual contracting party. Since a single perfect solution was not possible the flexible approach the Delegation was proposing may be a way forward to a compromise solution that everyone could accept. Thus it would propose a logical step by step process to reach the Committee's final goal. Once there was a good understanding of what was considered to be TK, what the objective of protection was, and to what extent already existing regimes already accomplished that objective, then the issue of how to supplement existing systems with a variety of non-binding international model could officially be addressed.

178. The Delegation of Egypt supported the statement of the Delegation of Algeria, on behalf of the African Group. It called for a *sui generis* system that would ensure required protection for issues under discussion, without going beyond the existing intellectual property system. Such *sui generis* system should consist of a mechanism congruent to conventional intellectual property systems, as substantiated by TRIPS Article 27.3 (b) which, while requiring protection for plant varieties, left to Members the choice between patent protection and/or a *sui generis* system, clearly implying that a *sui generis* system was indeed congruent to a conventional patent system as a tool for the protection of intellectual property rights.

179. The Delegation of Japan stated that there appeared to be a variety of motivation, demands and needs, expressed from different Member States, communities, groups, etc. for this exercise. In such a situation, there should be gradually forming common understanding why to conduct this long-standing exercise, that was to say for example whether this exercise was for protecting some aspects, economically or morally, of indigenous peoples?, or others. If the scope of subject matter and objective were vague and uncertain, giving legal effect to these subject matters could cause negative effect and huge confusion to society. On the other hand, if the scope and objective were clear and well defined, some substantive approach might be acceptable to society at large. While Japan did not want to reiterate in detail again the fundamental questions it submitted at the last session, these fundamental questions were not yet clarified sufficiently, and an in-depth discussion needed to be continued. In this context Japan commended the Secretariat for producing an informative document, the factual extraction. Among these issues, "definition of TK" of Issue 1, what was "traditional" or what was "knowledge" in TK context. And who was the TK holder to be benefiting of Issue 2 were the most important issues to be tackled for clarification before going further. Besides these fundamental issues: objectives of protection; balancing analysis between public interests and TK protection; factual investigation and analysis of harm in real world were essential before going further in the discussion on issues 5, 6, 8, 10. Regarding item 7, an

analysis on how existing IP regime addressed protection of TK was useful and helpful for the discussion.

180. The Delegation of China stated that it would not repeat its comments on the list of issues. This list contained many important issues for the protection of TK. WIPO/GRTKF/IC/11/5 (a) had already provided much useful information for the discussion and already contained important provisions on this. The most important was not a written text but a consensus of all Member States. Therefore, the repetition of well-known positions might help everyone to better understand each other but would not necessarily help make progress in the discussions. The Delegation proposed the Secretariat should make a summary of Member States comments on the two lists of issues and the two drafts on objectives including WIPO/GRTKF/IC/12/4 (b) and WIPO/GRTKF/IC/12/4 (c) on TCEs and WIPO/GRTKF/IC/12/5 (b) and WIPO/GRTKF/IC/12/5 (c) on TK. Such a summary would help the Committee to find out where there was agreement and disagreement and what might be most effective in the work. The documents prepared by the Secretariat previously were the fruit of the common wisdom of Member States and other participants, as well as considerable efforts by the Secretariat. The most important documents mentioned were of great value as a reference for all delegations and for Chinese experts. These documents helped them to continue their discussions on TCE, TK and know the positions of other countries. It noted with regret that these documents existed only in English, French and Spanish and that there were no document translated into Chinese or into any other language. This was an obstacle for participation by Chinese experts in the work of the Committee. The Delegation considered that for a country that spoke neither French, nor Spanish, nor English, the official translations of these texts into other languages by the Secretariat would certainly facilitate research and exchanges of opinions. It called on the Secretariat to attach great importance to the problem of language.

181. The Delegation of Colombia said that in considering the international dimension of the list of issues on the topics both of TK and of genetic resources, the best option for Colombia had always been the number (v) of document WIPO/GRTKF/IC/12/6, which referred to ‘strengthening of international coordination through guidelines or model laws’. The model clauses that the Committee should develop would seek the elimination of misappropriation and misuse of traditional knowledge, characterizing these actions as a violation of international law. Other options such as (ii) explanations or interpretations of existing legal instruments were not viable for the reasons given above for the item on TCEs/EoF. These considerations of the Government of Colombia with regard to TK did not rule out the possibility of carrying out a comprehensive treatment of TK and TCEs/EoF, while this distinction was more responsive to the institutional models and market place current in Western society, which acknowledged a distinction from the owners of that TK and TCEs/EoF. However, it was clear that integrity must be guaranteed by each state, according to its own institutional dynamics and the relations of governments with indigenous and local communities. In the case of Colombia, there was a challenge to move forward at the nacional level, so that decisions adopted with binding force at the international level concerning TCEs/EoF, and the model provisions in relation to TK, shoould enjoy legitimacy, ensuring the applicaation of the provisions of Article 6 of the ILO Convention 169 on the right of peoples to be consulted previously on any legislation, etc. that might affect them.

182. The Delegation of the United States of America commended the Secretariat for the factual extraction in particular. This document however highlighted the need for a continued exchange of ideas and experiences to address the points made in this discussion as the discussions thus far had left many questions unresolved and unaddressed. Consistent with the

view that the discussion had been helpful, the Delegation was supportive of the continued discussion of the list of issues assisted by the factual extraction and hoped this would help to bridge differences among members, clarify matters and lead to progress in this Committee. As to the first issue, definition of TK that should be protected, as previously noted a precise working definition of TK was important in order to ensure a common understanding of the debate more fully considered in the Committee in order to build upon the vast amount of studies already done in the Committee and to take the next step of achieving agreement among members. It believed that the Committee should further analyze and discuss the parameters for TK that had
been identified in the Committee consistent with the views on TCE. The Committee should deeply discuss the parameters that had already been identified in paragraph 58 of WIPO/GRTKF/IC/6/4. These general characteristics were helpful results of the discussions and therefore provided a good framework for a useful discussion. As to the second issue, beneficiaries and who should hold the rights, the Committee would benefit from further study informed by representatives from many stakeholder groups including indigenous groups and local communities 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 the sometimes competing claims of beneficiaries. As previously stated, identifying beneficiaries was a difficult task. For example, what would constitute an identifiable group? Did an entire national population qualify? Did a community for this purpose need to be an ethnic group? The delegation of Japan had previously raised an interesting question regarding groups that were not ethnically or kinship based groups, such as certain religious groups. What about remotely located communities or individual families? As to the third issue, what objective is sought to be achieved through according intellectual property protection (economic rights, moral rights), the United States continued to believe that the short answer to this question was that the overall objective of providing intellectual property rights was to promote creativity and innovation. This overall objective may apply with equal force, in whole or apart, to protecting TK. As it became clear in the discussion of TCEs, existing systems of IP protection may 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. The United States looked forward to deepening the discussion of these issues under the renewed mandate of the Committee. As to the fourth issue, what forms of behavior in relation to the protectable TK should be considered unacceptable/illegal? this Committee had made considerable progress in identifying specific forms of behavior regarded as unacceptable or illegal by various stakeholders, including indigenous peoples and traditional and other cultural communities relating to TK. Although there remained a wide divergence of views regarding the meaning of the fundamental term “misappropriation,” paragraph 18 of WIPO/GRTKF/IC/7/5 provided a useful framework for facilitating the discussion of this issue within the Committee. As for the remaining issues and in the interest of time, the United States addressed issues 5 through 10 collectively. It believed that it was premature for the Committee to undertake a focused discussion of (issue 5) “exceptions and limitations,” (issue 6) the duration of any such protection, (issue 8), sanctions or penalties, and (issue 10) the treatment of foreign rights holders or beneficiaries. The United States looked forward to a sustained and robust discussion of the existing IPR protection, including any gaps under issue 7. Similarly, it looked forward to an extensive discussion of issue 9 which addressed which issues were best dealt with internationally. The Delegation addressed some points raised by other Member States. The previous day, the Delegation of Brazil had suggested equating TK to inventive ideas (patents) and TCEs to Copyrights or TMs. That same day, TCEs had also discussed in terms of their similarity to Geographic Indications. The use of the phrase “patenting an idea” was probably not intentional, but it was important to note that patents were not granted on ideas, but on inventions. The difference was critical, in

that the inventive concepts must be sufficiently concrete for a patent to be granted. An abstract idea was not sufficient. Moreover, the reference to patents, while interesting (because the term of a patent was limited and the right was granted only in exchange for public disclosure of information that could be used by others), was not considered useful. This Committee was considering mechanisms to avoid misappropriation and unfair commercial use. A patent right was granted for a limited term and in exchange for a disclosure of how to make and use the new and non-obvious invention. The goal of the patent system was to encourage public disclosure and to promote innovation. As understood, the desire to protect TK was not to primarily promote their disclosure, or to limit the duration of protection. Since the desire stemed instead from a desire to discourage misappropriation, a closer analogy would be to Trade Secrets. Like TK, Trade Secrets and Undisclosed Information were subject to claims of unfair commercial use. The advantage of using the analogy to Trade Secret protection was that the protection was not "conditioned on formalities" and the information was not required to be made public (or put into a database) before it could be protected. Furthermore, with such protection, the information would be protected so long as the TK was protected by the TK holder.

183. The Delegation of Switzerland thanked the Secretariat for the revised draft of the factual extraction, which incorporated comments received, including comments from its delegation. A few of their comments had not been incorporated into the revised draft. The current version of the factual extraction therefore did not fully reflect the views expressed by Switzerland. It added that it would gladly re-send its comments to the Secretariat, but will not go into detail here. The factual extraction provided a valuable source of information for the further discussions of the Committee. It regretted that this document had been made available to the Committee only recently, rendering a careful analysis of its contents difficult. It therefore proposed that any future work of the Committee would provide the Secretariat with adequate deadlines and time frames. Only this would enable the Secretariat to make available the documents for the next session in a timely manner. With regard to the list of issues, as stated at previous sessions of the Committee, it considered two points as prerequisites for a successful outcome of the work that needed to be addressed at the outset of our discussions. The first prerequisite was the need for a clearer understanding of the relevant terminology. 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 well suited for further discussions. It thus proposed to use these working definitions as a basis when addressing issue 1 of the list of issues. It welcomed that many other delegations had also called for the clarification of terminology. A second prerequisite for a successful outcome of the work was the clarification of the objectives of the protection of TK. The Committee had extensively discussed these objectives, without reaching any final conclusions. More work in this regard was thus necessary. The document containing the factual extractions would be most helpful for this purpose. With regard to the other issues in the list of issues, it referred to its comments made at the eleventh session of the Committee and its written comments.

184. The Delegation of Saudi Arabia endorsed the views expressed by the Delegation of Algeria, on behalf of the African Group regarding TK, and seconded the wish expressed by the Delegation of China that meeting documents, as requested and promised in previous sessions, should be provided in other languages, including Arabic, to allow for wider contribution to the issues at stake.

185. The Delegation of Norway found that, also in respect of TK, the list of issues, as well as the documents prepared by the secretariat provided for a very useful point of reference in

getting to the substantial core issues and identifying convergence. In order to be brief, in respect of the list of issues, it referred to its written comments, as well as interventions made in previous sessions. However, Norway highlighted just one point that it considered was an important underlying theme in respect of TK. That was the importance to provide for a balance taking into account the competing interest and expectations, in order to reach a substantive outcome, such as establishing an international norm. This would also provide for predictability for the benefit of all concerned. Or to state it in a different way - to provide for needed guidance on the international level on *inter alia* - what constituted acceptable behaviour or use and what did not constitute acceptable behaviour or use.

186. The Delegation of Brazil agreed with the Delegation of Switzerland and others who indicated the need for further clarification on the terminology used and who believed that the working definitions provided by the Bureau up until now could be a basis for further and focused discussions. It referred to the proposal of the African Group on Issue 1 which indicated and recognized that the Committee should have a simple, flexible working definition complemented by a list of examples of what TK was. There was also a recommendation by the African Group that a focused member state expert team be established to work to provide operational definition. Perhaps these kinds of suggestions could be looked at in the context of establishing the roadmap for future work. Such a clear roadmap was necessary as to next steps. This important contribution of the African Group could be the basis for discussing a road map along the other elements discussed, especially the gap study document on TCEs proposed by the Deputy Director General which might also be useful in this context of TK. Just to clarify Brazil's statement of the previous day which had been referred to by the Delegation of the United States of America, it mentioned it had spoken on very general terms regarding this idea of TK being sort of equated to the whole concept of an idea, it meant an inventive idea, an idea that met the criteria of patentability not just any kind of idea. The United Sates had provided greater precision to what the Delegation of Brazil had meant. To comment of the idea of using trade secrets as a means for protection, it asked to hear the Bureau on this issue as it was its understanding that trade secrets would not provide positive protection because it did not lead to a recognition of rights of an IP nature on the subject matter that had been protected. It added the Committee had to be clear on the different options.

187. The Delegation of Algeria had listened carefully to other statement on TK in particular that of the Delegation of Slovenia, on behalf of the European Community and its member states, when identifying three issues which it considered being key for the discussions and the need to find some common understanding which could help discuss and agree on the other issues. Regarding the factual document, on issue 1, there was an agreement that a definition for TK was needed, the second issue, there were different options on what were the elements on which the Committee could base definitions. For instance, some said TK should be defined to include knowledge systems generating from local indigenous or traditional communities or that the definition should be anthropological. Other said that the first question to be asked was further formal origin definition was needed by attempting to define TK and TCEs. Others said that in order to achieve the necessary legal certainty TK should be defined so that it be clearly described, a single exhaustive definition might not be appropriate. On this issue, there was already an agreement, that was the need to have a definition and there were different options. These should be put clearly in order to see how to find a bridge between the three options. Regarding the second issue, on this issue as well, all recognized the rights of local communities to be beneficiary. There were some difference on how it would be. Some were considering existing human rights protection of TK should benefit the community which generated, preserved and transmitted the knowledge in a traditional and

intergenerational context. There were different options. There were some parties that benefited from this protection – who were those. The Committee could give the several options. Regarding the third issue, some delegations had said that there was a good basis of discussion in the document. Some rights were being recognized so they should be written down. There were common understanding on some issues while there were different degrees of accepting or presenting things. So they should be discussed to see how to come to a common agreement on that. The work should now be organized. The Secretariat was not mandated to do that and it wished the Secretariat could do this exercise.

188. The Delegation of El Salvador stated its interest in having a roadmap or a guide which the Secretariat could develop to show the Committee where the work was heading, taking into account the IP models which could be used to protect these intangible rights. If possible, this could take into account discussions taking place in other fora on the issue of disclosure of origin and with regard to TK also.

189 The Secretariat made a few brief observations on the question posed by the Delegation of Brazil concerning trade secrecy. The first point was that generally speaking trade secrecy was a relational right as opposed to a pure property right in conventional terms. Commercial confidential information or trade secret did give certain rights in relation to certain forms of misbehavior in relation to that information: an employee misuse of a trade secret or a sub-contractor's misuse of a trade secret for example. In terms of what was classically understood by property, it was not a pure property right because it did not give any rights against, for example, an independent discoverer of that information who may not have acted in breach of any obligation in relation to the original possessor of that information. Thus the only way to get that sort of right, the right against everyone, in connection with information in this regard was through the patent system. Strictly speaking, although the notion of property was a very fluid one and changing somewhat, it was not a property right as opposed to a relational right. The second point was that the way in which trade secrets were protected was very different across the legal systems of the world. Sometimes, what was protected was trade secrets or commercial confidential information and that was the notion one found taken up in the TRIPS Agreement. There should be a provision which described protectable undisclosed information. In terms of information, one of the criteria was information that had a commercial value. That was a particularly important point in the current context because one would find that there was a demand for some form of protection for confidential information in the nature of TK that did not necessarily have a commercial value. This was a point for discussion. There were other ways in which the matter was however treated in other legal systems which had a more comprehensive notion of confidentiality or breach of confidence. In those legal systems, one might cite the example of a case in Australian law, Foster vs. Mountford, where under the notion of confidentiality TK was protected from unauthorized disclosure by an anthropologist, the TK in question belonging to Aboriginal peoples. That was done without any reference to a commercial value or content. However, that was not the way it was treated across the world and it was not the way it was translated necessarily into the TRIPS Agreement as it was understood. Perhaps a final point to make was that there had been a discussion over quite a significant number of years about the compatibility of the law protecting on the one hand trade secrets and favoring therefore a behavior of secrecy and, on the other hand, the underlying policy of the patent system which encouraged the disclosure of the information. These two from a policy point of view were compatible within the IP system more generally. He noticed that the Delegation of Brazil had mentioned that perhaps trade secrets should not be conceived as part of IP. He added that was a question of definition: they were and they were not depending on how one regarded property. There had been litigation on this very question of the underlying policies and their

compatibility certainly at least in one jurisdiction. The Supreme Court of the United States considered the compatibility of these two and came to the view that they were entirely compatible, that the objective of trade secrecy protection or protection of confidential information was, on the one hand, to ensure the efficient functioning of certain social relations which could not exist without confidentiality being respected. One could think of doctor and patient relationship, lawyer and client or within the commercial context, the contractor and the sub-contractor. These relationships could not function within the society without a protection of some form of confidentiality. In addition, another underlying policy said to be present in the law with the protection of confidentiality was an incentive to other forms of innovations that were not necessarily covered by the patent system. Thus, know-how was also a synonym used for confidential informational trade secrets.

190. The Delegation of Serbia underlined that it strongly supported further work and better understanding the link between the IP conventions which could be applied in this complex subject matter. The link between the Bern Convention and the Copyright aspects and the Paris Convention and aspects which could be applied to indication of origin was also interesting. It repeated and joined the present statements, observations and proposals of the member states and observers. It wished a good result in the next drafting process.

191. The Delegation of New Zealand thanked the Secretariat for its explanation of the concept of trade secrets. It did not want to reiterate the comments it had made at the Eleventh Session in regard to the legal concept of trade secrets as a potential legal option for the protection of TK. It had raised that the concept of trade secret as a potential mechanism of protection might entail a compromise by indigenous and local communities, which may be that those indigenous and local communities that were trying to protect those sacred elements of TK and TCEs, by using such a legal mechanism, may be restricted in their ability and liberty to transmit and promote those sacred elements of TK and TCEs within their communities, in accordance with their own customary laws, values, and protocols. Those sacred elements may get locked up and kept away from the peoples and the communities. This may have some significant ramifications in terms of the survival, vitality, and integrity of the culture. Notions of trade secrets were foreign and in many ways a false constraint. They encompassed trade and commercial values. As the Secretariat explained trade secrets was a relational right as opposed to an IP right. It required an agreement between parties, which might not always work in the community context. In the community context the risk of having an independent discoverer was very high. The emphasis should be on understanding, honoring and reinforcing the means of traditional restraint, control, and management of TK and TCEs by communities, the customary means of safeguarding and protection of TK and TCEs. There was no question that the concept of trade secrets had relevance as a model of protection, but it would need to be significantly adapted in order to fit the community needs and aspirations.

192. The Delegation of the Russian Federation thanked the Secretariat for the documents prepared in particular WIPO/GRTKF/IC/12/5 (b). The discussion showed that members of the Committee had different positions and understanding of the main questions concerning the definition of protection and the aims of protection. In view of the varied opinions, the work should be continued to bring the opinions closer together. It would be useful to draw on the experience of those countries that were taking steps on a national level in the area of TK and find solutions to those problems, for example, mechanisms for the interaction of the subject of protection with third parties. The information received by those countries could play a positive role in achieving the aims by the Committee.

193. The representative of the Secretariat of the Convention on Biological Diversity (CBD) updated the Committee on the ongoing activities under the framework of the CBD in relevance to the Committee. The ninth meeting of the Conference of the Parties will be held in Bonn, Germany, in May 2008. As part of the enhanced implementation of the Convention, a major effort was being made to achieve the target of a significant reduction in the current rate of biological diversity loss by 2010 as adopted by Heads of States at the World Summit on Sustainable Development in 2002. These efforts included measures to increase worldwide awareness of the CBD by reaching out not only to governments but also to key partners and major groups of stakeholders in the protection of TK, biological diversity including international organizations, scientific and technical bodies, indigenous and local communities, industry and the private sector. Further to this, the Secretariat of the Convention participated with the WIPO Secretariat in the workshop with indigenous representatives jointly organized with the ICTSD and the Government of Switzerland and with the technical support of DOCIP held in the Château de Bossy close to Geneva on the 22 and 23rd of February, just prior to this Committee. The work carried out in the Committee was relevant to the work of the Convention particularly as it related to the implementation of the third objection of the Convention i.e. the fair and equitable sharing of benefits arising out of the utilization of GR. To the respect of preservation and maintenance of TK, innovations and practices, relevance of the conservation and sustainable use of biological diversity and to the equitable sharing of benefits arising out of the utilization of such knowledge innovations and practices and, finally, to access and transfer of technologies, an important component in the implementation of the Convention. He therefore focused on recent developments in these three areas of work of the Convention relevant to this Committee. With respect to access to GR and benefit-sharing, the COP at its 8th meeting instructed the Working Group on ABS to complete the negotiation of an international regime on ABS as soon as possible before the tenth meeting of the COP, which will be in 2010. The Ad-hoc Open-Ended Working Group on ABS had met twice since the eighth meeting of the COP. The fifth meeting was held in Montreal, Canada, between the 8th and 12th of October 2007 and the sixth meeting was held in Geneva from the 21 to 25th of January 2008. The meeting in Geneva provided an opportunity for those involved in discussions related to the IP and trade aspects of GR, here in Geneva, to become more familiar with the work of the Working Group on ABS thus contributing to a greater mutual understanding among the environmental trade and IP communities of the issues and concerns at the heart of the negotiations on an international regime on ABS. He reported that significant progress had been made in the negotiations of the international regime. Indeed, the Working Group on ABS had now successfully circumscribed the main components of an international regime and embarked in the negotiations of its main objective. With respect to the issues of the nature and scope of the international regime options had been put forward by parties at its ninth meeting in Bonn in May 2008, the COP was expected to take note of the progress made by the WG on ABS and to urge the WG to complete its work as planned before the tenth meeting of the COP in 2010. Regarding TK relevant for biological diversity, in the light of the relationship between the work of TK and ABS, the COP invited the WG on Article 8 (j) to contribute to the negotiations of the international regime on ABS. COP 8 acknowledged the work being done in this Committee on the IP aspects of *sui generis* systems for the protection of TK as well as the discussions within the WIPO to examine the relationship between the TRIPS Agreement and the Convention as regards to the protection of TK. As requested by COP 8, the WG on Article 8 (j) at its fifth meeting last October continued its work in order to identify priority elements of *sui generis* systems. The WG recognized that the elements identified were useful to consider as and when parties and governments develop *sui generis* systems to protect TK. The Executive Secretary had been tentatively requested to update available information in

light of case studies and experiences received for the consideration of the sixth meeting of the Working Group on Article 8(j), which was likely to occur in 2009.
Some Parties had suggested that *sui generis* systems may be a possible contribution to the protection of TK within the context of the International Regime on ABS. Others had suggested that the draft elements of a code of ethical conduct to protect the intellectual and cultural heritage of indigenous and local communities may also be a useful contribution but there was no consensus on these issues at that particular time. Other elements of the work program on TK of particular interest to this Committee, which were being addressed in preparation for the next meeting of the Working Group on Article 8(j) included: 1. The completion of the Composite report on status and trends regarding the knowledge, innovations and practices of indigenous and local communities, relevant to the conservation and sustainable use of biodiversity, including the identification of national processes that may threaten the maintenance, preservation and application of TK and the identification of processes at the local community level that may threaten the maintenance, preservation and application of TK. 2. Further to the completion of the Composite report, under the plan of action for the retention of TK, Parties, Governments and indigenous and local communities had been invited to report on positive measures for the retention of TK in areas relevant for the conservation and sustainable use of biological diversity. 3. The further development of draft elements of a code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity, for submission to the COP at its tenth meeting for its consideration and possible adoption. 4. The Executive Secretary had been requested to collaborate with WIPO, UNESCO and the UNPFII to address both the potential benefits and threats of the documentation of TK and to make the results available at the 6th meeting of the Working Group on Article 8(j). 5. 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 6. The intensification of efforts to promote the voluntary fund for indigenous and local community participation in meetings held under the Convention. As you would appreciate, the work of the Convention on TK and the work of this Committee, therefore, continue to be highly complementary. With regard to technology transfer and cooperation, the representative reported that a technical study on the role of IPR in technology transfer in the context of the Convention had been finalized in cooperation with the Secretariats of UNCTAD and WIPO, and will be submitted to the COP at its ninth meeting. He explained the study provided a succinct review of the different impacts, and the associated benefits and costs, of IPR that may arise during the different phases of technology transfer under the Convention, and identified potential options to increase synergy and overcome barriers to technology transfer and cooperation. He strongly believed that this study would make a useful contribution to assist Parties in their cooperation in order to ensure that patents and IPR were supportive of and did not run counter to the objectives of the Convention. He thanked the WIPO Secretariat for their cooperation and hard work in the preparation of this important study. The Ad hoc Technical Expert Group on Technology Transfer and Scientific and Technological Cooperation was held in Geneva from 10-12 September 2007. The meeting identified and analyzed ongoing tools, mechanisms, systems and initiatives to promote the implementation of the CBD provisions on technology transfer and scientific and technological cooperation, and developed a draft strategy for the practical implementation of the program of work, which would be considered for adoption by COP-9. He reported that the experts integrated into their draft strategy a number of the options identified in the aforementioned technical study prepared in cooperation with UNCTAD and WIPO. The CBD Secretariat looked forward to continued collaboration with the 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 Convention and WIPO, particularly with regard to this Intergovernmental Committee. Finally, he wished the Committee every success in the continuation of the deliberations in the course of the twelfth session, confident that they would also contribute to and complement the work of the CBD with regard to access to GR and benefit-sharing, as well as traditional biodiversity-related knowledge.

194. The Delegation of South Africa appreciated the scope of the comments from the member states that had been made on TK. The African Group had proposed a methodological approach to deal with the content of the factual extracts and the future work. The proposed attempts to link the useful responses in the factual extracts to the work that needed to be done and had been identified by the member states such as definitions of TK, scope of TK, object of protection. This was a useful step in the right direction. It wished to see the work of the Committee accelerated and, in so doing, was in accordance with the proposal by the African Group of setting up member states expert groups to provide expert advice on definitions and clarifications of the complex issues that had been identified through the member states comments. It recommended that the work of the expert group should be presented to the thirteenth session for the purpose of building the consensus as articulated by the Delegation of China. This transparent and participative approach would enhance the understanding of the outstanding issues such as those of definitions. The Delegation was in agreement with the African Group observation based on the analysis of the factual extracts that the member states were closer to each other than they sounded in their verbal statements. It therefore called on the delegates to respond the proposal of the method of work that had been put across by the African Group and supported by the Delegation of Brazil.

195. The Delegation of India stated that the conventional form of IPR protection for TK was not effective, (a) because it was not held individually but collectively and (b) it was developed over a period of time over generations and therefore not novel or inventive in that sense. While it was imperative to develop criteria for protection and focus on the criteria and thereafter deliberate on the attributes that needed to be protected. Once there was a subject matter to protect then the related attributes of duration, protection, misappropriation, limitation and exceptions could follow. In the negative sense, if there was a TK and one acquired property right over it, one would have exclusive right over it. In the meantime, to impede misappropriation so that the commercial use was not made of this, it was imperative that the patents were not taken on this knowledge. One modality that had been adopted was the codification of this knowledge and using it as a prior art. The Delegation had mentioned earlier in the previous meeting that India had a TK Digital Library which had 150,000 entries. Recently, those entries had been translated into five languages. India had entered into agreement with the USPTO as well as the EPO on an access agreement so that the entries in this database were made available to the patent examiners on a confidential basis. At least, if it was not possible to have a positive advantage of one's own TK, one would at least be able to prevent misappropriation by patentability of this knowledge outside of national jurisdictions. This could be one modality, that at one point an international instrument be acquired to protect TK if within a national system it was possible to codify and make that information available to the other patented offices. Then at least as a prior art it could prevent misappropriation.

196. The representative of the Saami Council stated it had commented on TK and the substantial matter in previous sessions but quite often it had done so, including at the last session, by saying that to a large extent what it had said with regard to TCEs applied also to TK. That of course resulted in the same kind of language that was included in the extract document on TCEs which had not made it into the TK document. He asked the participants

and the Secretariat for future purposes to note that some of the comments on TCE should also be reflected in the TK extract document. He found interesting the proposal by the African Group to appoint expert groups to work on particular aspects to move the process forward. He was looking forward to hearing more about the details of this kind of groups taking for granted that indigenous experts would also be included in that kind of groups.

197. The Delegation of New Zealand thanked the African Group for their quite constructive proposal. It was however concerned that without the actual text of the proposal it was quite difficult to be able to comment. Given that the Committee was asked to comment on it, it proposed that perhaps a written copy of it could be provided for analysis.

198. The Delegation of Algeria, on behalf of the African Group, thanked all the delegations supporting the African Group proposal. For the hard copy of the proposal, it informed that it would distribute it on the following day as it was being finalized in order to give a full picture of all the different items. Of course, it would be available for all delegations as it would be presented as an official document.

Guidelines for patent examination and recognition of TK within the patent system

The Chair introduced document WIPO/GRTKF/IC/12/7, Recognition of Traditional Knowledge within the Patent System.

This document was summarized in WIPO/GRTKF/IC/12/INF/2 as follows:

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, especially WIPO/GRTKF/IC/5/6, WIPO/GRTKF/IC/6/8, WIPO/GRTKF/IC/7/8, WIPO/GRTKF/IC/8/8 and WIPO/GRTKF/IC/9/8, as well as the national positions and reports that led to this work and are addressed in those documents. It also draws on responses to a Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System (WIPO/GRTKF/IC/Q.5) that was circulated between the Committee's sixth and seventh sessions. (Responses to the questionnaire are contained in WIPO/GRTKF/IC/9/INF/6.)

199. The Delegation of Canada thanked the Secretariat for preparing WIPO/GRTKF/IC/12/7 and the consultation paper in its Annex entitled "Recommendations on the Recognition of TK in the Patent System". What stood out most for Canada concerning the paper's recommendations was that, at least with respect to the defensive protection of TK, many of the recommendations called for patent examiners to have access to better information, in a general sense: Respecting recommendation I, new initiatives should be undertaken to ensure the validity of patents which may contain TK; Respecting recommendation IV, patent examiners who worked in the relevant technical fields should have greater awareness of TK and TK systems; Recommendation VI called on Patent authorities to take full account of diverse TK sources when assessing patent validity. All these objectives – promoting greater awareness of TK and TK systems, observing a healthy number of diverse sources of TK in

prior art searches, and ensuring greater patent validity, could be advanced by initiatives that improved patent examiners' access to better prior art sources. In Canada's view, these objectives could be better realized by improved prior art databases. Japan's proposal, presented in documents WIPO/GRTKF/IC/9/13 and WIPO/GRTKF/IC/11/11 in the context of GRs, called for just such an initiative, and it believed that the objectives of the vast majority of the Committee's members would be served by establishing better quality databases, both for TK and GRs, and that further discussion and consideration of Japan's proposal should be undertaken by this Committee. Confidentiality was of course a crucial issue in this ambit. Japan's second document identified promising avenues to address these concerns. The discussions of these issues under the heading of "prevention of third party access" represented useful first explorations. As underscored by the Secretariat, potential synergies between the proposed system and WIPOs' existing digital library portal existed, and mentioned the willingness of his organization to support an infrastructure that would allow custodians of GR and TK to limit access to sensitive information. Canada must emphasize that defensive protection measures designed to improve the validity of patents, such as TK and GR databases, did not preclude the development of other measures.

63. The Delegation of the United States of America supported that patents related to TK were valid. When a patent was examined, the patent examiner conducted a search of prior art i.e the information that was already known to determine whether the invention that was being claimed was new and non-obvious. To support the work of patent offices having information about what was previously known available to the examiner in a readily retrievable manner was critically important. Accordingly, it strongly supported the creation of databases and other tools to provide for easier access to public TK so that the examiner could ensure that patents were not issued on the information that was already known. Although the United States supported efforts to ensure that a patent was valid it opposed the creation of additional requirements to patentability. The USPTO however had made considerable specific and systemic initiatives to avoid granting patents and infringing upon public TK. For example the USPTO had complied lists of databases that provide information about public TK in a manner that allowed for efficient searching. As the Government of India had noted the USPTO had been discussing with the Government of India the use of their database for this purpose. It added that the USPTO had also held several workshops related to TK and the use of GR. If anyone would like additional information regarding the USPTO's efforts to improve search and examination of patent examination related to TK it would be happy to provide it.

200. The Delegation of Japan stated that, as had mentioned the Delegations of Canada and the United States, this kind of improvement of the examination search tool was a right direction. In the context of GR, Japan proposed the improvement of databases to avoid erroneous patents. This kind of document was also useful in the context of TK to avoid as much as possible erroneous patents.

201. The representative of the Tulalip Tribes responded to the idea of public knowledge. The Delegation of Brazil had pointed out in the context of TCEs that such registers were much more feasible because TCEs had a tangible form and were often kind of limited in scope in the sense that the number of actual cultural production were maybe limited to the hundreds or thousands. With TK one may be talking of knowledge that went into the thousands and thousands of items of knowledge. Some of this knowledge may have been dispersed and had been traveling for a while. One had to look at the conditions under which this knowledge had traveled. In many cases it was because the Western system had not given protection for this knowledge. There may be a sort of dilemma here in which there was knowledge circulating because it had been published in books and it was not because there

had been a wish on the part of indigenous, local communities to have this knowledge published or made available through academic research etc. Now it was out there and circulating it became very difficult to control. If one said it was therefore a public knowledge one was kind of taking away the ability for indigenous peoples to get repatriation or to come up with mechanisms to control it. So there were several problems with these kinds of registers. He added he was not against them if indigenous peoples wished to get involved, he understood the need to have information available for patent review. On the other hand, it could be an enormous burden to compile this volume of information and it did put TK potentially at risk without good protections. He believed the TKDL produced by India was a good model and he praised that but Ayurverdic medicine may be very different context than the TK very small scale societies which have not had schools to teach these things for thousands of years.

202. The Delegation of Brazil believed WIPO/GRTKF/IC/12/7, although it had been made available on the Internet only a few days before the meeting, was an interesting document. The issue of database was probably the issue of greatest concern to its delegation. It echoed the last intervention which also mentioned previous Brazilian interventions on the same topic. Basically, its concern was clearly reflected in paragraph 14 of the document when it stated that “in the absence of positive rights, public disclosure of TK may actually facilitate the unauthorized use of TK which the community wishes to protect”. For this reason, these recommendations did not encourage TK holder to disclose, document or publish any element of their TK or to give consent to their TK to be published or otherwise disseminated unless they had had the opportunity to consider fully the consequences of doing so and had given their PIC. Therefore, Brazil would reserve its position in regards to any interpretation that this document encouraged members to create such databases or to encourage indigenous communities to actively contribute to the creation of these databases. Additionally to the issue of placing TK at risk, which the previous speaker captured very precisely, the existing databases that may contain information on TK were not particularly useful from the perspective of for example implementing CBD objectives because usually the databases would not indicate whether the information was included in there with the PIC of the community. It would have not indication as to whether or not the information had been accessed in accordance with the applicable national ABS regime for example. If these databases were to be used in support of applying or enforcing the CBD objectives then they would not be very useful. Much of what was published was not necessarily published with the authorization of the indigenous or traditional communities so the fact that the information was there on the database did not ensure that information was published or provided with the authorization of the communities. Only a small proportion of TK that existed would be found in the existing databases, much was either not in written form, not published or remained confidential information, information available only to the communities and thus was basically undisclosed or not formally registered. This element of a database was a particularly sensitive issue in these recommendations. It mentioned this aspect because certain delegations had been supporting the idea that the Committee had agreed to establish a kind of a TK database as an outcome for the work of the Committee. It would really caution against that for the reason it presented. Finally, it added that Brazil and others had made a proposal in the Doha Round for a disclosure of origin requirement that in its view would at least partially safeguard the interests of holders of TK per se and TK related to GR by establishing a mandatory requirement to be applied nationally or required nationally of patent applicants to disclose whether not their inventions had made use of GR or had been derived on or based on GR and/or associated TK. It believed such a mandatory requirement would establish a safeguard mechanism against the misappropriation of TK. Of course, it did not necessarily solved the issue of biopiracy but it did create an element of transparency and traceability as to

what happened with the GR and associated TK in terms of patenting activities where at least when the invention that was being patented had a direct relationship with biodiversity and with TK. This proposal would create an important safeguard to allow traditional communities first to be informed of patenting activities that could have a relationship to GR and associated TK and that could open a door for possible legal action in case they felt that such an invention was developed with their TK but without their consent or without the appropriate fulfillment of applicable national regimes.

203. The Delegation of New Zealand stated that some of the concerns raised by the representative of the Tulalip Tribes and by the Delegation of Brazil had also been heard domestically in New Zealand expressed by Maori communities and individuals. Again it went back to the same comments made in relation to TCEs that communities and individuals felt that it was not because something was in the public domain, meaning that it was publicly accessible, that it was readily made usable without any cultural, customary protocols, values and laws that attached to it. That was one concern the Delegation had heard. The other concern was in relation to the potential risks that registers and databases raised in terms of the potential for further misappropriation and misuse of TK. In that regard, it was quite interesting because the comment had been made in one of the domestic workshops, that patent examiners had research, science and development background. How did one ensure if the patent examiner decided to go back to the research, science and development realm, that the knowledge that he had been exposed to would not be used in a manner that was unacceptable to the community. So there were some risks that had been identified. For New Zealand, there were other potential ways of ensuring that patent examiners had the information necessary in order to assess prior art, for example, the Maori Advisory Committee that was created under the Trademarks Act 2003. There were possibly potential other legal mechanisms or provision available that would assist patent examiners in having the information readily available for them to make decisions. It would propose that a research and analysis of such other potential mechanisms might be useful in the context of the Committee. It raised again the same issue it had raised with regard to TCEs: if we went down the path of registers and databases to assist patent examiners in assessing applications, what would be the nature of TK that would be recorded? How would it be documented? What type and level of information about the TK would be recorded? By whom would the recording be undertaken and what kind of access to and control over the documentation going to be implemented in order to ensure proper management?

204. The Delegation of India shared the concern expressed by the Delegation of Brazil. It was a catch 22 situation at this stage. Until one had affirmative or positive protection of TK, one had to look at the defensive protection mechanism. If one had databases openly available, then apart from the difficulties expressed by the Delegation of Brazil, one ran the risk of stimulating piracy, that the knowledge easily available in the database could promote piracy. The TKDL database was available on access agreement on a confidentiality basis, this being available only to the patent authorities. It was not available freely only on the basis of confidentiality, sharing agreement with the patent authority so that it could operate as a prior art and prevent a grant of patent based on this knowledge. It was as defensive mechanism. Until a positive mechanism for protection was developed one had to have a defensive mechanism and prevent piracy. This was what India had attempted to do.

205. The representative of the Assembly of First Nations stated that there were many interesting ideas and concepts related to the defensive protection that would need further discussion, clarification and analysis. There had been considerable discussion the day before on the merits of the database during the session. As with the submissions of some delegations

on potential problems with databases, it had additional comments on the viability of databases. In the past, First Nations communities had provided information to government agencies to incorporate into databases issues which arose with respect to First Nations' ability subsequent to providing information, on seeing what the information was being used for. In many cases, First Nations communities themselves could not even access their own data. Finally, First Nations were not able to use a data themselves. In the current discussion whereby indigenous peoples' TK was being considered, the following areas were also problematic. Once information was stored, many indigenous communities would loose control of that information. Government authorities would now be in the possession of various TK, TCEs and information on GR. There was an issue with respect to security of databases. Should security be compromised, what would the effects be? For instance, if someone would enact one of these systems and downloaded information on TK on to the Internet, would that now fall under the public domain? One practical solution the AFN could offer the Committee was the system it had in Canada which was called the OCAP Program. The principles for OCAP, which stood for Ownership Control Access and Possession, provided a system whereby First Nations controlled their own data information collected in their communities. In this regime, First Nations owned, protected and controlled how the data and information was used. He believed the right of First Nations communities in Canada to own control, access and possess their own data was in line with the principles of self-determination and also promoted and fundamentally enhanced their cultural development. An example under the OCAP system was relationship with Health Canada. A great number of First Nations communities basically acquired their own data related to health issues, they owned, stored and hosted their own database. When Health Canada requested information from the First Nations communities about various health related issues, it was the First Nations themselves who provided that information to Canada. They determined what information was transmitted, what data was transmitted and it was always done in the spirit where the information was only being used for a single purpose. Given this, he recommended that further study be looked at in databases to see whether or not First Nations or other indigenous peoples even contributed to a database system at a national or international basis. As stated in his first intervention, TK and TCEs were fundamental to the survival of many indigenous communities and collectivities. It may be very difficult for First Nations communities and other indigenous communities to basically give all this information to a third party who may or may not act in their best interest.

206. The Delegation of the Russian Federation thanked the Secretariat for having prepared WIPO/GRTKF/IC/12/7 which included recommendations to patent offices and to holders of TK about checking applications including information about TK etc. It also dealt with practical issues about search and examination, etc. There was also a list of sources of information including information about TK, the use of GR which were already included on a list with the minimum of documentation which experts had to check. The information provided about a searching international patent codification was also useful. There were some two hundred sub-groups of medical patents including medicinal plants. It was very important that experts dealing with TK applications checked this kind of information. There was a table in the document containing the characteristics of some already existing databases on TK including the purpose for which the database was being used or could be used, retention, protection of TK, positive protection and international knowledge about TK. The functions to be covered by the database were covered as technical specifications and examples of already existing databases of TK which were in accordance with the stipulated purpose, functions and technical parameters. In this connection, it reminded the Committee of a document prepared by the Secretariat before including recommendations on the establishment of a database for holders of TK. It seemed the Committee had forgotten about it but the

Delegation believed it needed to be brought out again as it would be interesting to many people. Furthermore, WIPO/GRTKF/IC/12/7 dealt with problems of the use of TK. This was also a problem. Information which countries had and where they had experience of consultation and cooperation with other countries with patent offices and with holders of TK was equally important. Disclosure of the origin of GR and TK when patent applications were submitted was crucial. The Delegation recalled the proposal made by the Delegation of Switzerland. All the proposals and details had been covered by national legislation which gave the opportunity to require the submission of a declaration about the source of the TK or the GR if the inventor knew that his invention was based on such knowledge or resources. A declaration needed to be made if the origin or source was not known to the applicant or the inventor. However, the meaning of the word "source" had to be understood and one had to bear in mind that according to the CBD, the Bonn Guidelines and the ITPGR, access to benefits could be enjoyed by many right holders depending upon the GR or the TK. There could be a first and a second source, for example, the first source would be the side agreeing to submit the GR, the indigenous community or group. The second source could be collections such as gene banks, botanical gardens and databases on GR and TK as well as scientific literature. The applicant may be required in other words to disclose several sources, both first and second sources as indicated. The first source should certainly be disclosed if the applicant knew that the source of the GR was a party which had agreed to the disclosure of the resource. The information must be provided. If the first and second sources were known then the first should certainly be disclosed and perhaps the second should as well, if the second was for example a botanical garden. Then that should be disclosed only if the first source had not been disclosed. If the first source did not know that a botanical garden was the second source, then of course that would not be disclosed. If the information about the first source was not available and the affirmation about the second source closest to the first source, then the first source must be provided. If the details on the botanical garden were not known, then the details of the botanical garden which supplied the GR to the other one must be disclosed. The Delegation added that there was a need to provide declarations about this source of GR and TK when a patent application was made. It would then be very useful if the members of the Committee were to be provided with information about how these issues of disclosing the original source of GR or TK in various countries were provided.

207. The representative of the International Chamber of Commerce explained that the ICC was the leading organization for world business. They had members in over 130 countries. Their members included commercial users of TK, TCEs and GR. These were people who were going to have to respect new laws on protection of TK – and would do so willingly, provided the laws were fair, reasonable and clear. The ICC sympathized with the wish to protect TK. But the importance of TK seemed to be, first, to the current holders – who used it, developped it and depended on it for their existence and culture. But their priority surely was to protect this knowledge by preserving it. Protecting it, in the sense of controlling the use of it by others, was a perfectly reasonable objective, but was surely secondary and less important than the main objective. That by way of introduction, the representative had a short specific point on the document under discussion. Doubts had been expressed about public registers of TK. The rationale of patenting was that the inventor disclosed his new and useful knowledge in exchange for a limited monopoly in its application. If it was already publicly known, then no patent was to be granted. But it had to be publicly known, not privately known. A database which was only accessible to patent examiners was not publicly known. If it was cited against my patent application, one asked for evidence that it was publicly known: the fact that it was in the database was not sufficient. The Examiner would then have to provide that evidence, or withdraw the citation. So the database if it was to be effective for its purpose would need to include not only the knowledge, but evidence that the knowledge

was public. It would be simpler to make the database public: which might prevent the patent application being filed in the first place. It may be said that if the knowledge was in the database and also in the patent application, that showed where the patent applicant got it. That may happen in some cases. But it was not necessarily so. The same invention was often made independently by two or more people: but experience showed that it could be extremely difficult to convince either inventor that the other had not copied. Here of course it would be clear that one source of the knowledge had not copied: it did not follow that the other was not also original.

208. The Delegation of China stated that some members had mentioned the use of databases for the protection of TK. This issue had been discussed many times in previous meetings. It of course agreed that as an option database had its significance and could play its role in the protection of TK. However while it recognized this positive effect in particular in preventing wrongful granting of patents, the following two points had to be noted: first, database was only a form or a means of preventing the erroneous granting of rights but it should not be the precondition of TK protection. Secondly, while the database was being used as a means to protect TK, it was important to also try to foresee some weakness in the system in order to prevent it for instance. As some members had mentioned, if there were some confidential TK in a public database then there would be no more confidentiality of TK. In that case, that TK may be made public unintentionally or unreasonably. These kinds of problems did exist so it was important to take these risks and problems into account.

209. The representative of the Indigenous People's Council on Biocolonialism (IPCB) stated she had made interventions on this issue before in the past. She was very skeptical about the use of these databases in their ability to actually protect indigenous knowledge particularly. The status of knowledge in the database must not be misconstrued as public knowledge. Their knowledge was inalienable and therefore could not be considered public in the sense of public domain in the patent system. As discussed here in the Committee, the objective was to evidence the existence of TK. But there did not appear to be mechanism within this database proposal to require evidence of the legal ownership of the Indigenous knowledge, which was vested in the relevant Indigenous peoples holding such knowledge. These proposals underscored the economic imperative underlying these discussions. Indigenous peoples were in a “catch 22” situation and documentation was a double-edged sword. The catch was that if Indigenous peoples did not document their knowledge, it would not be considered part of the existing body of knowledge. If it was not considered part of that existing knowledge base, then patent claimants (researchers, corporations, etc.) could lay claim to it and include it within the scope of their patent (ownership) claim. That was one edge of the sword. But the sharper edge of the sword was that if we did document and data based it, it trusted the knowledge into the Western world, and the Western legal system for commercial purposes, and it would eventually fall into the public domain, an open access realm with unrestricted access and use rights for all. This resulted in the permanent alienation of IK. They were not here to commercialize and alienate IK, which was what these databases existed for.

210. The Delegation of Brazil made this intervention to respond to the representative of the ICC who raised some interesting point. First, it outlined that the representative had stated that the members would comply with the law if it was reasonable. It hoped they would comply with it even if it was not entirely reasonable because it was the law. The second point was that the representative had indicated that members of the ICC were users of TK and GR. The Delegation stated it would be particularly interested in knowing if it was possible to quantify somehow that part of the membership of the ICC that made use of TK and GR and what it meant in economic, trade terms or even in terms of patenting activities. Finally, the question

that had been underscored by the representative of the ICC sort of hit at the same note that the Delegation had been trying to refer to in the debate. In fact, it was exactly along the same lines as the advice it had received from its colleague from a national patent office, who was a patent examiner in Brazil. Databases would really not prevent erroneous patents from being granted because if they were available only to patent examiners, particularly if there were concerns about the TK not being openly disclosed to the broad public and therefore these TK on a database were only available for patent examiners, they were not publicly disclosed and therefore they did not become part of the prior art. So even if the patent examiner could have access it could not prevent a patent from being granted on that ground because the TK would not be part of the prior art. It believed there was an additional element in most case, the TK as such would not be the element being claimed in an invention. There would probably be some sort of improvement on the TK which was the issue of "derived from". Of course, the inventive step that would justify granting a patent would probably be examined different ways under different national systems. Some might be a little bit more rigorous in their analysis, others less, but it was fair to say that any improvement that may indicate that there was an inventive step that built upon the TK would make that particular invention patentable even if there were a database of TK because there would be a difference between the inventions. There would be an inventive element there justifying the granting of the patent. In that case, the TK was used as a stepping stone to the invention. It would not be relevant even in defensive or in offensive terms to the indigenous communities. The community would receive nothing from the invention. It believed there were a lot of concerns with the issue of the databases for it to be effective and preventive of erroneously granted patents. It had to be really made public which was the point made by ICC. If it was really made public, then there are the other issues and concerns of indigenous communities that their TK was just being disseminated and one was further exposing it to more misappropriation by making it public and easily accessible. It was here the "catch 22" situation already mentioned. That's why the Delegation would caution against the idea of a database at this point for TK. The patent system needed to evolve to include certain safeguards that would facilitate traceability of patenting activity related to TK and GR. That could be done as a fundamental first step through a disclosure of origin requirement which was the proposal that 77 developing countries had co-sponsored in the Doha Round at the WTO.

211. The representative of the Tulalip Tribes stated that their concerns had been very well covered by the Delegations of China, Brazil and the IPCB. He added that he had great concerns about the usefulness of these things regarding disclosure requirement within the patent system. There had been a rush to compile this kind of databases. He acknowledged that India did have adequate controls but, as the Delegation of Brazil had raised the point, even with these controls and securities did it make a difference currently within the patent system. One could certainly talk about the difference between pre-hoc and post-hoc defensive measures. The idea that one had to register everything before it could be protected went against Common law in most nations. If someone stole something from someone's house, he could expect the police to try to recover it even if he had not registered it. The rule that one had to register everything in his house before it could be protectable was not a supportable regime. For post-hoc defensive measures, one could talk about diligence. Those accessing resources would know when they encountered TK. It was usually fairly clear this was outside their domain. Protection should not be a precondition of TK registration but he emphasized that indigenous peoples generally, and certainly the Tulalip Tribes, were not only concerned about unjust enrichment but also about violation of customary law as well as petty violations or petty uses of the knowledge. The patents were about large scale misappropriation for large scale markets but from the tribal point of view, they were interested in cultural survival, they wanted their material to be accessible. When these things were put in the public domain and

made more accessible, they became open to petty markets, to people who open up their herbal market. The problem was often most severe when one could not get hold of the berries, the medicinal plant etc. because they had been picked out by non-indigenous peoples. One also had to look to the issue of catastrophic disclosure even though a patent office had control of this, it had been pointed out that people move through different profession in their lifetime. If one compiled a database at one point and one had one role to play as an academic researcher or someone in the patent office and one moved one, was there security in that database. He added that indigenous peoples were guardians of the past and guardians of the future. They had responsibility for those to come. What one was looking for was some kind of protection for TK that were permanent and lasted forever. He reminded the parties that forever was a long time. If one compiled these database and thought they could be guaranteed forever, a lot more work and consideration would be needed.

212. The Delegation of India questioned what importance was accorded to the TK or TCEs which had been developed, not yet preserved, and expected by the communities and the groups of peoples to whom it belonged. This discussion was primarily to bring this in harmony with the contemporary realities and accord the treatment to this knowledge which belonged to the community and ensure that they derived legitimate and fair benefit from it. The discussion had brought out the complexity and the difficulties, both pros and cons. What if one had this publicly available information in the database? What if it was on a confidential database and what if it was not even in a database? This information should be available. The fair economic and non-economic benefits should go to the communities and the stakeholders who developed it and shared it. One way out of this was provisions of the CBD: PIC, disclosure a sharing of benefits. We were looking for harmony and acceptance of these principles so one had a fair and equitable system both for the commercial users, for the industry and for those developers. That was precisely the effort being made at the Committee in which one was seeking to develop an instrument which harmonized both the concerns and the expectations.

213. The Delegation of Ecuador believed that when looking at the role of databases for the protection of TK, it placed the Committee in a scenario which was one that should be engaging in a lot of reflection. In indigenous communities of Southern countries, these issues were important because the users of TK did not have ethical or moral codes of conduct. He added that TK should be respected. The codes that had been built in the communities had been in force for a long time. They were based on consensus, many of them were collective. Information was reserved only for internal use by the communities themselves. This information was very important for the existence of these peoples. When hearing that there would only be respect and recognition of rights once the knowledge was in databases and only then, one could see the risk this could entail. This knowledge was important for the survival of these communities. The Delegation asked the representative of the ICC what benefits could be derived by the users of TK and what had been done to improve the living conditions of the indigenous communities? Had there been some minimum procedure to respect the communities? When looking at the policies engaged in by a number of countries especially in the South, had there been complied with? The guidelines for the indigenous peoples within the UN set forth some minimum procedure that had to be in place when it came to making us of TK based on PIC. These matters put forward by the Permanent Forum were to make sure that there could be PIC. But above all, these procedures were there so that those entities that were making improper use of TK should be aware of them. It urged the Secretariat that the document prepared by the Permanent Forum pertaining to PIC for the use of TK be widely available to the delegations and, especially, to the ICC. It seemed the ICC was not aware of the fact that this theme had already been dealt with in the UN system.

214. The Delegation of Peru stated that when talking about databases one should make a distinction between confidential databases and ones that were available to the public. There was very often improper use of such databases. A lot of knowledge was already in the public domain but had not been documented. Through the database it was important that this information be incorporated and that there be a date for the addition of this information. Even when the TK was in the public domain, rights were very often conceded. One had to make distinction between a confidential database and there should be no violation of the information. It was very complex to talk about confidential information. There was a lot of knowledge in Southern countries that was confidential or should be made confidential. Very often emails were being used to disseminate and spread the information while it was supposed to be confidential. There should be some mechanisms making it possible to protect and use this knowledge through the publication of patents for example. If the country knew that this knowledge did exist and it was confidential, then it had to ask the authorization of the community whether or not the information could be disseminated. This was information that should be covered in the same way that patents protect information.

215. The Delegation of Egypt believed the Committee was going round in circles. It repeated what had been said during the fourth session of the Committee regarding the inclusion of TK and GR on a database. At the time, it was already said that recording on a database should not be seen as a condition for protecting the information. It was just one technical way that could be useful in the case, for example, of any litigation or dispute. Dissemination thereof should not be linked to the need or the obligation to include professional knowledge or GR on a database. Entities using GR or TK that would be protecting it by a patent would have to make this information available even if these GR or TK were not included in a database. Registration on a database did not mean that the GR or TK became the object of illegal or unlawful use. Recording should not be a condition for protection but should be one possible way of protecting the information. When it came to unlawful use, those who used the information should be sanctioned and had to pay.

216. The representative of the International Chamber of Commerce replied to the Delegation of Brazil. He did actually say that ICC members were going to have to respect new laws on protection of TK but this would be done willingly if the laws were fair, reasonable and clear. If they were not fair and reasonable, the members of course would respect them but they would grumble a lot. If they were not clear, they would not know if they were respecting them or not. It was thus important that they should be clear. As regards the use of TK by industries, this was a large subject. He gave one example of an industry which certainly used TK i.e. the seed industry. However, to specify in detail how much TK the seed industry used and in what respect it might be seen as subject to new laws on protection of TK, one had first to define TK clearly, broadly and then one had to look at the specific facts in each case. That was a major task.

217. The Delegation of New Zealand supported the comment made by Ecuador that it was a matter of fostering and encouraging better, more respectful and fair behaviors by users of TK and TCEs, whether it be private industry, university, government institutions or others. As the ICC had indicated, their members wished to do the right thing as long as the right thing was clear, fair and reasonable given the rights and interests of all stakeholders. In the context of New Zealand's domestic experience, they received on a regular basis requests from private industry for guidance on how to proceed when they wished to use a cultural element belonging to Maori in particular in the context of their business. The businesses came to them at the outset: they wanted to do the right thing, they just did not know what it was. Realizing

the cultural sensitivity of the nature of their business and what they wanted to do, they came to the government for guidance. This issue actually had a significant international dimension as some of the requests received were from industry, businesses, corporations that existed outside of New Zealand. The approach so far had been to appeal on a diplomatic level to the ethics and the goodwill of these businesses in recommending issues and ways of proceeding that they might wish to consider. To reiterate, the Delegation believed that first and foremost it was a matter of fostering and encouraging better, more respectful and fair behaviors by users.

218. The representative of the European Patent Office stated that the EPO was dealing with about 200, 000 data applications a year and with patent applications from the member states. A small amount of these patent applications were dealing with TK. It might be interesting to see their experience, how they had talked about what was public availability. Under the European Patent Convention, public availability was there when only one single member of the public was in a position to gain access to it and also if there was no obligation to maintain secrecy. So it was true as what had been mentioned by the Delegation of Brazil that a secret database could not be part of the technical public domain. But a database must not be easily available. For example, one could ask to pay for it and maybe put other conditions in order to have direct access to the database. If you compare with non-patent literature, most of this was copyrighted. When the EPO published the search report, it only provided a link to the publisher. In order to see what was in the database or what had been published by him, one had to fulfill certain conditions. In this database, one put certain conditions of use, of course payment but also maybe other conditions. That was a point that could be discussed because for patent offices it was very important to have these databases for protection. The EPO wanted absolutely to avoid granting patents which were not worth being granted.

219. The Delegation of Brazil added two additional points. Another element was that if the information was made public and if by chance that particular TK contained an element of inventive activity but it was made public because it was included in a database, then the community from which it came no longer would be able to apply for patent on its own TK. This additional element might run counter to the interest of the traditional communities. Another element was that of the date. If a database was to be created today, the date of the entry of the information on the TK into the database would probably determine the date in which it had become part of the prior art. It would be irrelevant for all of the patents that were currently being examined in the Brazilian patent office because patents were still being examined due to the backlog coming from 1998-1999. There would be about a 150,000 patents later with this database if it were to be established today. If all of these patents made use of any particular TK that was entered today into the database it would be irrelevant. They would all be granted because the TK entered only then into the state of the art. There were really many different aspects that recommended a lot of caution and proceeding with this issue of the database.

220. The Delegation of India added that when the concept of benefit-sharing as outlined in the CBD was being discussed, the CBD had set up a task force under Article 8 (j) and numerous meetings had been held. In one of the meetings, the Bonn Guidelines outlined a number of principles and guidelines which could be made use of for sharing the benefits. The guidelines could be helpful to the industry, to the other users, to transmit the benefits to the communities and to the groups which had stake in the TK and the associated GR as well.

221. The Delegation of Mexico expressed its thanks for the excellent documentation that would guide them in relation to this issue in future sessions of the Committee. Having listened

to other delegations, it considered that some guidance was needed regarding both the creation and use of databases. Certain elements had to be considered with respect to databases prior to the development of databases. Mechanisms should be present for the development and inclusion of TK in databases, with, firstly and fundamentally, prior informed consent of the holders of TK for any use; secondly, consideration of what was public domain and what was disclosed traditional knowledge, and what was undisclosed traditional knowledge. In this regard, systematization should be considered as a second level of information to be included in the databases, for example the quality and quantity of information, the origin of the information and where it had been obtained from, whether the databases were private "copyrighted" databases, as the representative of the European Patent Office had mentioned, or if they had been obtained from public databases or private databases that were specific to communities, etc. Consideration was also to be given to the type of documentation, which was very important for many patent offices because it could be oral or written. In the case of orally disclosed information it would be difficult to ascribe a specific date, and some laws did not recognize oral declarations as prior art. On the other hand, the Delegation felt that there should be mechanisms related to the use of databases, with due account being taken of who users were and who had access to the databases. Mechanisms should be present to safeguard the integrity and confidentiality of the information in the databases, and there should be, as mentioned earlier, codes of conduct for use and access. Also, there should be mechanisms to ensure that holders and creators of TK could access the information and, where appropriate, decide what information should be in the database and what information should be reserved for their use, and could be considered as valuable, whether economically or otherwise, for the indigenous or local community that held it. On the other hand, and finally, once information had been used from a database, there should be be mechanisms to safeguard the information in the case of public procedures in substantive examination by patent offices utilizing much of that information, the international trend being to give access to the public at large. Finally, there should be mechanisms to safeguard the information in the event of post-grant litigation.

222. The Delegation of Panama explained some of the measures that had been taken in order to allow patent examiners in the Panama Office to monitor and control the use of TK or genetic resources. It had created an industrial property examiner role that also covered marks. In Panama, some businesses, for example coffee companies, were using ethnic names on their products. Such situations had led to the creation of that role, which was part of the National Industrial Property Office. In addition, the National Environment Authority had created an intellectual property office that was responsible for following up all issues relating to the regulation of access to genetic resources. It would report back at the next session of the Committee. However, it wanted to make clear that, for example, as part of such regulation, it was the the National Environment Authority that approved access contracts. All requests for patents for inventions or processes that had been submitted to the Directorate of Industrial Property, which was part of the Ministry of Trade and Industry, and of any patent office of the WIPO Member States, had to include, for information purposes, a written explanation of the origin and source of the genetic material and genetic and/or biological resource used in the development of the invention or process. Equally, the office could contact or work with their relevant counterpart in order to monitor everything, in relation to TK, for which patent protection in Panama had been requested.

223. The Delegation of Switzerland had been listening with great interest to the debate on, among others, databases for TK. A number of speakers had expressed concerns about the establishment of such databases. It considered these concerns to be very important, and was

of the view that they needed to be taken into account in further work. One objective advanced in favor of the establishment of databases for TK was the prevention of so-called "bad" patents. In this regard, the Committee had heard from the representative of the European Patent Office that patent examiners needed to have access to information stored in databases when examining inventions. So if databases were not considered to be a suitable means, it was obviously necessary to look at alternative measures. It therefore would be interested to hear from those who did not view databases as a suitable means, what alternative measures they saw fit to prevent bad patents. In this regard, it had listened with great interest to the intervention just made by the Delegation of Panama.

224. The Delegation of Algeria indicated that it would provide to the Secretariat the document prepared by the African Group in order that it be distributed to members of the Committee to obtain their reaction.

Decision on agenda item 9

225. The Committee took note of documents WIPO/GRTKF/IC/12/5(a), WIPO/GRTKF/IC/12/5(b), WIPO/GRTKF/IC/12/5 (c), WIPO/GRTKF/IC/12/6 and WIPO/GRTKF/IC/12/7. The composite decision taken by the Committee on future work on this agenda item is reported under agenda item 11.

AGENDA ITEM 10: GENETIC RESOURCES

226. The Chair introduced documents WIPO/GRTKF/IC/12/8 (a) and WIPO/GRTKF/IC/12/8 (b).

These documents are summarized in document WIPO/GRTKF/IC/12/INF/2 as follows:

WIPO/GRTKF/IC/12/8 (a), 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; this document reproduces the text of the corresponding document from the eleventh session, WIPO/GRTKF/IC/11/8(a), in line with the Committee's decision at its eleventh session that the document "remains on the table in its existing form and comments made in relation to it are noted."

WIPO/GRTKF/IC/12/8 (b), a factual update of international developments relevant to the genetic resources agenda item. This document is the further update of WIPO/GRTKF/IC/11/8 (b) that was requested by the Committee, including the omissions identified in the eleventh session, more recent developments, and any other relevant developments reported to the Committee.

Reports from other intergovernmental organizations

227. The representative of the Secretariat of the Convention on Biological Diversity (CBD) provided the Committee with an update of ongoing activities under the framework of the CBD of relevance to this Committee. The ninth meeting of the Conference of the Parties would be held in Bonn, Germany, in May 2008. As part of the enhanced implementation of the Convention, a major effort was being made to achieve the target of a significant reduction of the current rate of biodiversity loss by 2010, adopted by Heads of State at the World Summit on Sustainable Development in 2002. These efforts included measures to increase worldwide awareness of 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. Further to that, the Secretariat of the Convention had participated with the WIPO Secretariat in the workshop with indigenous representatives jointly organized with the International Centre for Trade and Sustainable Development (ICTSD) and the Government of Switzerland, and with the technical support of the Indigenous Peoples' Center for Documentation, Research and Information (doCip), held at Château de Bossey close to Geneva, on 22-23 February 2008, just prior to that Committee. The work carried out in the Committee was relevant to the work of the Convention, particularly as it related to the implementation of the third objective of the Convention, 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 Convention. With respect to access to GR and benefit-sharing, the COP, at its eighth meeting, had instructed the Working Group on Access and Benefit-sharing to complete the negotiation of the International Regime on access and benefit-sharing as soon as possible before the tenth meeting of the Conference of the Parties. The Ad Hoc Open-ended Working Group on Access and Benefit-sharing had met twice since the eighth meeting of the Conference of the Parties. The fifth meeting had been held in Montreal, Canada, from October 8 to 12, 2007, and the sixth meeting had been held in Geneva, from January 21 to 25, 2008. The meeting in Geneva had provided an 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, thus contributing 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 access and benefit-sharing. Significant progress had been made in the negotiations of the international regime. Indeed, the Working Group had successfully circumscribed the main components of the International Regime and embarked in the negotiations of its main objective. With respect to the issues of the nature and scope of the international regime, options had been put forward by Parties. At its ninth meeting, in Bonn, in May 2008, the Conference of the Parties was expected to take note of progress made by the Working Group on ABS and to urge the Working Group to complete its work, as planned, before the tenth meeting of the COP. With regard to TK relevant to biological diversity and in light of the relationship between the work on TK and access and benefit-sharing, the COP had invited the Working Group on Article 8 (j) to contribute to the negotiation of the international regime on ABS. COP-8 had acknowledged the work being done in this Committee on the IP aspects of sui generis systems for the protection of TK, as well as the discussions within the WTO to examine the relationship between the TRIPS Agreement and the Convention as regards the protection of TK. As requested by COP-8, the Working Group on Article 8 (j), at its fifth meeting last October, had continued its work in order to identify priority elements of sui generis systems. The Working Group had recognized that the elements identified were useful to consider, as

and when Parties and governments develop sui generis systems to protect TK. The Executive Secretary had been tentatively requested[1] to update available information in light of case studies and experiences received for the consideration of the sixth meeting of the Working Group on Article 8(j), which was likely to occur in 2009. Some Parties had suggested that sui generis systems may be a possible contribution to the protection of TK within the context of the International Regime on ABS. Others had suggested that the draft elements of a code of ethical conduct may be a useful contribution but there was no consensus on these issues at this time. Other elements of the work program on TK of particular interest to this Committee, which were being addressed in preparation for the next meeting of the Working Group on Article 8(j) included the completion of the Composite report on status and trends regarding the knowledge, innovations and practices of indigenous and local communities, relevant to the conservation and sustainable use of biodiversity, including the identification of national processes that may threaten the maintenance, preservation and application of TK and the identification of processes at the local community level that may threaten the maintenance, preservation and application of TK. Further to the completion of the Composite report, under the plan of action for the retention of TK, Parties, Governments and indigenous and local communities had been invited to report on positive measures for the retention of TK in areas relevant for the conservation and sustainable use of biological diversity. The further development of draft elements of a code of ethical conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity, for submission to the Conference of the Parties at its tenth meeting for its consideration and possible adoption. The Executive Secretary had been requested to collaborate with WIPO, UNESCO and the UNPFII to address both the potential benefits and threats of the documentation of TK and to make the results available at the 6th meeting of the Working Group on Article 8(j). 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 intensification of efforts to promote the voluntary fund for indigenous and local community participation in meetings held under the Convention. The work of the Convention on TK and the work of this Committee, therefore, continued to be highly complementary. With regard to technology transfer and cooperation, a technical study on the role of IP rights in technology transfer in the context of the Convention had been finalized in cooperation with the Secretariats of UNCTAD and WIPO, and would be submitted to the Conference of the Parties at its ninth meeting. The study provided a succinct review of the different impacts, and the associated benefits and costs, of IP rights that may arise during the different phases of technology transfer under the Convention, and identified potential options to increase synergy and overcome barriers to technology transfer and cooperation. The study would make a useful contribution to assist Parties in their cooperation in order to ensure that patents and IP rights were supportive of and did not run counter to the objectives of the Convention. He thanked the WIPO Secretariat for their cooperation and hard work in the preparation of this important study. An Ad hoc Technical Expert Group on Technology Transfer and Scientific and Technological Cooperation had been held in Geneva from September 10-12, 2007. The meeting identified and analyzed ongoing tools, mechanisms, systems and initiatives to promote the implementation of the CBD provisions on technology transfer and scientific and technological cooperation, and developed a draft strategy for the practical implementation of the program of work, which would be considered for adoption by COP-9. The experts had integrated into their draft strategy a number of the options identified

[1] The draft decisions of the 5th meeting of the Working Group will be considered for possible adoption by COP 9 in May 2008.

in the aforementioned technical study prepared in cooperation with UNCTAD and WIPO. The CBD Secretariat looked forward to continued collaboration with the 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 this Intergovernmental Committee. He wished every success in the continuation of deliberations in the course of this twelfth session, confident that they would also contribute to and complement the work of the CBD with regard to access to GR and benefit-sharing, as well as traditional biodiversity-related knowledge.

228. The representative of the World Trade Organization reported on on-going work in the TRIPS Council on issues related to the work of the Committee. Pursuant to instructions given by Ministers at the Doha Ministerial meeting in November 2001, the issue of the relationship between the TRIPS Agreement and the CBD was being addressed in the WTO on two tracks: in the regular meetings of the TRIPS Council (pursuant to paragraph 19 of the Doha Ministerial Declaration) and in the consultative process for addressing the so-called outstanding implementation issues (pursuant to paragraph 12 of the Doha Ministerial Declaration). For some time now, the Council for TRIPS had before it a proposal made by a group of developing countries to amend the TRIPS Agreement to include an obligation on patent applicants to disclose the origin of biological resources and of TK used in inventions as well as evidence of prior informed consent and of fair and equitable benefit-sharing. This proposal was now co-sponsored by the African Group, the LDC group and the ACP group of Members as well as other developing countries, many of whom had also spoken about it in the Committee. The European Union, Japan and Switzerland had referred in the Council to the proposals they had made in WIPO. In addition, Norway had submitted a proposal calling for the introduction of a mandatory disclosure requirement in the TRIPS Agreement. Most other developed countries held the position that a national-based approach using tailored national solutions, including contracts, was sufficient to ensure that the objectives of the CBD in relation to access and benefit-sharing were met and that it had not been shown that it would either be helpful or desirable to involve the patent system. They were of the view that more intensive fact-based discussion on national experiences would be helpful in order to examine the issues involved. Constructive discussions had continued the process of clarification of the views held by the proponents, but divergent views persisted in relation to the issue as to whether or not a disclosure requirement would address the concerns raised. Moreover, even among those who agreed with a disclosure approach, there were differences on several aspects, such as what type of disclosure requirement should be put in place (mandatory or voluntary; origin or source or both) and under what instrument (the TRIPS Agreement or the Patent Cooperation Treaty of WIPO), and the legal effects of wrongful disclosure or non-disclosure (invalidation of the patent and in what circumstances; outside the patent system under civil/criminal law). The Hong Kong Ministerial Declaration of December 2005 (WT/MIN(05)/DEC) provided for the TRIPS Council to continue this work and for the General Council to report on it to the next Ministerial meeting. The latest developments on these discussions in the TRIPS Council could be seen from the minutes of these meetings recorded in documents IP/C/M/53-55. The second track was consultations on the relationship between the TRIPS Agreement and the CBD as an outstanding implementation issue. At the Doha Ministerial Conference it had been decided to address a list of outstanding implementation issues of concern to developing countries in accordance with paragraph 12 of the Doha Declaration. That list comprised several TRIPS issues, including the relationship between the TRIPS Agreement and the CBD. The Hong Kong Ministerial Declaration of December 2005 had provided for the Director-General, to further intensify the consultative process that he had been undertaking on the issue. That issue had been one of the two outstanding implementation issues explicitly referred to in the text of the Declaration,

alongside that of the extension of the protection of geographical indications. Consultations had been held in various formats by Deputy Director General Yerxa, acting on behalf of the Director-General, on the relationship between the TRIPS Agreement and the CBD as an outstanding implementation issue, following the resumption of the Doha Round negotiations. In that discussion the Disclosure group of developing countries had advocated that Members take a decision, within the context of decisions to be taken on so-called "modalities" in the Doha Round, agreeing to the inclusion in the TRIPS Agreement of a mandatory requirement for the disclosure of origin of biological resources and/or associated TK in patent applications and agreeing that it would be negotiated as part of the results of the Round. However, there continued to be a range of views both on the merits of the proposals on the table and on the process, including on whether or not there was a Doha Round negotiating mandate on this issue.

229. The representative of the FAO Commission on Genetic Resources for Food and Agriculture briefed the Committee on relevant developments and activities of the Commission since the Eleventh Session of the Committee. The Commission was an inter-governmental body, currently with 170 countries and the European Community as Members and it was the only inter-governmental body specifically dealing with all GR for food and agriculture. FAO had reported on the outcome of the Commission's Eleventh Regular Session which had been held in June of last year to the last Session of the Committee. In the meantime, FAO had held the International Technical Conference on Animal Genetic Resources for which the Commission had acted as a preparatory Committee and the Commission Secretariat had taken first steps in the implementation of its Multi-year Programme of Work. The International Technical Conference on Animal Genetic Resources for Food and Agriculture, held at the invitation of the Government of Switzerland in September of last year in Interlaken, had launched the first authoritative assessment of global livestock biodiversity, entitled *The State of the World's Animal Genetic Resources for Food and Agriculture*. The main achievement of the Conference was the *Global Plan of Action for Animal Genetic Resources*, which provided a framework for supporting and increasing the overall effectiveness of national, regional and global efforts for the sustainable use, development and conservation of animal GR. The Global Plan of Action called, *inter alia*, for the development, of *"as necessary, national policies that incorporate the contribution of animal genetic resources to sustainable use, which may include [...] mechanisms, to support wide access to, and the fair and equitable sharing of benefits arising from the use of animal genetic resources and associated traditional knowledge."* In addition, the GPA also called for "enhanced coherence" between the policies and legal instruments, including in the fields of IP and access and benefit-sharing, that may have direct or indirect effects on the use, development and conservation of animal GR. The International Technical Conference had also adopted the *Interlaken Declaration on Animal Genetic Resources*, by which Governments reaffirmed their common and individual responsibilities for the conservation, sustainable use and development of animal GR for food and agriculture. The FAO Conference, the highest governing body of FAO, at its Thirty-Fourth Session, in adopting Resolution 12/2007, had welcomed and endorsed the outcomes of Interlaken. FAO's Commission on Genetic Resources for Food and Agriculture, at its last Session, had also adopted a rolling Multi-year Programme of work on biodiversity for food and agriculture. This program covered all components of biodiversity for food and agriculture and it set out a work program for the Commission's next 5 sessions, that was the next 10 years. In the context of this program, the Commission would also consider cross-sectorial issues that were of particular relevance for this Committee. These were: access and benefit-sharing for GR for food and agriculture; and the role of IP rights in relation to GR. In fact, the Commission had identified the issue of access and benefit-sharing for GR for food and agriculture, as an

early task that would be addressed at its next Session. The Commission's next session would take place from 7-11 September 2009 in Rome. In preparation of the Commission's consideration of policies and arrangements for access and benefit-sharing for GR for food and agriculture, the Commission Secretariat would prepare a number of studies which would cover current patterns and modalities of use and exchange of GR for food and agriculture in the various sectors. These sectorial studies would be prepared on the basis of existing analyses and on the basis of consultations of stakeholders in the following areas: Plant, animal, aquatic, forest, micro-organism and invertebrate GR. The sectorial studies would also address the need for capacity building as well as effects of IPRs and of access and benefit-sharing measures on exchange patterns in the various sectors. In addition, the Secretariat would study in detail the role of food and agriculture in current access and benefit-sharing arrangements and policies, including in existing national laws and international policy processes. In its opening statement, FAO had emphasized its particular and fairly obvious interest in GR relevant for food and agriculture. In the Committee and in the Ad Hoc Open-ended Working Group on Access and Benefit-sharing under the CBD, access and benefit-sharing and IP rights were viewed from slightly different perspectives. However, IP as well as access-and-benefit-sharing regimes which embraced GR for food and agriculture, and any linkage or crossover of these regimes, should take into account the need to fully and wisely use GR for food and agriculture; continued and sustainable utilization of these resources and their exchange are fundamental to their conservation, and, thus essential, to ensure long-term food security.

230. The representative of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture highlighted that the treaty was the only international binding access and benefit-sharing system which today regulated daily transfers of genetic material in more than 116 countries. Currently more than 400 transfers occurred every day within the Multilateral System of the International Treaty. At its last session, the Committee had requested "a further update of international developments [concerning IP and genetic resources] based on WIPO/GRTKF/IC/11/8 (b)" and had taken an interest in "recent … relevant developments" in the field of access and benefit-sharing. In the case of the International Treaty on Plant Genetic Resources that was well covered up to the Second Session of the Governing Body in WIPO/GRTKF/IC/12/8 (b). In that context, the developments in the implementation of the International Treaty since the Second Session of its Governing Body had been highly positive. That concerned both pillars of the International Treaty, namely the Multilateral System of Access and Benefit-sharing, with its SMTA, and the Funding Strategy of the Treaty. There were three developments regarding the Multilateral System of Access and Benefit-sharing and its Standard Material Transfer Agreement, following the successful conclusion of the Second Session of the Governing Body of the Treaty in November 2007. At present there were more than 96,000 accessions of genetic material within the Multilateral System of the Treaty from the IARCs of the CGIAR alone. The Treaty Secretariat was now receiving increasing requests from Contracting Parties, regional gene banks, national ex-situ collections and the private sector to include plant GR which they held within the Multilateral System. The Treaty Secretariat would shortly issue a form letter and several standardized tools which would simplify the inclusion of material for holders of PGRFA in the Multilateral System. The first development in the context of the Multilateral System concerned plant GR beyond Annex I of the Treaty. In November 2007, the Governing Body of the Treaty had successfully adopted a second Material Transfer Agreement (MTA), which would now cover all plant GR for food and agriculture *other* than those listed in Annex I of this Treaty and collected before its entry into force that were held by International Agricultural Research Centers of the Consultative Group on International Agricultural Research. That footnote stated that *"In the event that the SMTA is used for the transfer of Plant Genetic Resources for Food and Agriculture other than*

those listed in Annex 1 of the Treaty: The references in the SMTA to the "Multilateral System" shall not be interpreted as limiting the application of the SMTA to Annex 1 Plant Genetic Resources for Food and Agriculture, and in the case of Article 6.2 of the SMTA shall mean "under this Agreement"; The reference in Article 6.11 and Annex 3 of the SMTA to "Plant Genetic Resources for Food and Agriculture belonging to the same crop, as set out in Annex 1 to the Treaty" shall be taken to mean "Plant Genetic Resources for Food and Agriculture belonging to the same crop".” In practice, this meant that now *all* Plant GR for Food and Agriculture, not only those listed in Annex I of the Treaty, were being covered by Material Transfer Agreements adopted under the International Treaty when they were transferred by IARCs, gene banks and other ex-situ collections of PGRFA which had signed Article 15 agreements with the Governing Body of the Treaty and by numerous other regional gene banks and holders of PGRFA. As of that month, all IARCs of the CGIAR were applying that second SMTA with the additional footnote to *all* PGRFA, including those beyond Annex I of the Treaty, and numerous Contracting Parties of the Treaty had also begun to apply it to non-Annex I materials. That represented a significant development in the use of Material Transfer Agreements for GR from which several policy lessons might be learned, including for the draft Guide Contractual Practices and 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/12/8(a). Concretely, that development might merit two actions by the Committee: the inclusion of the new standardized MTA into the Online Database of Access and Benefit-sharing Contracts developed by the Committee at Committee-3 to Committee-5 and second, the reflection of that new development in the draft Guide Contractual Practices developed by the Committee, as referenced in Part C under WIPO/GRTKF/IC/12/8(a). When the first version of those guide practices had been produced in November 2004 as WIPO/GRTKF/IC/7/9, it had included in Part V.B, paragraphs 31 to 33, a reference to the International Treaty. That reference however, predated the adoption of the SMTA of the Treaty which had been adopted by the Governing Body at its first session in June 2006. In paragraph 36, Section V.C it also referred to the MTA for non-Annex I crops which had just been amended by the Governing Body of the Treaty four months ago. In the text of the Draft Practices that would also affect paragraph 10, second bullet. Clearly, these developments could not be reflected in the draft at the time and, in due course, the Committee might wish to update those versions in order to reflect the latest status of the access and benefit-sharing instruments under the International Treaty within the draft Guide Practices. The second development in the Treaty’s Multilateral System concerned SMTA operations and IP information systems. In the first eight months of operation of the Multilateral System, there had been more than 89,000 transfers of genetic material under SMTAs reported from the IARCs of the CGIAR alone. Since each SMTA required the Provider and Recipient of genetic material to provide certain information to the Governing Body through its Secretary, the Secretariat was now establishing the information infrastructure to cope with that massive amount of information, after demonstrating initial prototypes of the systems to the Second Session of the Governing Body. The system would consist of a Data Warehouse which would store SMTA reporting data; a PID Server, which would issue Unique and Persistent Identifiers (PIDs) to users of the MLS; and an Ordering Toolkit (OTK), which would fully automate SMTA operations to allow direct, accession-level online ordering of genetic material from the Multilateral System. A continuation of the work reported in paragraphs 37 to 41 in WIPO/GRTKF/IC/12/8(b) under heading III, could create synergies with the ongoing development of the information infrastructure of the MLS, in particular in light of the benefit-sharing provisions of Articles 13.2(a) and 13.2(b) of the Treaty, entitled “Exchange of information” and “Access to and transfer of technology.” The second pillar of the International Treaty was the Funding Strategy of the Treaty, which was implemented through a Benefit-sharing Trust Fund, just established in Rome. A major initiative had been

announced by the Mr. Terje Riis-Johansen, the Minister of Agriculture and Food of Norway. The Minister had announced that week that Norway would make an annual contribution to the benefit-sharing fund of the Treaty equal to 0.1 percent of the value of all seeds that were sold in the Nordic country. Minister Johansen had specified in his statement: *"The percentage of the seeds sold in Norway will include seeds that are sold through Norwegian agri-businesses and bought by Norwegian farmers. […] By our calculations, if we all contribute a similar percentage from sales of our seeds, the Treaty's benefit-sharing fund would have some USD20 million a year - encouraging farmers to continue conserving and improving plant diversity on their farms. […] I also note here that this is not conventional development funding. This is a situation in which the agricultural sector of Norway will be linked and contributing to the farmers of countries in the developing world"*. By making that contribution to the international benefit-sharing fund, Norway was directly supporting farmers in developing countries through the legal structure of the International Treaty. The President of the European Commission José Manuel Durão Barroso, who had also attended the meeting in Norway, had declared that the measure taken by Norway was "a very good message". By making that contribution, Riis-Johansen had challenged other countries to make similar contributions. These recent developments indicated that the Access and the Benefit-sharing mechanisms of the Treaty were working and working well. For the first time, international access to GR and benefit-sharing was being implemented from the international level down to the level of individual transfers of genetic material and down to the sharing of benefits resulting from individual products resulting from the use of those GR. In further advancing the implementation of the Treaty, the representative looked forward to continuing the existing collaboration with the Committee in the future.

231. The Delegation of Canada stated that given the work done in the Committee's past sessions, and developments in related *fora*, Canada remained convinced that the role of the Committee in providing expert input and analysis of IP issues related to GR and disclosure was instrumental. It therefore pressed the Committee to make progress in the area of GR. Canada encouraged fact-based discussions favouring the sharing of national experiences, especially from countries that had implemented national access and benefit-sharing regimes. Though many countries and several of the options listed in WIPO/GRTKF/IC/12/8(a) assumed clear linkages between patent protection and access and benefit-sharing, these links had not been well established. Canada was strongly interested in learning about disclosure mechanisms and their effectiveness, but also about other potential checkpoints for monitoring and enforcement of access and benefit-sharing clauses. As such, it proposed concentrating the discussion on options 2 and 3, to further the understanding of the issues related to disclosure requirements. It would like to hear more about the benefits and costs related to the implementation of such measures, especially considering the expected benefits directly related to disclosure requirements, and their related implementation, monitoring and enforcement costs. It would also like to hear Members' views with respect to the impact such requirements could have or already had on research and innovation using GR. The data gathered in questionnaire WIPO/GRTKF/Q.5 would also be valuable in assessing the impact on patent examination offices and their activities. With respect to the Canadian situation, the examiners did not have the means, training or mandate to verify whether the source or origin of material, as identified by the applicant, was accurate. Even given the necessary training, a determination of this kind was likely to be difficult and time consuming, and would require an improvement of the available prior art. That was in line with WIPO/GRTKF/IC/12/7 discussed the day before, and the Delegation reiterated the merit of the Japanese database proposal set out in WIPO/GRTKF/IC/9/13 and WIPO/GRTKF/IC/11/11 as a potential tool for patent examiners to improve the quality of their searches involving GR and associated TK. It thanked the Assembly of First Nations for its intervention on the "ownership, control, access

and possession" initiative related to TK. In the context of GR, it looked forward to exploring further initiatives that succeeded in bringing prior art to the attention of patent examiners while taking into account confidentiality concerns. In that sense, it also supported clarifying and discussing further the propositions listed under option 6. That option was very unclear. If that option proposed the use of databases of public domain information for improved prior art searches related to GR and associated TK, the Delegation would be interested in discussing it further. Canada would also like to see work on expanding the use, scope and accessibility of the online database of IP clauses in material transfer agreements for access and benefit-sharing, as proposed in option 8. Mutually agreed terms in private contracts could be an important way to give effect to the equitable sharing of benefits arising from the use of GR. As such, it was interested in pursuing further work on this option. Case studies describing licensing practices in different communities of practice could provide interesting information and enrich fact-based discussions on GR and access and benefit-sharing. There was not only one model on how licensing worked, hence learning about alternative licensing methods could broaden views and discussion on the protection of GR. Canada would be interested in learning more about the technical details related to these initiatives and especially about their impacts on innovation. The potential case studies should also address the issue of the monitoring and enforcement of the rights, as these often represented a challenge. As previously stated, it supported any fact-based discussion that would help Committee Members to further our understanding of the issue.

232. The Delegation of Switzerland held that WIPO/GRTKF/IC/12/8(b) provided an excellent overview of the international efforts with regard to GR. It viewed all three agenda items of the Committee - GR, TK, and TCEs - 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 the three agenda items. The options for continuing or further work listed in paragraph 4 of WIPO/GRTKF/IC/12/8(a) included the issue of disclosure requirements. In this regard, it referred to the proposals Switzerland submitted on the disclosure of the source of GR and TK in patent applications, WIPO/GRTKF/IC/11/10. Switzerland, not "demandeur" with regard to the disclosure issue, submitted its proposals because it recognized the importance of increased transparency with regard to access and benefit-sharing. The proposals explicitly enabled the national legislator to require patent applicants to declare the source of GR and TK in patent applications. 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 the requirement. Non-fulfillment could carry civil and criminal sanctions. The concept of "source" allowed covering all potential sources of GR and TK, including the country of origin, the contracting party providing GR, indigenous and local communities, as well as the Multilateral System of FAO. Accordingly, the broad concept of "source" was chosen to ensure consistency with the relevant international instruments on access and benefit-sharing, namely the CBD, the Bonn Guidelines and the International Treaty of FAO. To further strengthen the effectiveness of the proposed measure, the Delegation put forward an online list of government agencies competent to receive information about the declaration of the source. Patent offices which received patent applications containing a declaration of the source should inform the competent government agency about that declaration. Switzerland had implemented its proposals - without having any internationally obligation - at the national level: The recently revised Swiss patent law introduced a requirement for patent applicants to disclose the source of GR and TK in patent applications. As sanctions, the revised law provided for fines of up to 100,000 Swiss Francs

and the possibility for judges to make their rulings public. That new law would enter into force next July.

233. The Delegation of Slovenia, on behalf of the European Community and its twenty-seven Member States reaffirmed the hope that the Committee could achieve progress in the field of IP and GR. A number of Member State proposals remained active within the Committee, including a proposal for a mandatory disclosure requirement submitted by the European Community and its Member States at the eighth session, as set out in WIPO/GRTKF/IC/8/11. These proposals should be discussed as a matter of priority. The discussions within the Committee and within WIPO were taking place in parallel to related discussions in other fora, for example the work within the CBD concerning ABS. At the end of January 2008, the sixth CBD Working Group ABS meeting had been held to continue to elaborate and negotiate the international regime on ABS. That regime had the purpose of implementing obligations under the CBD, which applied to the vast majority of members represented in the Committee. The success of that work depended on the progress of work in the Committee, since the proposed mandatory disclosure requirement was intended to provide the necessary information for effective benefit-sharing, while preserving the incentives to innovate that were offered by the patent system. The relationship between IP and GR was an IP issue. As such, the burden of the discussion should be borne by the organization responsible for IP, namely WIPO, and one should not try to transfer that task to other fora. There were other fora looking forward to the progress and results achieved in the framework of the Committee. Concerning the options for further work, as set out in WIPO/GRKF/IC/12/8(a), the Delegation would like to request clarification as to whether these options referred to the work that the Member States would undertake during the meetings of the Committee, or the work that the Secretariat was intended to do between the meetings. All of these issues were important, and the Secretariat had indeed shown that it was capable of undertaking any and all work that the Committee assigned to it. However, new documents may have maximum value only if there was sufficient opportunity to discuss them at the meetings. As the last item on the crowded Committee agenda, GR received only a limited amount of discussion. Thus, it may be productive to address, at the next meeting, only one or two issues among the many issues listed with respect to GR. The Committee should focus, as a matter of priority, on item (i) concerning a mandatory disclosure requirement. The discussions could be held on the basis of the Member State proposals that were already before the Committee. The Delegation reaffirmed its commitment to the important work of the Committee, and expressed its desire to focus on procedure and substance that would lead quickly to practical results.

234. The Secretariat responded to the question of the Delegation of Slovenia that the answer depended on a specific item. In the case of some items the work as a Secretariat preceded automatically, for example on the contracts database. It updated it as it received new accessions to it and reported on that. It was publicly available on the internet. In the case of some other items the Secretariat was not proceeding with any further work until the Committee gave instructions to do so. For example, in relation to the disclosure requirement there had been a number of studies that had already been undertaken, but at the moment there was not any request from the Member States to do any further specific work in that area. One of the reasons for the discussions right now was whether the Committee had specific requests for work for the Secretariat to do, and in that event of course that work would come back normally to the Committee and be the subject of discussion in the Committee.

235. The Delegation of Japan stated that so-called bio-piracy consisted of two issues, one of which was the erroneous granting of patents and the other was compliance with the CBD

concerning benefit-sharing and prior informed consent. One should address bio-piracy keeping in mind which issue should be addressed within the IP framework, and which should be addressed comprehensively, including measures beyond IP. As regards erroneous granting issues, Japan had introduced a proposal for developing a one-click database search system, WIPO/GRTKF/IC/9/13, as a possible solution at the ninth Committee session. It had provided an additional explanation on how to protect the secrecy of GR in such a database at the eleventh Committee session. It recognized there was apprehension about inappropriate exposure through such a database which had already been raised under the previous agenda. These were important points worth to be reflected in future consideration. The proposed database was for the purpose of patent examination, only accessible by authorized patent offices and patent examiners. And registration for the database was voluntary in nature and would be collected by national authorities who were supposed to know well customary laws of their indigenous communities and other sensitive matters. Basically, the contents to be collected were supposed to be publicly known GR. However, it might be included, upon request, GR which was not yet publicly available. But in such a case technical measures could be contrived to add some signs or flags which distinguished clearly the ones which were publicly known from the ones which were not publicly known. Examiners could handle them distinctively with caution. Additionally, as discussed in the context in TK, storing in database itself was not necessarily evidence that the item was publicly known. Other related information for proof or further investigation would be needed for sufficient evidence, where necessary in possible collaboration with the appropriate authority in the GR country. Even in such a case the database would be an initial useful tool or call for initial attention to prevent from granting a patent erroneously. As regards confidence of examiners, there were commonly strict confidential duties for examiners and criminal penalties in case of violation. That kind of database could be contrived also for the purpose of monitoring which patent application was filed in which country by accumulating information by patent offices when patent examiners examined each application which related to, or referred to GR in the database. There was room to improve that proposal technically and legally and the Delegation hoped it be improved in WIPO with its expertise. CBD compliance issues should be addressed in a holistic way. Proper balancing to encourage innovation was necessary. In that context the exercise for licensing guidelines, as contained in WIPO/GRTKF/IC/7/9, was important. Discussion of these guidelines should resume as early as possible for concrete results.

236. The representative of the Eurasian Patent Office (EAPO) said that the development of biotechnology was closely linked to the use of GR and should be examined in the context of a wider problem – the preservation of biodiversity, which was one of the main problems of modern times. The accession of many countries in the world to the CBD bore witness to the fact that the problem under discussion was recognized by the world community. However, as GR and related TK were becoming the subject of ever-increasing interest on the part of producers of biotechnology products, the establishment of an adequate system of protection for GR and TK was currently an important task. While realizing that the rules governing access to GR and TK were intended to serve as an effective means of protection against their misappropriation and misuse, the EAPO supported the opinion that the new requirements for the disclosure of an invention, relating to GR, i.e. the compulsory indication of the country and/or source or origin of the GR in patent application materials would not have the necessary impact on the achievement of the stated aims. The disclosure requirement presupposed the provision of specific information on the GR used in a claimed invention. However, in practice that might give rise to specific problems linked to the extent to which the stated disclosure requirement was compatible with the basic principles of patent law. It was necessary to examine a number of examples of inventions relating to the use of GR. Eurasian

application 2004 01393 had been filed for a method of obtaining an immunomodulator. In order to produce the method, a water extract was removed from the original material, i.e. muscle from reptiles of the scaly variety, with subsequent purification and lyophilization of the target product. Thus, the invention in question was based directly on the use of genetic material and GR, in accordance with their existing definitions. An assessment of the patentability of the invention in question was conducted according to the established standards, i.e. its compliance with the criteria of novelty, inventive step and industrial applicability was determined. Moreover, the invention must be disclosed in the application in a complete and clear manner so that a person skilled in the art could carry it out and, in that regard, the possibility to carry out the invention and achieve the fixed technical outcome must be confirmed. All the above criteria were satisfied by the application in question. The preparation obtained had a direct effect on the blood phagocytes and activated them. From the prior art, there were no known solutions identical to the one claimed. As a result, the invention satisfied the patentability criterion of "novelty". The essential features of the claimed invention were not obvious from the prior art and therefore they satisfied the patentability criterion of "inventive step". The invention was industrially applicable, as it could be used in the medical industry and healthcare. A decision had been taken to grant a patent for the application. She asked in what way could the proposed rules on the compulsory indication of the country and/or origin or source of the GR be applied to that application. As the scaly variety was the most widespread group of reptiles, numbering about 6,000 types and living on virtually all materials in highly diverse living conditions (reptiles included lizards, snakes and chameleons), – the definition of the country and/or their specific source or origin was problematic, although in general possible. Reference to scientific literature, although possible, was not required in that particular case, since the animals used were well known and described in any zoology handbook. There were sufficient indications of the fact that the reptiles were well known to confirm the possibility that the invention could be carried out. Thus, in relation to the given application, the requirements for the disclosure of the country and/or origin or source of the GR could not be satisfied and a whole series of uncertainties was created when a patent examination was conducted. Another example related to Eurasian application 2006 01150, filed for an anti-virus preparation and the method of obtaining it. The claimed preparation was a haemolymph of insects, of the varieties of dragonflies (4,500 types), beetles (250,000 types), butterflies (100,000 types) and dipterous creatures (80,000 types), produced in a specific manner. It was obvious that in the given case the situation already noted, relating to the impossibility of an unambiguous indication of the country and/or source or origin of the corresponding GR and the pointlessness of references to scientific literature, recurred. It was possible to cite more than one example relating to the use, for the creation of inventions, of plant GR. In particular, Eurasian application EA2005 01611 related to obtaining a preparation with a high curative-prophylactic effect in the case of liver diseases using the slender Russian thistle (Salsola Collina). A plant was widely used, could be collected in the area of natural growth, and was characterized in any botanical encyclopedia. The country of origin might not be known. The examples cited could serve as confirmation of the fact that the new requirement of compulsory disclosure of the country and/or source or origin of GR in materials of patent applications, the subject of which related directly to the use of GR, might not be applicable to such applications and, consequently, did not have a corresponding impact on the decisions of patent offices to recognize that type of inventions as patentable. It was necessary to define clearly which GR specifically were being referred to in the requirement for their compulsory disclosure, what specifically was understood by their source or origin, in addition to botanical gardens, zoos and collections in which they might not even be located, and what specifically it was intended to protect by means of such a requirement. In the absence of the corresponding clear wording, the Delegation believed that it was not justified to refer to the compulsory inclusion of the country and/or source or origin

of GR in patent application materials, since that might create additional obstacles for the assessment of the patentability of an invention. Thus, the question under discussion remained open for the EAPO. The amendment of current patent legislation should be approached with great caution, taking into account all aspects of the procedure of examining applications for the grant of a patent for an invention. Moreover, the examples cited bore witness to the possibility of protecting specific technologies and/or products linked to GR/TK, using the patent system. Such a practice might prove to be useful and it should not be ruled out. In that regard, it was absolutely essential to continue working to create a system of protection for GR and TK at the national, regional and international levels, including within the framework of the WIPO Intergovernmental Committee. The representative expressed hope for the successful completion of the searches for mechanisms governing relations, connected to access to and use of GR and TK, and, in particular, to conditions for the commercialization of goods and services produced on the basis of such use.

237. The Delegation of the United States of America expressed its support for continued work of the Committee in the area of GR. As had been noted at the founding of the Committee, GR, TK, and folklore were integrally related and could not be separated. Therefore, in order to resolve differences among Members on these matters, the Committee was uniquely suited to that end. The Delegation therefore supported working toward concrete outcomes of the Committee. Options (i) - (iv) regarding patent disclosure requirements: Over the course of recent meetings of the Committee, numerous written submissions, oral statements and positions had been offered with respect to proposals, such as new patent disclosure requirements, relating to the relationship of patents and GR. These had contributed to useful discussion, but had generally confirmed a wide divergence of views on how to address these issues and had not demonstrated that a disclosure requirement would eliminate or reduce misappropriation of GR, or even that such a requirement would reinforce local laws requiring prior informed consent before the use of GR. The Delegation recognized the importance of these issues and that the Committee was the proper mechanisms to consider these matters in WIPO. Nonetheless, mindful of the divergent views of the Members of that body, future work should, consistent with the mandate, continue with the focus of analyzing real world examples and scenarios illustrating the perceived concerns. That work could include, in particular, examination of existing ABS regimes, as that appeared to be directly related to perceptions of what constituted “misappropriation”. In that way, future work could facilitate convergences and progress in that area and continue to clarify points of disagreement while helping to reduce differences among Members. As consistently stressed, it remained important to focus on what was intended to be achieved. Most demandeurs cited to objectives such as providing for appropriate access and equitable benefit-sharing, and a minimization of mistakenly granted patents. These objectives were achievable within the framework of nationally based laws and systems, and new patent disclosure requirements were not an appropriate or effective solution to meet the concerns raised by some Members. In that light, it could not support proposals for new disclosure requirements relating to source or country of origin of GR in patent applications, such as that proposed by the European Communities and its Member States or proposals that went beyond that as had been suggested by delegations such as Peru, Brazil, India and others. That was not to say that the Committee could not continue to discuss disclosure requirements - the United States was interested in hearing national experiences of how such requirements had aided in eliminating or deterring misappropriation and had improved the quality of patents, without making their enforcement more expensive or patent applications more resource-intensive or undermining the contribution of the patent system to the promotion of innovation. It was clear that in order to achieve the objectives of PIC and equitable benefit-sharing, national laws outside the patent

system that directly and effectively regulated such conduct were critical. Indeed, the United States had long observed that concerns about misappropriation arose more broadly than in the context of products under patent protection. Rather than focusing on the few uses of GR that involved patents, the more appropriate solution to deter or eliminate misappropriation would be to strengthen national regimes outside the patent systems in order to address all instances of commercialization of misappropriated resources and/or TK that needed to be addressed regardless of whether these instances involved patenting or not. Some specific questions for IP Office with a disclosure requirement: What guidance did the IP Office give to applicants in determining when a specific application should disclose the source/origin/etc of a Genetic Resource or TK? What was the additional cost of processing such an application? How often was such information (a disclosure requirement was met) in a patent application? In these, how often had the Genetic Resource been: Directly accessed (in situ); accessed from a seed bank or other depository; or purchased as a commodity? Since the imposition of that requirement, had the number of patent applications filed in this area of technology increased or decreased? If it had decreased, had any research been done to see if applicants who may have previously filed a patent application have decided to maintain the invention as a trade secret rather than filing a patent application? If there was a disclosure requirement, did the Office also require disclosure of other types of knowledge that was known to the inventor in making their invention? If not, what was the basis for having a disclosure requirement of the source of GR or TK, but not other knowledge known to the inventor? How did disclosure improve examination? How often was the information material to patentability? For countries with an IP law that required disclosure, was there also a national law that more directly related to misappropriation or misuse of GR? Recommendations or guidelines for search and examination procedures for patent applications to ensure that they better take into account disclosed GR were another area of future work that the Committee could explore. The USPTO had intranet websites that consolidated useful commercial and non-commercial resources for literature related to GR and TK that patent examiners could use for searching prior art. The United States would be interested in learning the experiences of other Offices in searching and examining patent applications related to GR and exchanging of search templates related to GR could be useful. As to examination procedures, a discussion of examination guidelines may also be useful. Regarding draft contractual provisions, considering options for the expanded use, scope and accessibility of the Online Database of IP clauses in mutually agreed terms for access and equitable benefit-sharing and considering options for stakeholder consultations on and further elaboration of the draft guidelines for contractual practices contained the Annex of WIPO/GRTKF/IC/7/9 was useful. Without clear national laws, users of GR could not understand what was required of them. Likewise, with a contract, the original owner of a genetic resource and the user of the genetic resource would have a clearer understanding of their rights and responsibilities. Where the national law required prior informed consent before a resource was obtained, the national law should provide a point of contact to obtain the prior informed consent. Without such, a user attempting to follow the national law may find their lawful intentions frustrated. As access to a genetic resource was granted, terms could not be mutually agreed if both parties did not understand the terms. The best way to communicate the expectations of each party to a transaction was with a contract, and for this reason, this Committee should include model contracts, and model contractual provisions within its future work. Even with some of the other options for future work, a contract would still be important. After all, the premise of a law requiring a disclosure requirement was that the disclosure requirement was necessary to identify patents that make use of the resource. With a contract, the original owner of the genetic resource would learn of the use of the resource before a patent application was even filed. With a contract, the original owner of the genetic resource would be able to trace all uses of the genetic resource, and would be able to clearly communicate their expectations

with respect to the genetic resource. Development of case studies, describing licensing practices in the field of GR which extended the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field: Additional consideration by the Committee of "real world" examples and national experiences of existing ABS systems could help to bridge differences where possible and lead to useful conclusions about the extent of alleged misappropriation, and about how systems could be implemented most successfully. Discussions both in the Committee and in other international venues had raised a number of issues regarding GR, their trade as commodities, perceptions of illegality of access, the relationship of these goods to national ABS regimes in place, as well as the relationship of such goods to starting materials that may be used for research or innovative purposes, among other major questions. A deeper, factual analysis of these issues could bear greatly on perceptions of misappropriation and perceived solutions to the concerns raised thereby allowing progress on these issues. The Committee, with its expertise in IP and GR, would appear uniquely suited to this task.

238. The representative of the International Chamber of Commerce talked about the question of the mandatory disclosure of origin of genetic materials in patent specifications. These discussions of the Committee had started in the year 2000 and the topic had not really been fully discussed yet so it was useful to have an opportunity to discuss it. The Committee was the best forum for it to be discussed because of the expertise of the Secretariat on the matter. The members of the ICC filed a considerable number of patents. They would be involved in meeting the requirements of any mandatory disclosure provisions and would do that with more enthusiasm if they were convinced that it would be of any benefit whatever to anyone. The Committee would be able to help them see that in a more proper light. There were two basic situations when dealing with a genetic resource in a patent specification. One situation was that the genetic resource was widely available and everybody knew the origin or perhaps nobody knew the original origin. And in that situation one would not typically say where it came from. The other situation was where one was dealing with a unique or almost unique material and for patent purposes one had to explain to the general public how they were to get hold of that material which would inevitably involve explaining how one had got hold of it. So those were the two situations and it did not seem that disclosure would be of much assistance to anybody in either of those situations. In the latter situation it would already be taking place obviously. Various problems with patents specifications had been discussed in the past in that forum and examples had been given and perhaps it would be helpful to give an example of the problem the ICC had with disclosure. A well known genetic resource, the potato, was a genetic resource where it was known where it had come from originally. The potato had been developed in Peru, it had originated in Peru and they were many thousands of varieties there. And Peru was a major source of genetic variation in potato. However, the potatoes that had spread from Peru first to the whole continent of America and then to the rest of the world, Europe, which had taken place in the 16th century or thereabouts, those potatoes, in fact, practically all originated from a specific variety in Chile. So if one was dealing with potatoes in Western Europe, was the country of origin Chile or was the country of origin Peru, or both? Or alternatively, as had been proposed by Switzerland the source should be indicated. If one had to provide the source that had the advantage that one certainly knew where one got it. If one did not know where it came from, one had to have an explanation for that. That could readily be given, but on the other hand it may not be very enlightening if one had purchased your potato at the local supermarket. The question was where they got it, and that information may not be readily available. That disclosure was going to put some kind of burden on patent applications as a requirement for disclosure. And if it was clarified sufficiently may be it could be reduced to a point of which it made more sense. At any rate to

those who were required to undertake it. From a quick search of the US Patent Office database of granted US patents since 1976 there were 35,527 which had mentioned potatoes and in the vast majority of those the potatoes would be mentioned very generally or incidentally. They may be mentioned as the components of a novel form of potato chip and in those cases, disclosure of origin was going to be beside the point. It would not tell anything they did not know. A small minority of those patents may be based on particular characteristics or particular genetic material perhaps acquired in Peru and possibly not acquired in accordance with the provisions of the CBD. Now, maybe, if the burden of disclosure was reduced to those particular cases, it would perform some function, but at the moment apparently, whenever there was a genetic resource or even a biological material in a patent specification one had to say something about the source and the representative had difficulty in seeing the point.

239. The Delegation of India said that the difficulty in identifying the source should not mean that the source did not need to be indicated and there should be no necessity for this requirement. It recognized the difficulty in certain cases and therefore could explore the possibility of addressing that difficulty and trying to work out a possible solution to this difficulty. But it continued to insist on the mandatory requirement because it was the harmonious interpretation of TRIPS and the CBD. Therefore it should be complied with. Difficulties of a procedural nature could be worked out. It had noted the proposals on the table which while taking cognizant of the requirement of disclosure did not adequately address the consequences of non disclosure, inadequate disclosure or willful misrepresentation. That disclosure requirement or inadequacy of disclosure was a requirement for the patent. The consequences should directly visit the patent, both either in the applicant opposition or the post revocation. The Delegation was pursuing that as an amendment to the TRIPS in the WTO and fortunately, the number of adherents to that point of view was increasing and hopefully there would be a critical mass in the course of time.

240. The Delegation of Norway was pleased that GR remained on the agenda of the Committee, and considered that further focused work on the agenda item should be done by the Committee. In respect of the list of options in WIPO/GRTKF/IC/12/8 (a), the main focus should be on the first issue, the development of a mandatory disclosure requirement such as had been tabled in the Committee. An obligation to disclose the origin of GR was an effective approach in order to ensure compliance with relevant international law, the CBD and provisions on access and benefit-sharing. Similar arguments were appropriate in respect of TK. Norway had previously made a proposal to amend the TRIPS agreement in WTO, as well as proposed that the relevant WIPO treaties be amended. The Norwegian proposal could be found in WIPO/GRTKF/IC/10/INF/2, p. 3-5 and remained on the table. The proposal also encompassed disclosure requirements in respect of TK. As far as the other options for future work in WIPO/GRTKF/IC/12/8(a) were concerned, these could be beneficial in particular in terms of providing information of relevance when considering disclosure requirements. However, future work on GR in the Committee at that stage should aim to focus on possible amendments to the relevant treaties under the auspices of WIPO.

241. The Delegation of Egypt expressed that the principle of disclosure was a principle which was not limited to the disclosure of the content of the application. It also required that the applicant be able to guarantee that he or she was making the application in good faith. Therefore if the applicant, in making his or her invention, had used TK and/or GR he or she was obliged to disclose the content and that was a mandatory requirement. That was a mandatory requirement to disclose the genetic material or the TK used for the purpose of the invention. These were very clear requirements and they were underpinned by the mandatory

disclosure requirement. It was the 12th meeting of the Committee and members were still exchanging opinions and experiences. It thanked the Secretariat for the efforts and the documents that it had produced. But it was high time to start implementing the content of these documents. That should be done on a non selective basis. The work in the Committee would be useless unless it got to the point of seeing whether a document was essential, it was a document on which the Committee had to base its work on if it finally wanted to be able to draft an international instrument, a binding international instrument and apply it. The Secretariat had put considerable efforts into all this and some of the documents were very specific and should be the basis for future work. It was time to actually act on the basis of these documents and stop just discussing them.

242. The Delegation of Mexico affirmed the importante of the existente of a linkage which would permit the exchange of information between the authorities competent for the grant of intellectual property rights and tose which authorize access to genetic resources, within frameworks that help us to contribute to the equitable and fair distribution and sharing of benefits stemming from the use of genetic resources. We believe that the intellectual property authorities should have some authority over the genetic resources which are used for example in patent applications and this could be done irrespective of whether or not there is actually a formal substantive requirement for the applicant to disclose the origin or source of the genetic resources involved. With respect to the creation of a database, this could be a feasible option in the short term; however, both its development and its potential uses and applications should take into account the fact that genetic resources could be shared between different countries. This should also be a topic of discussion within the framework of the Committee. In this sense, detection by the intellectual property authorities of the genetic resources that were used or resulted in the invention claimed in patent applications, could be carried out regardless of whether or not there existed a formal or substantive requirement for the applicant to declare the origin or source of genetic resources. The intellectual property authorities could use dissemination mechanism which would alert the authorities responsible for granting access to genetic resources of the possible existence of a specific access to a genetic resource. Depending on the information contained in the apatent application and the accessed genetic resource, the authorities responsible for granting access could analyse and if necessary determine whether there should have been a prior authorization for that resource. Along these lines, the Delegation encouraged the Committee to explore mechanisms that would make it possible to exchange information between the authorities responsible for authorizing access to genetic resources and the authorities responsible for intellectual property rights.

243. The Delegation of Algeria was of the opinion that the three questions which had been identified under the substantive consideration of that issue deserved very careful and thorough attention: defensive protection, the disclosure requirement of information relating to the GR used in an invention for which a patent had been applied for and IP rights in areas where there was a common agreement on the just and equitable sharing of benefits stemming from the use or exploitation of GR. The work of the Committee should take into account ongoing negotiations within the CBD and in the WTO. Its work should be complementary to what was being accomplished in other fora dealing with the issues related to GR and the protection thereof. On the question of the link between the patent system and GR and in particular to defensive protection of GR, it was essential to improve defensive protection accorded to GR in respect to the granting of IP rights. Disclosure was a very particular form of defensive measure. Several proposals had been tabled. These proposals did contain aspects which could be useful for future work in that area. Furthermore, several of the options proposed in the documents which had been submitted by the Secretariat could indeed contribute to dealing

with the issue of the protection of GR. That included the reduction of the specific probability of the issue of illegal patents. And a WIPO provision already dealt with the problem. There was also the issue of the creation of a database on GR and TK to which examiners in all countries could have access in order to avoid the erroneous issue of patents involving GR or related TK. The relationship between IP and GR was part of the overall attempts to improve the defensive protection accorded to GR and to deal with the emerging link between the IP system and national and international regimes of access to, and equitable sharing of, the benefits stemming from the exploitation or use of GR. These issues were already being considered in fora other than the Committee, for example, the CBD and the WTO. The current and future work on that issue should be in harmony with and complementary to what was already being carried out in other international fora. The group had already raised some other points at the eleventh Session and those points were contained in the documents available to the Committee.

244. The Delegation of the Islamic Republic of Iran emphasized the equal values of GR, TK and TCEs. The Committee should address them in an equitable manner. That could lead to tangible outcomes on the preservation of GR and related TK and create world-wide mechanisms on protection of these important issues. The Committee should investigate the relations between GR protection and the existence of IP regimes and the possible gaps in that regard. That approach should cover all the IP rights such as patents, plant variety rights and geographical indications. For the moment, the Committee focused on disclosure requirements on patent application. That could be a good beginning, but was not enough, because it was not the unique challenge. Biopiracy may happen through plant variety rights mechanisms and there was a need to include a disclosure requirement in plant variety applications. Unfair competition rules may prohibit the stakeholders to access the information about GR and related TK and therefore, they could not claim against illegal usage of their material. Expanding the patent system to cover protection over GR and related TK was not enough. Therefore, the Delegation suggested the Committee also considering in its works other sorts of IP regime for protection of GR.

245. The Delegation of Brazil pointed to WIPO/GRTKF/IC/12/8(b), which was the factual update of international developments. In the last version, the developments in the Doha Round of Trade Negotiations had been lacking. In the new version, a small segment had been included on the WTO TRIPS Council. It was important to highlight that process, because that was where more work had been achieved in the context of negotiating a disclosure requirement within the patent system. In fact, there was still more to expand on that information as those were currently the most important ongoing negotiations in the multilateral circuit in Geneva on the disclosure requirement. Not only the TRIPS council was discussing the issue, but it was part of the Doha Round *per se*. It was one of the two implementation issues that were still being negotiated and it had been the object of a series of informal consultations carried out by Deputy Director General Rufus Yerxa in the name of Director General Pascal Lamy with members in different configurations. It included the issue of TRIPS and CBD on the one hand and the GR extension on the other hand. The amendment to TRIPS which would be an Article 29 bis now also had the support of the LDCs and the ACPs, which should be included in paragraph 35. The African Group, the LDCs and ACPs added up to 77 WTO members co-sponsoring the amendment proposal. There was also an important proposal from Norway that was not mentioned. That proposal would provide for an amendment to the TRIPS agreement to include a mandatory requirement of disclosure of GR. The proposal from the EC should be clarified. It proposed a mandatory disclosure requirement. It was of course up to the EC to specify the nature of its submission, but the submission referred to a mandatory disclosure requirement. It was not very clear the way it

was written, but the requirement was not outside patent law, it was a mandatory requirement within the patent system, but the legal effects would be outside the patent system, which was different than to say that the requirement would be outside the patent system. It was very important to be more precise on the information that was being provided in the document and to further expand it because discussions on that at the WTO had been in depth. There was a considerable amount of documentation to be analyzed and drawn from and that was a very important source of information for the Committee. It indicated in fact that that was where the action was taking place in terms of the disclosure requirement negotiation and discussion. Whereas the Committee had been more subdued in dealing with that particular item of the agenda, the item which referred to GR in the Committee had not really been developed to a great extent and had not demonstrated or not proven to be very promising an item on the agenda. So for future work, the Committee should begin to structure and prioritize the way in which it dealt with the different components and perhaps, without excluding any subject matter, focus a little bit more on TCEs which seemed to be the issue that could be dealt with in a more extensive manner or with greater ease.

246. The Delegation of Colombia considered, as it had under the theme of TK, that the internacional dimension on the issue of genetic resources should be considered under option (v) of document WIPO/GRTKF/IC/12/6, referring to strengthened coordination through guidelines or model laws. This would ensure that the Comitee's work would be done in complementarity with what was already being done in other fora such as the CBD. In this direction, the work could focus on seeking equitable limits on the definitions of the terms 'genetic resources,' 'biological resources,' and 'access' to them in the light of technical knowledge and scientific research. On patent applications involving this type of resource, the Delegation proposed that when dealing with pure knowledge about nature, this would be excluded from protection (as was the case in the Andean legislation). When applications aremade that refer to are for derivatives or direct exploitation of this type of resource then the requirements and the information should be clear and strict. For example, as well as disclosing the origin of the developments, the contribution of the invention with respect to the purely biological resource must also be clearly indicated. In the case of an invention which stems directly from the biological resource then protection can be provided by another way ensuring that it is properly exploited and that the country from which the resource originates is properly compensated. In the case of further development of resources, informaron on their origin may be sufficient. Being a major concern, the defensive protection of biological and genetic resources measures should be directed to other types of mechanisms such as the declaration of 'sources' of the development of inventions, which are registered and/or cataloged (inventoried) by the countries. On the other hand, it was important to consider the need for the interconnection between the different instruments envisages, and the coherente between the various provisions and the necessary infrastructure for their development and the needs of all Member Status.

247. The representative of the Tulalip Tribes expressed his concern about trans-boundary GR. Even though the Committee seemed to be talking about GR, actually it was talking about material samples. Material samples were very different from GR. Genes were connected together in a gene pool and they flowed. The Tulalip Tribes for example depended on salmon. There had been some salmon that they had created through selection that had certain characteristics and these salmons traveled off of their territory into Canadian waters. He asked what would be the case when that salmon was harvested in Canadian waters and property rights were assigned to somebody who harvested it. But not only international trans-boundary was of interest, also national. If the Tulalip Tribes had resources which they

had either bred or selected from natural resources which they depended on and had harvested and may be maintained over many years, if those could be collected next door to their tribal territory, he questioned whether they did have rights to them. So again, there was a gap, and that was not a fail flaw to the certificate system, but certainly a gap where there may be GR that they had some claim to but which were not geographically located within their territory. In the same way, TK also traveled. And certainly access on benefit-sharing could be tightly controlled where knowledge had not been disclosed and access to an existing indigenous territory was sought. But where knowledge flowed one might run into a condition where the TK was available off of the territory and the GR could be accessed off of the territory. Some more thought needed to be put into these kinds of situations and considered by the Committee.

248. The Delegation of Switzerland said that in the debate on GR, different views had been expressed with regard to the issue of disclosure requirements. As stated in its previous intervention on the Swiss disclosure proposals, Switzerland was not "demandeur" in this regard. Switzerland had submitted its proposals because it recognized the importance of increased transparency with regard to access and benefit-sharing. These proposals presented a simple measure that could be introduced in a timely manner. The Delegation was aware that disclosure requirements by themselves would not resolve all issues arising in this regard. Some speakers had expressed concerns about disclosure requirements. Instead, they favored a purely national and contractual approach as the means to resolve the issues arising with regard to access and benefit-sharing. With regard to that approach, the Delegation had a number of questions: First, how a purely national and contractual approach would address problems arising with regard to trans-boundary access and benefit-sharing, in cases where GR and TK were used outside the scope of application of national provisions. Second, how a purely contractual approach would address cases where no contract on access and benefit-sharing had been concluded between the provider and the user of GR and/or TK. Third, how the proposed approach would take into account the generally long-term nature of research and development activities involving GR.

249. The Delegation of South Africa wished to render its voice to the Delegation of Algerian statement of behalf of the African Group on GR. It would like to share its recent experience with the disclosure requirement. The South African Government had pursued the course of action of developing a mandatory disclosure requirement. In terms of recent amendments promulgated in terms of the Patents Act of South Africa, with effect from 15 December 2007, all patent applicants were required to lodge a Form P026 wherein they should indicate if they were making use of GR or not. If they were, a patent may only be granted if the applicant obtained the following documents in terms of the Environment Amendment Act of 2005, together with the regulations thereto: the permission for use granted by an accredited authority, a letter of prior consent and an agreement on benefit-sharing. Although the South African Patent Office was still to implement an official practice, it was clear that there would be no additional costs to the implementation of the disclosure requirement.

250. The representative of Indigenous People's Council on Biocolonialism (IPCB) raised the point that indigenous peoples did have rights to GR when they originated from their territories. The Tulalip Tribes had just mentioned an example of GR that in fact did perhaps leave the original territory of the tribe and had gone into other jurisdictions. Nevertheless, they still did assert a right to those GR and many indigenous peoples remained in the same position. She provided an example in the United States on a very recent update to the law in the State of Hawaii. The Supreme court of the State of Hawaii on January 31, 2008, so just within the previous month, had granted an injunction barring the State of Hawaii from selling

or transferring ceded lands from the public land trust until native Hawaiian claims to the ceded lands had been resolved, citing among other sources of law, Public Law 103-150, commonly referred to as the Apology Law. That was a joint resolution of the US Congress which stated that "indigenous Hawaiian people never relinquish their claim to their inherent sovereignty as a people or over their national lands to the United States either through their monarchy or through a plebiscite or a referendum". Ceded lands were those lands that the Kingdom of Hawaii, the Sovereign Kingdom of Hawaii had had under its jurisdiction and had been illegally taken by the US government in 1893 through military action. All these actions had been admitted in fact by the US Congress through the Apology Resolution. In the context of GR, if indeed the state Supreme Court of Hawaii had placed an injunction barring the sale or transfer of those lands that would also apply to the natural resources upon those lands. These lands were over 1 million acres in the State of Hawaii. They included not only lands but submerged lands. One could imagine marine GR and all the rest of the biodiversity in the State of Hawaii were implicated and so were claims to those GR so that was a significant issue. It was not unusual amongst other indigenous peoples that similar outstanding rights claims were implicated in that discussion on GR.

251. The Delegation of Spain stated that Spain held the first biodiversity days for TK in the Spanish speaking part of America in May 2007. It had been organized by the patent office in the Spanish agency of international cooperation in Guatemala. Representatives from 14 countries in the Spanish speaking world, patent offices, environmental institutes and academia had attended. Thirty people in all had taken part. The objectives of the gathering had been to exchange experience and legislation and to provide a forum for debate looking at the question of biodiversity, patents and TK. Spain planned the second series in Santa Cruz de la Sierra (Bolivia) for June 2008.

252. The Delegation of Slovenia on behalf of the European Community and its 27 Member States considered that GR was an extremely important topic in the Committee. Being at the end of the agenda sometimes the time allotted to GR may not be sufficient to have a full discussion and come to some resolution on the issue. Therefore, it suggested opening the agenda with the discussion of GR at the following meeting and rearranging the discussion of the topics at that meeting to allocate more time to it. Different experts from the home offices came for different subjects and GR and TK should probably be taken in sequence because of the related experts. The Secretariat would have to let the delegations know ahead of time so that they could bring the appropriate experts at the appropriate time.

253. The Delegation of New Zealand explained that the country was currently awaiting the judgment and report of Y262 which was a case before the Waitangi Tribunal. The claim focused on GR issues and the alienation of these resources from the indigenous population by the crown. Until that report was received New Zealand was unable to comment further.

254. The Delegation of Canada expressed support for the Slovenian proposal on behalf of the European Community to reorder the agenda for the next meeting as mentioned earlier in its intervention on GR. It attached great importance to the role of this Committee in providing analysis of the IP aspect of GR and also supported the US proposal to that sense.

255. The Delegation of Brazil believed that it was premature to change the order of the agenda items for the next meeting and did not support such a proposal. GR was an issue that had been lagging behind the rest and there was very little convergence on it in the Committee. The Committee could focus on a more promising subject matter in the next meeting which seemed to be TCEs. It suggested that more time be allotted to TCEs and that the agenda be

maintained as it had been for all of the meetings up on to present. There was more to talk about on the other two issues, in particularly on TCEs, the item on which the Committee had the longest exchange of views during the present session.

Decision on agenda item 10:

256. The Committee took note of documents WIPO/GRTKF/IC/12/8 (a) and WIPO/GRTKF/IC/12/8 (b). The composite decision taken by the Committee on future work on this agenda item is reported under agenda item 11.

AGENDA ITEM 11: FUTURE WORK

Decision on agenda item 11

257. The Intergovernmental Committee reviewed the progress made on its substantive agenda items at the current session, and agreed that:

(i) concerning item 8 (traditional cultural expressions/expressions of folklore (TCEs/EoF)), the Secretariat will, taking into account the previous work of the IGC, prepare, as the working document for the next session of the IGC, a document that will:

(a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs/EoFs;

(b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples;

(c) set out considerations relevant to determining whether those gaps need to be addressed;

(d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level;

(e) contain an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

The Secretariat will make explicit the working definitions or other bases upon which its analysis is conducted.

This document will be made available by the Secretariat in draft form by May 31, 2008. Participants in the Committee will have the opportunity to comment on the draft before June 30, 2008, after which a final draft of the document will be published by August 15, 2008, for consideration by the Committee at its thirteenth session.

(ii) concerning item 9 (traditional knowledge (TK)), the Secretariat will, taking into account the previous work of the IGC, prepare, as the working document for the next session of the IGC, a document that will:

(a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for TK;

(b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples;

(c) set out considerations relevant to determining whether those gaps need to be addressed;

(d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level;

(e) contain an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

The Secretariat will make explicit the working definitions or other bases upon which its analysis is conducted.

This document will be made available by the Secretariat in draft form by May 31, 2008. Participants in the Committee will have the opportunity to comment on the draft before June 30, 2008, after which a final draft of the document will be published by August 15, 2008, for further consideration by the Committee at its thirteenth session;

(iii) The Secretariat will reissue document WIPO/GRTKF/IC/12/8(a) and update document WIPO/GRTKF/IC/12/8(b) for full in-depth discussion at the thirteenth session. Member States and accredited observers will be invited to submit comments on the documents in advance of the next session if they so desire.

(iv) With a view to accelerating the work of the Committee in accordance with its mandate, at its thirteenth session the Committee will consider taking a decision on proposed modalities and terms of reference for the establishment of intersessional mechanisms or processes, as well as other possibilities, to continue and to build on the progress achieved so far, in a structured and focused manner, the technical work of the Committee on the three substantive items between its sessions, on the basis of proposals submitted by Committee participants to be circulated prior to the thirteenth session;

(v) At its thirteenth and subsequent sessions, including any intersessional sessions, all three substantive items of the Committee's mandate should be discussed in depth and that the time allotted to each item should be balanced.

AGENDA ITEM 12: CLOSING OF THE SESSION

258. The representative of the Creators Rights Alliance, on behalf also of Assembly of First Nations, Call of the Earth, Creators' Rights Alliance, Indigenous People (Bethechilokono) of Saint Lucia Governing Council (BCG), Indigenous Peoples' Council on Biocolonialism, Jigyansu Tribal Research Center (JRTC), Mbororo Social Cultural Development Association (MBOSCUDA), Pauktuutit Inuit Women of Canada, Sudanese Association for Archiving Knowledge (SUDAAK), and Tulalip Tribes of Washington, made a statement which recognized the difficult task the Chair had taken on in leading the Committee in its work to fulfil its revised mandate to accelerate its work. The representative looked forward to increased progress in future meetings and recorded appreciation for the Chair's continuing support in providing time for indigenous peoples and local communities to make interventions and contribute substantively to the work of the Committee, and the Chair's setting aside time to consult personally with such peoples and communities; the representative looked forward to many such fruitful exchanges. With that in mind the representative, continuing on behalf of these observers, looked forward to the Chair's and Member States' support for the full and effective participation of indigenous peoples and local communities in any intersessional mechanisms and processes established by the Committee, taking into account their diversity and the need for regional representation. The representative took note of the proposal for future work which was a viable way forward, and looked forward to further consultations with Member States in the elaboration of terms of reference for intersessional mechanisms and processes, and the elements and issues to be discussed. The representative drew attention to the United Nations Declaration on the Rights of Indigenous Peoples, the incorporation and implementation of which must now become a fundamental part of the Committee's future work. The proposed gap analysis must be framed by the need to apply the principles of the

Declaration and any convergence analysis must establish the Declaration as a primary area of convergence, since all but four Member States of WIPO had signed it. Indigenous peoples and local communities extended their appreciation to Member States for establishing the Voluntary Fund which had been a crucial tool for increasing their opportunities for participation in the work of the Committee. They thanked the states that had provided contributions and encouraged Member States to provide further financial support for the Fund. There was also need for capacity building to ensure full and effective participation of Indigenous peoples and local communities in the Committee's processes and discussions. The representative expressed thanks for the opportunity to voice these concerns and looked forward to continuing to work with the Chair and Member States in ensuring respect and protection for the rights of indigenous peoples and local communities.

Decision on Agenda Item 12

259. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 7, 8, 9, 10 and 11 on February 29, 2008. 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 April 30, 2008. This was circulated as document WIPO/GRTKF/IC/12/9 Prov. Committee participants were then invited to submit written corrections to their interventions as included in the draft report. A revised report, document WIPO/GRTKF/IC/12/9 Prov 2, was then submitted for consideration and adoption by the Committee at its thirteenth session, subject to further corrections or amendments to the record of interventions by Committee participants. The present document WIPO/GRTKF/IC/12/9 is the final version of the report as adopted at the thirteenth session.

260. The Chair closed the Twelfth Session of the Committee on February 29, 2008.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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(dans l'ordre alphabétique des noms français des États)
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Vijavat OSARABHAKDI, Minister, Permanent Mission, Geneva

Supavadee CHOTIKAJAN (Ms.), First Secretary, Permanent Mission, Geneva

Vowpailin CHOVICHIEN (Ms.), Third Secretary, Division of International Economic Policy, Department of International Economic Affairs, Ministry of Foreign Affairs, Bangkok

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UKRAINE

Andrii HRYSHKO, First Secretary, Permanent Mission, Geneva

URUGUAY

Lucia TRUCILLO (Sra.), Ministro, Misión Permanente, Ginebra

YÉMEN/YEMEN

Hesham Ali Ali MOHAMMED, Deputy Minister for Culture (Intellectual Property Section), Ministry of Culture, Sana'a

Shehab AL-BARAKANI, Intellectual Property Administration (IPPYEMEN), Ministry of Culture, Sana'a

II. DÉLÉGATIONS SPÉCIALES/SPECIAL DELEGATIONS

COMMISSION EUROPÉENNE (CE)/EUROPEAN COMMISSION (EC)

Jean-Philippe MULLER, Internal Market and Services Directorate General, Unit D2, Industrial Property, Brussels

Barbara NORCROSS-AMILHAT (Mrs.), Copyright and Knowledge Based Economy, Internal Market and Services Directorate General, Unit D1, Brussels

UNION AFRICAINE/AFRICAN UNION

Georges-Rémi NAMEKONG, conseiller, Délégation permanente, Genève

III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/ INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

ORGANISATION DES NATIONS UNIES (ONU)/UNITED NATIONS ORGANIZATION (UNO)

Elissavet STAMATOPOULOU-ROBBINS (Ms.), Chief, United Nations Secretariat of the Permanent Forum on Indigenous Issues, New York

AGENCE DE COOPÉRATION ET D'INFORMATION POUR LE COMMERCE INTERNATIONAL (ACICI)/AGENCY FOR INTERNATIONAL TRADE INFORMATION AND COOPERATION (AITIC)

Caroline VIEIRA NETO (Ms.), Training Project Assistant, Geneva

CONVENTION DES NATIONS UNIES SUR LA LUTTE CONTRE LA DÉSERTIFICATION (UNCCD)/UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION (UNCCD)

Ndegwa NDIANG'UI, Senior Scientific Affairs Officer, Bonn

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

Johan AMAND, Consultant, International Affairs, Munich

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

Honorine Annick SIMO (Mlle), juriste, Département de la protection et gestion de la propriété intellectuelle, Yaoundé

ORGANISATION BENELUX DE LA PROPRIÉTÉ INTELLECTUELLE (OBPI)/BENELUX ORGANISATION FOR INTELLECTUAL PROPERTY (BOIP)

Edmond SIMON, directeur, La Haye

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

Dan LESKIEN, Consultant, Rome

Shakeel BHATTI, Secretary, International Treaty on Plant Genetic Resources for Food and Agriculture, Rome

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

Françoise GIRARD (Mme), Section du patrimoine immatériel, Paris

ORGANISATION EURASIENNE DES BREVETS (OEAB)/EURASIAN PATENT ORGANIZATION (EAPO)

Victor TALYANSKIY, Director, Examination Division, Moscow

Maria SEROVA (Ms.), Chief Examiner, Chemistry and Medical Department, Moscow

ORGANISATION ISLAMIQUE POUR L'ÉDUCATION, LES SCIENCES ET LA CULTURE (ISESCO)/ISLAMIC EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (ISESCO)

Papa Toumané NDIAYE, spécialiste de programmes, Direction de la culture et de la communication, Rabat

ORGANISATION MONDIALE DE LA SANTÉ (OMS)/WORLD HEALTH ORGANIZATION (WHO)

Malebona Precious MATSOSO, Director, Department of Technical Cooperation for Essential Drugs and Traditional Medicines, Office of the Director General, Geneva

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

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ORGANISATION RÉGIONALE AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (ARIPO)/AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO)

John Ndirangu KARARE, Examiner, Technical, Harare

SECRÉTARIAT DU COMMONWEALTH/COMMONWEALTH SECRETARIAT

Margaret A. BRUCE (Ms.), Legal Office, London

SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY (SCBD)

John Gordon SCOTT, Program Officer, Traditional Knowledge, Montreal

SOUTH CENTRE

Viviana MUNOZ TELLEZ (Ms.), Programme Officer, Innovation and Access to Knowledge Programme, Geneva

Yogesh Anand PAI, Intern, Innovation and Access to Knowledge Programme, Geneva

Patrick LOWE G., Intern, Innovation and Access to Knowledge Programme, Geneva

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

Amazon Cooperation Network (REDCAM)
Santiago OBISPO (Coordinador General, Coordinación General, Amazonas)

American Folklore Society (AFS)
Burt FEINTUCH (Professor/Representative, Durham); Patricia M. GOFF (Ms.) (Department of Political Science, Wilfrid Laurier University, Waterloo)

Assembly of First Nations
Stuart WUTTKE (Acting Director, Environment, Ottawa)

Association internationale pour la promotion de l'enseignement et de la recherche en propriété intellectuelle (ATRIP)/International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)
François CURCHOD (représentant, Genolier)

Association internationale pour la protection de la propriété intellectuelle (AIPPI)/International Association for the Protection of Intellectual Property (AIPPI)
Konrad BECKER (Chairman, Q166: Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Basel)

Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI)
Victor NABHAN (président); Silke VON LEWINSKI (Mme) (Munich)

Association romande de la propriété intellectuelle (AROPI)
Alliana HEYMANN (Mme) (présidente de la Commission 'Droits internationaux de l'AROPI', Genève)

Bioresources Development and Conservation Programme (BDCPC)
Augustine Bantar NJAMNSHI (Ms.) (Executive Secretary, Yaoundé)

Call of the Earth
Rodrigo DE LA CRUZ (Delegado, Quito)

Centre d'études internationales de la propriété industrielle (CEIPI)/Centre for International Industrial Property Studies (CEIPI)
François CURCHOD (représentant, Genolier)

Center for International Environmental Law (CIEL)
Dalindyebo SHABALALA (Director, Protection of Intellectual Property and Sustainable Development, Geneva)

Centre for Research & Action on Developing Locales, Regions & the Environment (CRADLE)
Richard INGWE (Executive Director, Calabar); Judith OTU (Mrs.) (Member of the Board of Directors, Calabar)

Centre international pour le commerce et le développement durable (ICTSD)/International Centre for Trade and Sustainable Development (ICTSD)
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Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC)
Timothy ROBERTS (Rapporteur, Intellectual Property Commission, Paris)

Conseil international des musées/International Council of Museums (ICOM)
Piet J.M. POUW (Interim Secretary General, Paris)

Consejo Indio de Sud América (CISA)
Tomás CONDORI (Representante)

Federación Folklorica Departamental de La Paz
Freddy Yana COARITE (Presidente, La Paz); Nemesio ORTIZ HUANCA (Fiscal General, La Paz); Alejandro CHIPANA YAHUITA (Coordinador General, La Paz)

Fédération ibéro-latino-américaine des artistes interprètes ou exécutants (FILAIE)/Ibero-Latin-American Federation of Performers (FILAIE)
Luis COBOS (Presidente, Madrid); José Luis SEVILLANO (Director General, Madrid); Miguel PÉREZ SOLIS (Asesor y Experto Jurídico, Madrid); Carlos LÓPEZ SÁNCHEZ (Asesor Jurídico, Madrid); Paloma LÓPEZ PELÁEZ (Sra.) (Madrid)

Fédération internationale de l'industrie du médicament (FIIM)/International Federation of Pharmaceutical Manufacturers Associations (IFPMA)
Eric NOEHRENBERG (Director, Trade, Geneva); Madeleine ERIKSSON (Ms.) (Policy Analyst, Geneva); Alain AUMONIER (Geneva)

Fédération internationale des associations de bibliothécaires et des bibliothèques (FIAB)/International Federation of Library Associations and Institutions (IFLA)
Winston TABB (Chair, Committee on Copyright and Other Legal Matters, Baltimore)

Indigenous Peoples Council on Biocolonialism (IPCB)
Le'a Malia KANEHE (Ms.) (Legal Analyst, Nixon); Debra HARRY (Ms.) (Executive Director, Nixon); Ronald BARNES (Nixon)

Indigenous People (Bethechilokono) of Saint Lucia Governing Council (BGC)
Albert DeTERVILLE (Principal Leader, Executive Chairperson, Castries)

International Intellectual Property Institute (IIPI)
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Indigenous Peoples' Center for Documentation, Research and Information (DoCip)
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Kanuri Development Association
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Knowledge Ecology International (KEI)
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Library Copyright Alliance (LCA)
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Max Planck Institute for Intellectual Property, Competition and Tax Law
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Musa Usman NDAMBA (Vice National President, Indigenous Knowledge, Bamenda);
Biro DIAWARA (Geneva)

Music In Common
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Pauktuutit Inuit Women of Canada
Phillip BIRD (Senior Advisor, Ottawa)

Policy and Legislation on Biodiversity (PLEBIO)
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Rural Women Environmental Protection Association (RWEPA)
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Mattias ÅHRÉN (Head, Human Rights Unit, Utsjoki)

Sudanese Association for Archiving Knowledge (SUDAAK)
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Third World Network (TWN)
Elpidio PERIA (Associate, General Santos City)

Traditions pour Demain/Traditions for Tomorrow
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Union mondiale pour la nature (UICN)/The World Conservation Union (IUCN)
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World Trade Institute
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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

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