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

Thirteenth Session
Geneva, October October 13 to 17, 2008

REPORT

Document prepared by the Secretariat

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INTRODUCTION

1. Convened by the Director General of WIPO in accordance with the decision of the WIPO General Assembly at its thirty-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 thirteenth session in Geneva, from October 13 to 18, 2008.

2. The following States were represented: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Cameroon, Canada, Chile, China, Colombia, Cuba, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jamaica, Japan, Kenya, Kyrgyzstan, Lebanon, Lesotho, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Mauritius, Mexico, Monaco, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Samoa, Saudi Arabia, Senegal, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Viet Nam, Zambia and Zimbabwe (95). The European Commission was also represented as a member of the Committee.

3. The following intergovernmental organizations ('IGOs') took part as observers: United Nations (UN), 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), South Centre, United Nations Conference on Trade and Development (CNUCED), United Nations Environment Programme (UNEP), United Nations University, Institute of Advanced Studies (UNU-IAS), World Health Organization (WHO) and the World Trade Organization (WTO) (12).

4. Representatives of the following non-governmental organizations ('NGOs') took part as observers: Assembly of First Nations (AFN); Berne Declaration; Bioresources Development and Conservation Programme (BDCPC); Centre for Documentation, Research and Information of Indigenous Peoples (doCip); Centre for Indigenous Cultures; Centre for International Environmental Law (CIEL); Centre for International Industrial Property Studies (CEIPI); Civil Society Coalition (CSC); Coordination of African Human Rights NGOs (CONGAF); Creators'Rights Alliance (CRA); CropLife International; El-Molo Eco-Tourism, Rights and Development Forum; Foundation for Aboriginal and Islander Research Action (FAIRA); Friends World Committee for Consultation (FWCC); Ethio-Africa Diaspora Union Millenium Council; Exchange and Cooperation Centre for Latin America (ECCLA); Hokotehi Moriori Trust; Ibero-Latin-American Federation of Performers (FILAIE); Indian Council of South America (CISA); Indian Movement "Tupaj Amaru"; International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP); Indigenous Peoples (Bethechilokono) of Saint Lucia Governing Council (BCG); *Institut du développement durable et des relations internationales (IDDRI)*; *Instituto Indígena Brasilero da Propriedade Intelectual (InBraPi)*; International Association for the Protection of Intellectual Property (AIPPI); International Centre for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International

Committee for the Indians of the Americas (INCOMINDIOS); International Council of Museums (ICOM); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Trademark Association (INTA); Inuuit Circumpolar Council (ICC); IP Justice; Knowledge Ecology International (KEI); L'auravetl'an Information and Education Network of Indigenous Peoples (LIENIP); Library Copyright Alliance (LDA); Maasai Association; Mamacila Apo Ginopakan Higaonon Tribal Council Inc.; Max Planck-Institute for Intellectual Property, Competition and Tax Law; Mbororo Social Cultural Development Association (MBOSCUDA); Métis National Council (MNC); Music in Common; Nainyoie Community Development Organization (NCDO); New England Conservatory of Music (NEC); Nigeria Natural Medicine Development Agency (NNMDA); Norwegian Council for Traditional Music and Traditional Dance (Rff-Sentret); Ogiek Peoples Development Program (OPDP); Queen Mary Intellectual Property Research Institute (QMIPRI); Research Group on Culture Property (RGCP); Russian Association of Indigenous Peoples of the North (RAIPON); Saami Council; Traditions for Tomorrow; World Conservation Union (IUCN); Tulalip Tribes of Washington Governmental Affairs Department; West Africa Coalition for Indigenous Peoples' Rights (WACIPR); World Self-Medication Industry (WSMI) (55).

5. A list of participants is annexed to this report.

6. Document WIPO/GRTKF/IC/13/INF/2 provided an overview of the working documents distributed for the thirteenth 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, Director General of WIPO. Mr. Antony Taubman of WIPO was Secretary to the thirteenth session of the Committee.

9. The Delegation of Germany, on behalf of Group B, stated that the gap analyses, as working documents, allowed the Committee to continue its work as agreed in its last session in February 2008. Group B very much appreciated the possibility for delegations and observers to discuss these documents and to submit comments. The Group looked forward at this session to have technical discussions to better understand the complex interplay between IP and GRs. As WIPO's newly-elected Director General had pointed out in his inaugural speech, the globalizing economy and advances in communication technologies had exposed the special vulnerabilities of indigenous peoples and traditional communities to the unfair use of their TK/TCE systems. The gap analyses were a helpful contribution to tackle these problems as they brought into sharper focus some key questions concerning the discussion on TK and TCEs, for instance, the question of objectives for protection. The gap analyses would certainly help to maintain the momentum of the Director General's remarks to make

substantive progress and finally come to concrete results endorsed by all Members of the Committee. Group B emphasized its readiness to participate constructively in this process. It reiterated its support for further work towards the development of options for the protection of TK and TCEs. Group B also reiterated that contracting parties needed to have flexibility to implement protection of TK and TCEs in a manner appropriate to their particular circumstances. Group B looked forward to continuing and deepening the discussion on the issues covered by the analyses as well as fundamental issues, such as definitions and objectives, with a view towards enriching a common understanding on these complex questions. Group B reminded the Committee of the agreement reached in the last session that, at the present and subsequent sessions, the discussion on all three substantive items within the Committee's mandate should be held in depth and that the time allotted to each item should be balanced. To that end, the Group suggested that, at subsequent sessions, the Committee rotated the agenda, allowing for each of the three substantive items to be discussed first. Group B reaffirmed its strong commitment to the work of the Committee and looked forward to continued substantial discussions.

10. The Delegation of Algeria, on behalf of the African Group, reaffirmed the importance that it attached to the protection of GRs, TK and TCEs, which were all important intellectual expressions of cultural identity and heritage, and were also a source of economic development and social well-being. The agricultural, ecological and medicinal TK of indigenous and local communities helped to meet their nutritional and health needs and contributed to the protection of the biodiversity of their natural environments. With that in mind, many African countries had enacted laws containing *sui generis* measures to protect the rights of holders of traditional, cultural and scientific resources against biopiracy, misappropriation and misuse. However, despite an increase in such defensive measures at the national level, their effect remained limited, especially outside of the countries, where national laws were not applicable. For that reason, the African Group considered that only the adoption of a binding international legal instrument could provide effective protection for the rights of indigenous communities and contribute to achieving the UN Millennium Development Goals, especially those relating to the fight against poverty, food security, health and sustainable development. Such an instrument, which would recognize the intellectual and cultural contribution of indigenous and local communities to the common knowledge of humanity, should be founded on the principles of disclosure of the origin of GR and resulting TK, prior informed consent from the local communities, and the equitable sharing of financial and non-financial benefits. Since the Committee's first session in 2001, numerous studies and documents had been produced by the Secretariat and, although such studies had facilitated exchanges of views and thorough reflection on suitable ways and means of protecting the rights of indigenous communities, the Committee should focus on its mandate to produce tangible results and conclude one or more legal instruments that would prevent all forms of misappropriation of GRs, TK and TCEs. The African Group urged Member States to demonstrate further commitment during the Committee's future deliberations. Progress depended on stakeholders' political will to move beyond general discussions and to draw up the substantive provisions of the instrument in question. The renewal of the Committee's mandate for 2008–2009 should be used as an opportunity to speed up the Committee's work and to make substantial progress. In his acceptance speech to the WIPO General Assemblies in September 2008 following his appointment, the Director General had stated that it was time to move the process of discussion and negotiation on the protection of TK and TCEs to concrete outcomes. The African Group looked forward to witnessing the most resolute commitment and to receiving his support for the Committee's work in concluding a multilateral treaty that would meet the aspirations of indigenous, local and traditional communities of the Member States. The African Group was in favor of holding inter-sessional meetings and was committed to

contributing in a positive and constructive manner to the negotiation process under way. Since the Committee's twelfth session in February 2008, the African Group had held two meetings to define the short-, medium- and long-term strategies for protecting GR, TK and TCEs. Those meetings had led to a proposal, which formed part of working document WIPO/GRTKF/IC/13/9, which was to be examined by the Committee, along with document WIPO/GRTKF/IC/13/10, which contained the terms of reference for the Committee's inter-sessional work. The African Group welcomed the successful launch of the WIPO Voluntary Fund, which allowed increased participation of indigenous and local community representatives and help Member States to find appropriate solutions to their problems. It thanked the sponsors for their contributions and encouraged other potential donors to support the Fund.

11. The Delegation of Cuba, speaking on behalf of GRULAC, said that it was crucial that efforts were focused on granting adequate international protection for genetic resources, traditional knowledge and traditional cultural expressions/expressions of folklore, which were of considerable economic importance and were a means of preserving the cultural heritage of developing countries. There certainly remained much work to be done. Measures aimed at taking into account the international dimension of these issues were required, without affecting the work carried out in other fora. The Committee should not exclude any outcome in relation to this work, including the drafting of an international instrument. With regard to the differences that existed, the Group was aware of the importance of proper coordination and cooperation between WIPO, as a United Nations specialized agency, and other international organizations for the purpose of dealing with the issues which were being considered by this Committee. GRULAC highlighted the right of indigenous peoples to maintain, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. GRULAC was willing to work and cooperate with other Member States, with the representatives of indigenous peoples and with all stakeholders to achieve concrete results at this thirteenth session. Furthermore, it encouraged new initiatives which were ensuring the participation of the representatives of indigenous and local communities in the work of this Committee. The gap analysis documents on the protection of traditional cultural expressions (WIPO/GRTKF/IC/13/4(b)) and traditional knowledge (WIPO/GRTKF/IC/13/5(b)) were of particular interest.

12. The Delegation of Pakistan, on behalf of the Asian Group, hoped that the Committee would make concrete progress towards tangible results including the possible development of an effective international instrument for the protection of GR, TK and TCEs. The Group noted with satisfaction that the new Director General was well versed with the needs, challenges and complexities of the effective protection of GR, TK and TCEs and was confident that there would be a fresh impetus and momentum in the work of the Committee. The importance of the issues under discussion at the Committee could not be over-emphasized. Gaps and complexities in appropriate protection of GR, TK and TCEs negatively impacted the possible moral and economic rights of a large number of holders of GR, TK and TCEs, particularly of traditional and indigenous communities. The Group looked forward to progress in the work of the Committee with a view that no outcome of this work was excluded, including the possible development of an international instrument or instruments within a definite time frame agreed by the Member States. As desired by the Member States during the last session of the Committee, the Secretariat had produced the gap analyses documents on TK and TCEs. These two documents (WIPO/GRTKF/IC/13(4)(b) and WIPO/GRTKF/IC/13(5)(b)) outlined the existing obligations, provisions and possibilities for protection at the international level, identified existing gaps in the protection of TK and TCEs at the international level, highlighted considerations relevant to determining whether these

gaps needed to be filled and presented possible options to address these gaps, including legal and other options. The Group hoped that these documents would positively contribute in taking the discussion towards its logical conclusion. The identified gaps could be categorized into three broad categories: (1) norm setting gaps, gaps in the existing international law through which misappropriation of TK and TCEs continued; (2) interpretation gaps, gaps in the interpretation of existing legal instruments for effective protection of TK and TCEs; and, (3) practical or implementation gaps, gaps and availability of specific implementation tools, such as databases and international data classification. Each of these categories of gaps needed an appropriate and synchronized policy response. There was not only a need to consider the establishment of new protection norms where they did not exist but also a need to consider effectively utilizing the existing norms to their maximum potential and modifying them to address the gaps for the effective protection of GR, TK and TCEs. Regarding the protection of GR the Group looked forward to making progress on the issue in line with the mandate of the Committee. The Group appreciated WIPO's cooperation with other relevant organizations and looked forward to further cooperation in this regard. Recalling the 2005 joint ministerial statement of the new Asian-African strategic partnership plan of action highlighting the need for concrete and practical measures for the protection of GR, TK and TCEs, the Asian Group supported, in principle, the African Group's proposal to hold inter-sessional expert meetings to take the work of the Committee forward in a concrete manner. In this regard, the Group would like to hear more details about the composition and mandate of these expert groups and the list of issues to be discussed.

13. The Delegation of Romania, on behalf of the Regional Group of Central European and Baltic States saw the current session as an opportunity for achieving a duel task: (1) continuing the work undertaken so far in terms of clarifying the essential concepts and the objectives to be achieved in the Committee; and, (2) finding the appropriate means that could help maximize the value of the debate. The new documents provided by the Secretariat, namely the draft gap analyses on the protection of TK and TCEs, as well as documents prepared in the past, were extremely valuable tools. They laid out, in a structured, objective and clear manner, the main issues that needed to be tackled before jumping to any conclusion in relation to the outcomes of the endeavors. The Committee had already given evidence of WIPO's potential in terms of the new subjects of protection that were covered by the Committtee's mandate. Now this potential had to be realised, by pursuing the work based on a pragmatic and efficient approach. More focus and avoiding futile repetitions would certainly contribute to advancing the work. A balance should be achieved in respect of the time allocated to the three substantive items on the agenda of the meeting, which would allow for a comparable progress in relation to all of them. The Group remained committed to a productive and satisfactory session.

14. The Delegation of Bangladesh, on behalf of the Group of Least Developed Countries, stated that the gap analyses might not be perfect or comprehensive, but clearly, a lot of work had gone into them and a number of significant gaps had been identified, including the gaps in the international legal protection for the holders of TK and TCEs. Possible corrective measures had also been suggested. GR, TK and TCEs were important to the LDCs in their efforts to promote economic development, protect their cultural heritage and generate livelihoods, especially through the promotion of small and medium enterprises. LDC Delegations remained concerned that the Committee had not made much headway towards the objective sought collectively. After years of deliberations, there was a felt need for taking up concrete outcomes. The LDCs would be participating in the discussions on the various issues on the agenda, including the gap analyses. The discussions on the gaps in legal protection should logically lead to the examination of binding legal instruments or

instruments on TK and TCEs within an agreed timeframe. LDCs looked forward to such concrete outcomes before the end of the current mandate of the Committee. The LDCs delegations were encouraged by the positive remarks of the new Director General on the need to move towards tangible outcomes. His active role in this area would facilitate such outcomes. While the work for finding the best normative framework to provide protection at the international level continued in the Committee, the WIPO Secretariat should provide more assistance to the LDCs in specific areas to address their needs, especially for the development or strengthening of relevant national institutions, enhancing the capacity of these institutions and formulating national legislation to protect TK and TCEs against misappropriation. For example, LDCs were looking forward to the publication of two WIPO reports to catalogue the entire range of TK and TCEs of Senegal and Bangladesh. To their knowledge, this was a first-ever attempt to catalogue the TK and TCEs to be found in the countries. They hoped that WIPO would do similar studies for other LDCs. These studies would let the LDCs know what resources they had, because only then could they take measures, or seek assistance, if necessary, from WIPO in order to utilize IP tools for protecting these resources and benefiting from them for their economic and social development. The LDCs remained in touch with the Secretariat to identify concrete undertakings in the areas of TK and TCEs that could be beneficial to them. Concerning the way forward, the LDCs supported the African Group proposal for inter-sessional expert meetings between the Committee's sessions. The LDCs highlighted the need for the provision of financial resources to facilitate the effective participation of the LDCs in such inter-sessional meetings and hoped that this matter would be appropriately addressed.

15. The Delegation of Peru noted that it was not a coincidence that the Committee was the first meeting that the Director General was participating in as Director General. Indeed, he had contributed greatly to the work of the Committee, he was committed to its work and the work that was ahead and, as he had clearly said when he took up his functions as Director General, the need to have a specific outcome after so many years working on this matter in the Committee. The work the Secretariat had carried out in producing the gap analyses documents was fairly positive. These documents would enable the Committee to find common ground and be able to make progress in the work. It was important to underscore that it would be good to separately deal with the three issues in the Committee and make progress where progress could be made. Those were TK and TCEs, the two aspects in which most progress could be made or had been made. There were a number of basic documents that would enable the Committee to make progress in an in-depth fashion without putting aside the progress that could be made with regard to GR. Peru supported the holding of inter-sessional meetings as long as they were geared towards speeding up the work in accordance with the mandate of the Committee. It was also important that they helped the development of a multilateral instrument and that the local and indigenous communities felt protected and that they could use IP without fear as they sought to ensure their development. The African proposal, as far as Peru understood it, sought to focus the work of the Committee through the creation of a group of experts, which would meet between the sessions. The proposal was, in principle, a positive proposal, which in all likelihood would have to be refined, but was an important proposal to make progress between the sessions and to achieve a final and concrete result before the General Assembly of next year when the mandate of the Committee ended.

16. The Delegation of Tunisia supported the statement of the Delegation of Algeria on behalf of the African Group. The wealth and abundance of the contributions and ideas which had been submitted by the Secretariat, the Member States and other stakeholders, which had been accumulated since the creation of the Committee, were supposed to help towards a more

focused and precise objective. The variety and diversity of the experiences, viewpoints and impressive volume of literature which had stemmed from all this work had to be gone through. One could not think that a common objective could be agreed upon without previous mutual understanding of each and everyone's fears and expectations. Now the time was ripe for a move into this second phase during which the efforts were focused to try and find consensuses that were agreed and which met a minimum of expectations. In this spirit, Tunisia wished to see the Committee speed up its work in accordance with its mandate and sharing the determination of the Member States to take a decision on the setting up of mechanisms that worked in the inter-sessional period. In this spirit, the African Group had submitted to the Committee a practical and pragmatic proposal whereby there would be a setting up of a certain number of groups of experts that each group would be in charge of discussing or considering one or more substantive issues. Draft terms of references had been made available to the Committee. This proposal from the African Group was in fact a response to the desire of the Member States to focus on substantive issues or, as had been said elsewhere, to come up with constructive stage-by-stage discussions or having a targeted and sustained discussion on the many complicated issues to make progress for the future. All these Member States' requests had been made in the same spirit as the proposal made by the African Group and the proposal would like to meet those objectives. Within the Committee, there were points of convergence between the Member States. All what was needed to be done was to spend some time in seeking those convergences. Mutual understanding and openness remained pre-requisites to be successful in that endeavor.

17. The Delegation of Thailand aligned itself with the statement by the Delegation of Pakistan, on behalf of the Asian Group. From the very beginning, Thailand had strongly advocated the need for an international instrument to protect GR, TK and TCEs, with a view to preserving its rich cultural heritage and to protect them against misuse and misappropriation. This issue remained of much importance to it as well as to most developing countries. Success in the Committee would not only help developing countries make use of IP for development, but would also enhance the current IP system for the mutual benefit of both developed and developing countries alike. Unfortunately, the progress of the Committee had been disappointingly slow despite lengthy series of discussions over the past seven years. Although it was optimistic about reaching a successful outcome, it was realistic enough to realize that much more work remained to be done to bridge the diverse range of views among Member States. Therefore, each country had to do its part in this endeavor to some kind of political declaration to inject a stronger degree of commitment into the process and lay out a roadmap for the future deliberations. It could serve as a building block to achieve the ultimate goal. In that spirit, the Delegation thanked the Secretariat for conducting the gap analyses on the protection of TCEs and TK. Thailand had already submitted specific comments to the Secretariat and hoped they were useful. However, it had to be recognized that, while the gap analyses provided some valuable information, they were not an end in itself. While their conclusions were useful in highlighting the gaps in the current IP system, it was more important to solve the puzzle of how to fill those gaps. The solutions might involve coming up with specific legislation on this issue, separately from other IP laws, as well as improving the current IP system. In thinking about the way forward, Thailand welcomed the African Group's approach to identify areas of convergence and divergence derived from the factual extractions. Such an approach would move the Committee closer to a consensus and would guide the path towards more tangible outcomes. Any new international instruments would have to reflect the effective core measures, such as mandatory disclosure of origin, prior informed consent, and fair and equitable benefit-sharing. In addition to effective international protection, efforts had also to be undertaken at the national level. Therefore, Thailand called on WIPO to render much needed technical assistance and capacity building to Member States

in need so as to develop an effective database on TK and TCEs. GR was an equally significant issue. WIPO, as the lead agency on IP, could contribute constructively to the ongoing negotiations on the international regime on ABS within the CBD. WIPO would need to pay closer attention to the cross-cutting nature of issues the Committee was dealing with. The principle of ABS, for example, related directly to the negotiations in other organizations, such as WTO, WHO, CBD and FAO. Over the course of this week, Thailand hoped to reach agreement on a mechanism for inter-sessional consultations to help facilitate the work of the Committee. Without seeking to replicate a regular session of the Committee, such a mechanism should be tasked with specific responsibilities to address some of the main issues. This included, but was not limited to, definitions, objectives of protection, exceptions, limitations and duration, prior informed consent, moral rights, beneficiaries and other options for protection. Thailand reiterated the urgency and the importance in addressing this matter. Thailand also stood ready to work in making progress in the Committee.

18. The Delegation of Egypt quoted the opening speech of the Director General that the protection of TK and TCEs was one of the fields identified as a means of broadening IP to make it more responsive to developing countries. The Delegation was confident in the intention of the Director General to enhance the efforts made by WIPO to support Member States in attaining their goal. Egypt fully endorsed the statement made by the Delegation of Algeria on behalf of the African Group and recalled the efforts made by the African Group, and, more particularly, the proposals submitted to the present meeting, in order to move forward with the process. For many decades, the TK and TCEs of some countries had been the object of illicit exploitation by foreign third parties. In recent years, such phenomenon had grown in form and frequency to the extent that it became a major concern for most developing countries and peoples, who, in their capacity as the original owners of their TK, should be entitled, solely, to dispose of such knowledge, in a manner that would preserve their rights from illicit exploitation and piracy. The Delegation underlined the role of IP-protected GR, TK and TCEs in the economic and social development of peoples and communities, as recognized by the international community. Over the past years, discussions undertaken throughout the various sessions of the Committee had revealed gaps in the existing international IP system, which failed to provide efficient protection for a significant part of human creativity reflected in TK and TCEs, and ensured the necessary harmony in existing international instruments on access to and fair use of GR. Overcoming those gaps was at the very core of WIPO's mission to promote IP protection at the international level, in a non-discriminatory manner that ensured balance among national interests of all countries. The Delegation reiterated the need for an international binding instrument or instruments for the protection of GR, TK and TCEs, stating that, if IP were to become a truly efficient and democratic tool for development, at the service of all, time was ripe for making tangible progress in that direction. Appreciation was expressed for the Voluntary Fund that guaranteed continuous participation by representatives of indigenous communities in the meetings of the Committee. The Delegation reiterated the need expressed as early as the first session of the Committee in 2001, to provide working documents of the Committee in the Arabic language, and requested the Secretariat to inform on the necessary steps to be taken to that effect.

19. The Delegation of Indonesia aligned itself with the statement made by the Delegation Pakistan, on behalf of the Asian Group. Indonesia considered that the development of an international legally binding instrument or instruments was a vital element to protect as well as promote TK and the respect of established indigenous traditions and intangible cultural heritage. Indonesia had taken note of the progress achieved so far. Nevertheless, the process was rather slow. Indonesia was now expecting a more productive process and concrete

outcomes at this session of the Committee, particularly, to have an international legally binding instrument or instruments by the end of this decade. Indonesia reaffirmed the Asian Group's endorsement on the African Group proposal to hold inter-sessional expert meetings on specific issues. It also acknowledged the proposal submitted by the African Group, which considered the factual extractions under the ten issues on TK and TCEs as a main instrument to expedite the establishment of a desired international legally binding instrument or instruments. In this regard, the Group had presented "a way forward" which enabled a converging of divergences among Members on the ten issues. Therefore, Indonesia recalled the Jubilee Anniversary of the Asian-African Conference in Indonesia in 2005 where more than 100 Heads of States/Governments had endorsed, through the Joint Ministerial Statement of the New Asian-African Strategic Partnership Plan of Action, adopted in Jakarta, Indonesia on April 20, 2005, on the importance of the protection of GR, TK and TCEs. They had specifically stressed the need to take concrete and practical measures to maximize the benefits arising from IP protection by advancing the protection of GR, TK and TCEs. Furthermore, in June 2007, the Asian-African countries had already adopted the Bandung Declaration on the Protection of GR, TK and TCEs. In line with the Declaration, the Asian-African countries reiterated that there were urgent needs to take measures to prevent all forms of misuse, distortion, and misappropriation of GR, TK and TCEs. The Asian-African countries also wished to expedite the establishment of internationally legally binding instruments, including *sui generis* mechanisms. Any issues relating to the gap analyses and the pertinent amendments and additions thereof should be resolved during this session of the Committee. It was also important not to disregard the ten issues on TK and TCEs, which had been extracted since the eleventh session of the Committee in order to expedite the establishment of a desired international legally binding instrument or instruments. Indonesia reaffirmed its commitment to the efforts aimed at the establishment of an international legally binding instrument or instruments in coping with the protection of GR, TK and TCEs as a whole. Indonesia continued to support the mandate of the Committee that it might attain these objectives.

20. The Delegation of China was pleased to see that with the active participation of and contribution by Member States, WIPO had done a significant amount of work on the IP protection of GR, TK and TCEs. It thanked the Secretariat for the meaningful gap analyses. The Delegation was convinced that the documents would help Member States better understand the mission and objectives of the Committee, and would become a good basis for further in-depth discussions on the relevant issues. China had taken an active part in the deliberations at all previous sessions of the Committee, and had contributed its own share of efforts in advancing the process of such debates. It pledged its commitment to continuously supporting the Committee in carrying out its work and to actively involving itself in the deliberations on the relevant issues. China 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 TCEs, which would lead to concrete and substantial results, so as to better address the concerns and needs of all countries, especially those of developing ones.

21. The Delegation of Mexico expressed its support for the view that the Committee should forge ahead with its work in line with the overall objective of ensuring effective protection for traditional knowledge, traditional cultural expressions/expressions of folklore and genetic resources. It was high time to take advantage of the impetus of this new mandate to initiate substantive discussions and negotiations within the Committee. Both the issues and the Committee itself had matured enough to initiate this process. This was reflected in particular in the documents which had been circulated by WIPO and which contained agreements

reached at the Committee's previous meetings. Traditional knowledge, expressions of folklore and genetic resources had to be protected effectively at both national and international levels, taking into account the free, prior and informed consent of the holders of such knowledge and resources. To achieve this objective, it was necessary to work constructively by finding compromises and solutions and formulating proposals which allowed a consensus to be reached on the adoption of international instruments in these areas. The Committee should start building models for the creation of databases under the conditions defined in this process. However, with regard to undisclosed knowledge, it was important to create the necessary mechanisms to safeguard the integrity and confidentiality of the information and to ensure that the disclosure of information between the authorities responsible for granting intellectual property rights and those authorizing access to genetic resources took place as part of systems which allowed the fair and equitable sharing of benefits derived from genetic resources. Mexico urged the Committee's Member States to explore ways of achieving information exchange between such authorities with a view to attaining the third objective of the Convention on Biological Diversity (CBD) concerning the fair distribution of the benefits derived from access to genetic resources. The Government of Mexico, mindful of the Committee's mandate under which States had been asked to consult their indigenous and local peoples and communities with a view to modifying or creating *sui generis* systems for protecting both their traditional cultural expressions/expressions of folklore and their traditional knowledge, had initiated the first phase of indigenous consultation on these issues in Mexico. This had allowed the collection of first-hand information on how the people who were consulted defined traditional knowledge, the importance of such knowledge for them, who were the holders of such knowledge within the peoples and communities, the condition that it was in, the threats that it faced, the ways in which it was being preserved by the indigenous peoples and communities, and their opinion on possible means of protecting it in international and national law. The Committee should take advantage of and draw on the experiences and discussions of other bodies such as the Ad-Hoc Open-Ended Inter-Sessional Working Group on Access and Benefit-Sharing and the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the CBD, UNDP, FAO, WHO, UNESCO, as well as the broad negotiation process that had led to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, which included in Article 31 the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, among other aspects. Furthermore, it was important to continue listening to non-governmental organizations, academic experts and indigenous organizations that worked in areas relating to the Committee's work, bearing in mind the United Nations Declaration on the Rights of Indigenous Peoples. Mexico referred to the Palenque Charter, adopted during the "Meeting of indigenous peoples convened to heal Mother Earth", held in the city of Palenque, Chiapas, Mexico, from March 10 to 13, 2008, which was a message from the indigenous peoples of Canada, the United States and Mexico to the world at large, asking it to look after the Earth's natural resources and health for the sake of sharing such knowledge.

22. The Delegation of the Republic of Korea complimented the endeavors and achievements of the Committee. Particularly, the gap analysis on TCEs suggested concrete and tangible options that the Member States could consider. It would be an excellent foundation for future discussion on TCEs. Measures for the protection of GR,TK and TCEs should be in conformity with existing IP system. Otherwise, the protection of GR, TK and TCEs might create conflicts with existing systems and result in numerous legal disputes. Thorough analysis and discussion on the existing obligations, provisions and possibilities for the protection of GR,TK and TCEs were inevitable and prerequisite to the possible establishment of new norms for their protection. The Republic of Korea highlighted the

importance of the policy considerations suggested in the gap analysis. The Committee should discuss not only the interest of indigenous and other traditional communities but also other policy considerations, such as preservation of the public domain and freedom of expression, which had enormous implications to the intellectual and creative activities of all human beings. More IP expert-based discussion would be helpful in exploring the possible options for the protection of GR, TK and TCEs within the existing IP system and determining whether new norms needed to be developed. The Committee could make substantial progress in this regard.

23. The Delegation of South Africa supported the statement made by the Delegation of Algeria, on behalf of the African Group. It should be accepted that the protection of indigenous knowledge systems was a key objective for developing countries. Discussions in the Committee had continued for almost eight years and although closer to achieving the objective to protect its GR, TK and TCEs, the political will was still lacking. South Africa, together with China, Brazil, India, Mexico and the G8, had established the Heiligendamm Dialogue Process, where the question of protecting indigenous knowledge systems was a key agenda item. An important principle underlying this dialogue was the recognition that it would be difficult to continue justifying the economic value of IP protection to developing countries unless they benefited materially from the system. At its recent WIPO General Assembly in September 2008, the Director General had indicated his commitment to development issues including the protection of GR, TK and TCEs. South Africa was indeed encouraged by his words that it was time to move this process to concrete outcomes. South Africa urged the newly elected Director General to guide the negotiations to a long awaited internationally legally binding instrument(s). South Africa, together with the African Group and other developing countries, continued to demonstrate within the WTO, CBD and other international fora dealing with this issue, a consistent support for the negotiations on a legally binding international framework. South Africa had participated in two inter-sessional meetings of the African Union to define clear medium- and long-term strategies and related activities on the future work beyond the thirteenth session of the Committee. The second of the two inter-sessional meetings had been hosted by South Africa and held in July 2008 in Durban where African experts had worked together to enhance the African Group document, which was submitted to the Committee at its twelfth session. The document had been circulated by the WIPO Secretariat as working document WIPO/GRTKF/IC/13/9 entitled "African Group Proposal on the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources". The objective of the African Group document was to consolidate the various documents, including the "factual extractions" and "gap analyses" under the list of ten issues, which were still under discussion. It was within this context that South Africa implored Member States to consider this document as a basis for further discussions within the spirit of the mandate of the Committee as intended when first agreed upon in 2002. The Secretariat's gap analyses were thorough analyses of the challenges facing the discussions in the Committee. The gap analyses, however, revealed a very wide range of uncertainties. To make progress, consensus had to be achieved at the basic level, on concepts and goals. It was for this reason, South Africa supported the proposed inter-sessional work as highlighted by the WIPO Secretariat's "gap analyses" and as proposed by the African Group at the twelfth session of the Committee. In view of this proposal, South Africa was of the position that expert groups be established to meet inter-sessionally to discuss certain issues, to generate recommendations, which the Committee might agree on.

24. The Delegation of El Salvador supported the statement made by the Delegation of Cuba on behalf of GRULAC. With the renewed mandate, the Committee would be continuing with its very important work. At the February 2008 session, new and very positive ideas had

emerged. Their purpose was to make the work of the Committee more flexible and help it to move on to more specific stages. El Salvador supported the proposal made by the African Group, because the purpose of that would also be to expedite the work being done by the Committee. El Salvador emphasized the need for financing to be provided so that developing country Members could participate fully in these very important discussions and negotiations. Also experts and technical people dealing with these issues should have their participation financed.

25. The Delegation of Chile supported the statement made by the Delegation of Cuba on behalf of GRULAC. The gap analyses were an excellent distillation of what the Committee had done in its previous twelve sessions. Chile supported inter-sessional work of the Committee. The main objective of this meeting should be to agree on the terms of reference and modalities for such work. That would be better than discussing details of the documents. After all, the documents were going to be useful for the discussion to agree on the program. At the previous session, Chile had emphasized equal time being made available for discussion of each of the three topics. However, this should not be taken to mean that necessarily results needed to be achieved on all the three issues, nor should it mean that the results achieved should be achieved simultaneously. The issues should not be looked at as a package but each issue on its merits. When subjects were brought together it was sometimes difficult to separate them but doing so might be useful in this case. Chile was studying the proposal made by the African Group, welcomed any fresh view on the work of the Committee and would like some more detailed information on the proposal. Chile wished there to be a communication with the working group that presumably would be made up of government officials and thought that that was normal for any working group.

26. The Delegation of Canada associated itself with the statement made by the Delegation of Germany on behalf of Group B. A federal election was taking place in Canada on October 14, 2008. As there were certain limitations placed on government activities during a general election process, Canada had not been in a position to submit written comments on the gap analyses on TK and TCEs nor on the list of options for pursuing the work on GR. Nevertheless, Canada was looking forward to engaging with other Member States and accredited observers at this session on all three pillars of the Committee's mandate and was considering sending written submissions on the aforementioned documents in the near future. Canada welcomed, as mentioned by the newly-elected Director General in his acceptance speech, the establishment of a Division in the Secretariat that would focus on the specific contribution that IP and WIPO could make within the framework of collective action to address global challenges. As the Committee tackled cross-cutting issues, this new Division could be useful in increasing collaboration and exchange of information between WIPO and other organizations also addressing GR, TK and TCEs but from different perspectives and mandates, including the CBD, WTO, UNESCO and FAO. It was time for the Committee to move the process to concrete outcomes. To that end, the Committee needed to focus the debate and structure the discussions in a way that would better enable the Committee to make tangible progress. It was time, at this session, to consider setting a critical path to advance the work of the Committee on all three substantive items in a pragmatic and step-by-step manner. Canada looked forward to engaging with all Member States and accredited observers during this session.

27. The Delegation of Morocco said that the draft gap analyses would help the Committee make substantive progress. WIPO should continue to work on getting these documents translated into Arabic. Translation into Arabic was essential for Morocco to be able to work properly and the gap analyses documents, in particular, needed to be translated into Arabic.

Morocco supported the statement made by the Delegation of Algeria, on behalf of the African Group. The African Group had been very active in the Committee. It had always taken initiatives and put proposals on the table to help the Committee's work move forward. Morocco reiterated that it attached very particular and considerable importance to GR, TK and TCEs. These things were important economically, culturally and financially and they had an impact on the social economic and cultural development of local and indigenous communities. They also had an impact on right holders. Since the beginning of the work in the Committee a great deal had been done, but the Committee unfortunately had not managed to reach any shared, common denominators. Quite a bit had been achieved and a great deal of knowledge had been accumulated particularly with respect to GR, TK and TCEs. That was welcomed, but now the Committee needed to move forward and come up with some real tangible practical solutions. GR, TK and TCEs were subject to misappropriation, illicit use and abuse. This proved that local and indigenous communities had to be involved in the work being done in the Committee. If that situation were to be changed for the better, a better share of the benefits, which stemmed from the use of such resources and knowledge, was needed. National laws and legislations were sometimes inadequate. For this reason, an international instrument was needed. The extension of the mandate of the Committee would and should help to achieve this objective. Morocco appreciated the initiative taken to establish a Voluntary Fund. Morocco assured its full support and cooperation. It would do all it could to help to move the Committee's work to fruitful results.

28. The Delegation of Guatemala supported the general statement made by the Delegation of Cuba on behalf of GRULAC. The documents prepared by the WIPO Secretariat for this session of the Committee gave a very clear and detailed picture of the discussions which had been held thus far and the ideas which had been put on the table in the course of the Committee's work over the years. The documents constituted a major and important foundation, which would enable the Committee to achieve specific results in the ongoing discussions and negotiations. As the Director General had said, a specific tangible resource would be the appropriate response to the phenomenon of globalization and its impact and technological developments, which had exposed the special vulnerability of indigenous and local communities, because they had led to the unfair and unjust appropriation and abuse of their TCEs and TK. Guatemala was aware specific results had to be achieved. The Committee had, as the mandate stipulated, to expedite the work. One way of doing that, without sacrificing the quality of the work done, would be to have inter-sessional meetings. Some countries had already put forward ideas in this respect and Guatemala supported those. Another major contribution to improve and enhance the work of the Committee was the establishment of the Voluntary Fund. Guatemala was grateful to those who had made donations to the fund. There were some Guatemalan indigenous peoples representatives in the Committee, for example, and both the Delegation and they trusted that their voice would be heard now properly in the Committee. Guatemala was grateful for WIPO's support to it and, particularly, WIPO's Creative Heritage Project which would be of great help in establishing a cultural heritage registry in Guatemala taking IP issues into account. That initiative would help to inform its society about these issues and help it to improve recognition of and protection for TK and TCEs. Guatemala would be pleased to help move the Committee towards rapid and tangible results.

29. The Delegation of Oman supported the statement of the Delegation of Pakistan on behalf of the Asian Group. The Delegation reiterated the importance of developing an international instrument which would serve to offer protection to GR, TK and TCEs. These three resources constituted pillars of the economies of especially developing countries. The gap analyses, in particular, would help to expedite the work being done in the Committee.

Oman would like to now lay down the principles which it hoped would be the constituent parts of an international instrument. Oman thanked the Director General for attaching such a high level of importance to these three issues. In his acceptance speech as incoming Director General, he had made a very good point that it was high time to make substantial, specific and visible progress. It was rather regrettable that the documents for this session were not translated into Arabic. That put Arabic speaking countries, including Oman, at a disadvantage. In this regard, Oman supported the statement made by the Delegation of Egypt and of Morocco.

30. The Delegation of the Islamic Republic of Iran supported the statement made by the Delegation of Pakistan on behalf of the Asian Group and by the Delegation of Algeria on behalf of the African Group. It was noteworthy to recall the Committee had done substantive work on GR, TK and TCEs, which were of vital importance to many developing countries. More concrete steps had been taken during the early sessions. However, progress was in decline. Preparatory work had been done by the WIPO fact finding experts in 1998. But the current goal was to reach an effective mechanism to protect the holder of GR, TK and TCEs through a comprehensive and fully binding international instrument or instruments.

31. The Delegation of Sudan endorsed the statement made by the Delegation of Algeria on behalf of the African Group and by the Delegation of Bangladesh on behalf of LDCs. Importance was attached to providing legal protection for traditional creations as a means for communities and holders of such creations to commercialize traditional products reflecting their cultural identity, and maintaining TK systems for the benefit of all. Any use of TK for industrial or commercial purposes should be subject to recognition of the role and contribution of the holders of such knowledge. The WIPO fact-finding missions had identified the needs and expectations of TK holders in terms of IP protection. Regional consultations organized by WIPO had confirmed the need for an efficient international system for the protection of TK. While lacking the technological basis, developing countries, including LDCs, became increasingly aware of the valuable GR and TK they possessed, and called for an IP system to protect and ensure fair sharing of such assets. Reference was made to the opening speech of the Director General, in which he said that WIPO had undertaken a long process of discussion and negotiation on the protection of indigenous and local communities, and that he believed it was time to move the process to concrete outcomes that would see WIPO embrace a broader base of constituents and a more universal mission. The Delegation confirmed its full readiness to actively participate in the Committee with a view to achieving such concrete outcomes.

32. The Delegation of Ecuador was committed to providing its cooperation and collaboration to fulfill the objectives of the Committee. It supported the statement made by the Delegation of Cuba, on behalf of GRULAC, and granted particular importance to the work of the Committee with a view to developing a *sui generis* protection system for GR, TK and TCEs. In the light of all this, Ecuador considered that great efforts had to be made to fill the gaps that existed with regard to the elements that could be part of a binding international regime. To this extent, Ecuador hoped that this possible tool would meet the hopes and expectations of indigenous peoples in protecting their TK and TCEs. On September 28, 2008, Ecuador had taken great steps towards achieving the aims. It had adopted a new constitution, which enshrined significant achievements in the area of TK and TCEs. In this constitution, Ecuador had used the elements developed by the Committee and also used the UN Declaration on the Rights of Indigenous Peoples. The new constitution in Ecuador established recognition by the State of the collective rights of indigenous and local communities, and gave them the right to maintain, protect and develop their collective and

ancestral knowledge and their science and technologies. The Delegation provided further details on the constitution, as well as efforts that Ecuador was making to adopt a protection framework for TK and TCEs through a direct consultation process with indigenous and local communities. The results of these studies had been shared with the Secretariat of WIPO. Ecuador highlighted the success of the Latin American workshop on GR, TK and IP, which had taken place in Ecuador in July 2008 with the cooperation of WIPO. The outcome of this seminar had been very useful in helping Ecuador to develop its legislation in the region in that field.

33. The Delegation of Malaysia hoped that the gap analyses would be a useful parameter for in-depth discussions by all Member States so that a conclusive international norm on GR, TK and TCEs would materialize before the current mandate of the Committee came to an end. Useful discussions had highlighted the Committee's convergence and divergence on these issues. Consensus had to be reached so as to facilitate some incremental development in the work of the Committee. For this purpose, Malaysia supported the suggestion made by the African Group that an inter-sessional session be held to expedite this deliberation for the facilitation of a conclusive and definite outcome that would benefit all Member States.

34. The Delegation of Japan attached importance to the issues of GR, TK and TCEs. As far as the issues of TCEs and TK were concerned, however, Japan was of the view that discussions during this session should be deepened from a more fundamental point of view. A common understanding of fundamental issues, such as targeted subjects or objects and definition of terms, had yet to be shared among Member States. Therefore, steady development of the discussions on those fundamental issues was indispensable. To deepen the common understanding of those fundamental issues, Members had been discussing a list of issues, and Japan had been actively taking part in these discussions. For this session, a new approach of gap analyses had been proposed. These analyses were a significant process for deepening understanding. However, some fundamental issues were not sufficiently addressed in this analyses. Therefore, it was advisable that Members States should seek a common understanding of the fundamental issues, even when the Committee adopted this new approach at this session. In this context, Japan highly valued a constructive and steady deliberation on the three issues, which were equally important to Japan. The Delegation, therefore, requested that sufficient time be allocated to GR. Japan had been pointing out that the issue of the misappropriation of GR should be dealt with from the following two aspects: (1) erroneously granted patents, and (2) CBD compliance related to benefit-sharing and prior informed consent. In this regard, with a view to preventing erroneously granted patents, Japan had introduced a proposal for an one-click database, which was gaining more understanding and interest from Member States. In the course of the discussion under agenda item 10, Japan intended to touch upon its thoughts on a possible direction to develop such a database. While issues relating to GR. TK and TCEs had been taken up in various fora, the Delegation believed that WIPO, as a specialized UN agency in the field of IP, could take advantage of its expertise and respond to various Members States' expectations concerning GR, TK and TCE issues, in accordance with its mandate. Japan continued to be committed to constructively contribute to the discussions in this session.

35. The Delegation of the United States of America fully associated itself with the statement made by the Delegation of Germany on behalf of Group B. This session of the Committee, the first WIPO meeting under the tenure of the Director General, presented important opportunities. In his acceptance speech at the General Assembly in September, the Director General had drawn appropriate attention to the special vulnerabilities and great contributions to human society of indigenous and traditional communities. The Director

General had furthermore appropriately encouraged Members of the Committeee, at the opening of the panel of indigenous and local communities, to seek common ground. In this spirit, the United States had come prepared to engage constructively on the complex issues before the Committee. At this session, the United States believed that the Committee was well prepared to engage in the kind of sustained substantive discussion needed to find such common ground, which the United States believed was a critical and necessary first step to advancing the work of the Committee. At the Committee's last session, Members States had requested the Secretariat to prepare two working documents describing, respectively, the existing obligations, provisions and possibilities, at the international level for the protection of GR, TK and TCEs and to identify any gaps in the international framework and related considerations and to describe options to address any identified gaps. The United States believed that the resulting documents expertly prepared by the Secretariat were important tools that would help facilitate the discussions, in particular, by cataloguing and describing the various options the Secretariat had prepared the way for the Committee to make progress. The United States also thanked the Secretariat for reissuing the list of options for continuing the work on GR along with the useful factual update on international developments in this area of the Committee's work. As noted in the statement of Group B and interventions of other delegations, the United States continued to believe that a rich, robust and balanced discussion of all three issues under the Committee's mandate was necessary to advance its work. The United States looked forward to a full and productive week of discussions.

36. The Delegation of Nigeria stated that one obvious outcome from the gap analyses prepared by the Secretariat for this session, was the urgent need to find a suitable mechanism to address the growing exploitation of these resources to the economic and cultural detriment of the holders. While appreciating the progress that had been made so far, particularly in the areas of TCEs and TK, discussions should be progressed to the development of concrete outcomes. While appreciating the many positive and constructive interventions made by many delegations, the movement towards a consensus was still slow. Nigeria supported the statement made by the Delegation of Algeria on behalf of the African Group. Nigeria wished to see a legally binding instrument as a logical outcome of this process. As well captured in document WIPO/GRTKF/IC/13/9, the best case scenario would be the development of a legally binding international instrument for the protection of GR, TK and TCEs. However, in the spirit of consensus building, Nigeria was prepared to engage positively in considering other means of achieving the desired protection, including the possibility of having the three issues considered separately without losing sight of the overarching issues. Nigeria supported a holistic approach to the work, which would take cognizance of: the (i) revised objectives and principles, which had been developed earlier in the course of the Committee's work; (ii) the comments received on the list of issues, which had been formulated by the Member States at the tenth session; and, (iii) the outcome of the gap analyses, which were now before the Committee. By far the most critical concern of the knowledge holders, which they had been unwavering since the WIPO fact finding mission in 1998, was the need to provide them with appropriate, effective and efficient mechanisms against unauthorized exploitation, misappropriation and abuse of GR, TK and TCEs. Nigeria welcomed and supported the proposal put forward by the African Group and believed that it presented a concise and practical basis for advancing the work of the Committee. The Group had always demonstrated that it was receptive to all shades of views and was prepared to proffer solutions at every point. The Committee needed to move beyond mere identification of issues as it had done with the list of issues and now with the gap analyses. The work of the Committee had slowed down considerably since the eighth session and it was to the credit of Member States that they had managed to keep the process going. However, it was time for the Committee to make some real and measurable progress. As a commitment gesture, the African Group had

put forward proposals. Nigeria supported these proposals and joined other delegations in urging the Committee to seriously consider the options, particularly, the possibility of using expert groups in inter-sessionals to narrow the issues under consideration and accelerate the work of the Committee. The clusters of issues, as proposed, were open to further discussions and more constructive suggestions should help the Committee achieve the desired outcomes. The Committee needed to be refocused. The proposals set out in document WIPO/GRTKF/IC/13/10 were certainly a positive, constructive and achievable way to structure the future work of the Committee and a practical step to ensure that the Committee was able to report some outcomes to the next General Assembly. It should be noted that various African countries and sub-regional organizations were exploring mechanisms for dealing with the concerns of TCEs and TK holders. The role of the African Union in complementing these efforts also confirmed the political will on the continent to find a credible and effective protection for these holders. Any mechanism that did not effectively address the concerns of knowledge holders and the gaps articulated in the gap analyses would hardly be satisfactory. While supporting the separate but equal treatment of the three issues on the agenda, Nigeria hoped that enough time would be available for quality discussions on the future work of the Committee so as to avoid the pressures that always seemed to come upon delegations at the end of every session. The discussions at this session should primarily focus on concrete outcomes.

37. The Delegation of Brazil stated that GR, TK and TCEs were highly important for developing countries, and in particular, for the countries in Latin America and the Caribbean region. The General Assembly had renewed the mandate of the Committee in 2008 and had requested that Member States search for greater coherence and convergence on their views. The Director General, when he had accepted his mandate, had highlighted the need to search for tangible results and therefore the need for the Committee to look for common ground. Brazil agreed with this objective and knew that this was a huge challenge for the Committee. Brazil considered that the documents that had been distributed for this session were a strong foundation for the Committee to carry out this task. The Committee needed to look for progress on different issues for achieving substantive results. In other words, the debate needed to be balanced and given the progress that had been made in each of these different fields, the Committee should give a detailed look to the terms of reference of the suggested inter-sessional mechanism in order for the activities carried out to be as effective as possible. These terms of reference needed to be clear with regards to the activities assigned to the Secretariat and the modalities needed to be decided on so that additional resources were provided to all delegations.

38. The Delegation of Switzerland associated itself with the statement made by the Delegation of Germany on behalf of Group B. Switzerland had always maintained that these issues should be addressed by competent international fora, such as the Committee. All three items on the agenda of the Committee were on an equal footing. These three items should thus all receive the proper attention they deserved. It was important that the Committee continued to collaborate with other relevant international fora, including the CBD, FAO, WTO and UPOV, and provide substantive and substantial input to the work in these fora. Additionally, each of these fora worked within its mandate and legal and technical competence. The two gap analyses on TK and TCEs were of value for the Committee’s discussions.

39. The Delegation of Norway associated itself with the statement made by the Delegation of Germany on behalf of Group B and reiterated its support and willingness to make substantial headway in achieving tangible resources in whatever form results could be

achieved. A traditional Norse expression that was appropriate to the work of the Committee was “one should not let the best stand in the way of the good”.

40. The Delegation of New Zealand noted that the work of the Committee had intensified as it delved more deeply into the substantive issues that had been raised by the Member States and accredited observers. The draft gap analyses on the protection of TK and TCEs were useful in defining the policy issues that existed at the interface between existing IP laws and the protection of TK and TCEs; and in identifying potential options. New Zealand would refer to the draft gap analyses in oral interventions and wished to submit written comments shortly after this session. Further steps would now be required, in light of the gaps and issues that had been identified, to determine a process through which the Committee could prioritize and focus its work in a constructive manner that would provide clarity and assist the Committee in assessing if, and where, there was convergence of views. New Zealand reiterated the importance to assess progress and reach consensus as the Committee continued in-depth analysis and consideration on the issues. It was apparent that, given the scope of the issues that had been identified and defined, and the volume of the documents currently in discussion, the Committee now needed to determine priorities and establish a structure for future work. This should be based on the policy gaps, priorities, and concerns that had been identified to date by Member States and accredited observers. New Zealand welcomed efforts by the Committee to establish processes and other possible initiatives, whether they be inter-sessional or in the course of the sessions, to continue to build on the progress achieved so far on the technical work of the Committee on the three substantive agenda items, in a balanced, structured and focused manner. New Zealand continued to support consideration of the range of options that had been identified and/or proposed and it also supported a “from the ground up” approach to the policy analysis and development that was required. This involved the development of a series of options, which could be tested and adapted to national and local circumstances, cognizant of the needs and priorities of indigenous and local communities. Some Member States and accredited observers had expressed a sense of urgency regarding the need to foster more respectful and equitable practices by users of TK and TCEs beyond their cultural context. This objective was important and required initiatives to guide and encourage users of TK and TCEs to adopt more respectful and equitable behaviors. New Zealand’s experience indicated that a good number of businesses, designers, and artists, who wished to use TK and TCEs, whether it be to promote their business, to innovate, or to incorporate them in their own artistic and literary works, wanted to do the right thing. Very often they were aware that there were sensitivities and issues to consider. They often did not know what those sensitivities and considerations were, or which process to undertake to seek advice and authorization from the indigenous and local communities. New Zealand reiterated that it was also open to exploring the development of guidelines, recommendations, and best practices, along the same lines as the recommendations for recognition of TK in the patent system (document WIPO/GRTKF/IC/13/7) that had been developed for patent offices. These types of initiatives were useful as part of a robust policy development process and could actively encourage change in stakeholder behaviors, when such changes were needed in order to achieve identified policy objectives. New Zealand would find similarly useful guidelines and process maps for policy makers who were committed to developing measures to address issues associated with the protection of TK and TCEs at the local, national and regional levels. For example, based on the Pacific Regional Framework, Ms Anne Haira had constructed a set of guidelines and a road map for policy developers in the Pacific region. These had been published in November 2006 and promoted by the Secretariat of the Pacific Community and subsequently by the Pacific Island Forum Secretariat that had now taken up this area of work. Tools such as these could assist in addressing the need for capacity-building at the local, national and regional levels that had

also been expressed by a number of Member States and accredited observers. Guidelines, recommendations, and best practices could be agreed upon by Member States and promoted both internationally by WIPO and domestically by Member States. New Zealand welcomed comments from Member States and accredited observers on whether and how these potential options could fit within the future work program of the Committee. There had been mention by the Director General of the proposal by several Member States of the potential creation of working groups or some sort of inter-sessional bodies. Perhaps these could be assigned the task of developing these tools. New Zealand looked forward to this week's discussions and anticipated progress in achieving effective resolution of these important issues.

41. The Delegation of Kenya associated itself with the statement made by Delegation of Algeria on behalf of the African Group and fully supported the proposals expressed therein. Kenya had hoped that the work of Committee would lead to an international legally binding instrument, something that developing countries had consistently sought after. Kenya also saw this instrument as an important milestone towards addressing the needs, desires and expectations of its local and indigenous communities. Kenya was making good progress in the development of policies and laws for the protection, management and regulation of GR, TK and TCEs. Such policies and laws afforded protection from misappropriation of these resources with the result that its 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 its policy formulation process. The Committee had come a long way in discussions but tangible results had been evasive. Kenya therefore urged Member States to work expeditiously towards a favorable conclusion of the issues before it. The outcome of these discussions would impact on the livelihood of a vast number of people, particularly, in developing countries. Kenya noted the importance the Director General attached to the work of the Committee and expressed confidence in his ability to steer the process forward.

42. The Delegation of Zimbabwe fully endorsed the statement made by the Delegation of Algeria on behalf of the African Group. Its statement reflected the aspirations and desires of Zimbabwe and the African Group at large. Since 2003, Zimbabwe witnessed with agony the slow pace in the negotiation and conclusion of this process. In an attempt to speed up the process, after consultations, both in Switzerland and Durban, the African Group had tabled a proposal which should merit the consideration of its partners. Zimbabwe stood ready to work in improving it. Zimbabwe had listened to statements of the various regional groups and countries and was pleased to note that there was a growing consensus on the need to address the three elements. Whilst there might be divergence on the modalities to achieve this, this should not, in any way, stop the progress for reaching a successful outcome. African countries remained marginalized in numerous areas, be it trade, economics, social, politics and even on IP issues. In this regard, Zimbabwe fully supported the proposal for the creation of a legally binding instrument to protect the small countries from continuous exploitation of their indigenous GR, TK and TCEs. It was no secret that people in Africa had been and would continue to be victim of misappropriation and piracy of their indigenous GR, TK and TCEs. A number of countries had put in place legislations to protect their indigenous knowledge. Their efforts would be put to waste if these instruments were not augmented by an international legally binding instrument. Zimbabwe noted that the creation of such instrument was not an end in itself, but would go a long way in ameliorating its plights. The issue of TK and GR was not only an issue of preserving its GR, TK and TCEs, but also had a development dimension for the benefit of its indigenous and local peoples. The African Group proposal presented the most pragmatic approach for resolving this issue if all were serious in finding a solution during this session. As was said by the Director General, it was

now time to come up with tangible results. Those in the legal circles would tell us that justice delayed was justice denied. A further delay in this process was denying African countries their right to fully benefit, either financially or non-financially, from the exploitation of indigenous GR, TK and TCEs. Zimbabwe therefore called upon the Committee to treat this matter with the urgency it deserved.

43. The Delegation of Trinidad and Tobago associated itself with the statement made by the Delegation of Cuba on behalf of GRULAC. The work of the Committee was very important to Trinidad and Tobago as a developing country in the Caribbean and more importantly, a country that was rich in traditional medicines, practices and customs. The Delegation looked forward to discussions on proposals that addressed the misappropriation of GR, TK and TCEs, particularly, in the context of the patent system. Trinidad and Tobago was keen on the protection and preservation of TK for the self-sustenance of the relevant communities and the benefit of current and future generations. The Delegation looked forward to a productive week of discussions on the three agenda items and ultimately, the development of a treaty.

44. The Delegation of Zambia stated that the documents before the Committee were of exceptional quality. They might not highlight all the weaknesses, but they were a good basis to move forward. The focus should be on the way forward. By now, there should be an area of common ground. Firstly, there was a problem and, secondly, it was an international problem. In view of this, Zambia fully supported the position advanced by the Delegation of Algeria on behalf of the African Group that an internationally legally binding instrument was needed. The Delegation did not see how national legislation could resolve an international problem. To attempt to respond to the issues raised by some delegations, no one was saying it would be easy to come up with an agreement. But this should not stop the Member States. Further, as regarded concerns that the agreement might not solve everything, Zambia doubted whether there was any agreement in the world on a particular subject that addressed everything on that subject. The mere constitution of the Committee was an acknowledgement of the transnational nature of the problem. Therefore, to resort to the domestic legislation would throw into question the need for existence of the Committee in spite of the challenges.

45. The representative of the African Union Commission thanked the WIPO Secretariat, especially the Africa Bureau and the WIPO experts responsible for traditional knowledge and traditional cultural expressions for the support given to the African Group and to the African Union in connection with the workshop held the previous June aimed at strengthening the capacities of its experts and defining its approach in preparation for the work of this Committee. The African Union reaffirmed the importance of the issue of genetic resources, traditional knowledge and expressions of folklore and expressed support for the statement made by Algeria on behalf of the African Group. The African Union remained convinced that WIPO's welcome initiative to launch a debate on international policy and the development of legal instruments and practical mechanisms for the protection of traditional knowledge and traditional cultural expressions against their misappropriation and misuse as well as the aspects of intellectual property relating to access and the sharing of benefits arising from the use of genetic resources should be implemented rapidly in order to meet the expectations of African communities. Unchecked piracy threatened the promotion, creation and distribution of local cultural products in all countries of the world. Thus, concerted efforts were urgently required to encourage creativity and promote protection for works of the mind. The African Union urged the Committee to focus effectively on the substance and work together to find a consensus on substantive issues with a view to adopting relevant instruments offering better protection for traditional knowledge and expressions of folklore. The documents produced

and submitted by the African Group contributed to the perception and the implementation of the process within the Committee and the responses of the African Group to the ten issues indicated the path to follow for a successful outcome of the Committee's work with regard to traditional knowledge and folklore. As to genetic resources, the African Group's document formed a good basis for continuing the work within the Committee. The African Union urged members to support these proposals which could constitute an innovative, consensus-based approach which met the requirements of all stakeholders. The significant progress made by the African Intellectual Property Organization (OAPI) and the African Regional Intellectual Property Organization (ARIPO) could serve as examples. It was worth recalling that these two African regional intellectual property organizations had adopted legal instruments to protect expressions of folklore in their member countries. This notable progress should be encouraged and congratulated. The African Union welcomed the commitment made by the new Director General not to spare any effort to respond to the aspirations of the African Group and African populations concerning issues relating to the protection of intellectual property rights for the equitable sharing of genetic resources and increased protection for traditional knowledge and traditional cultural expressions. While assuring him of its support, the African Union urged WIPO Members to assist the new Director General in achieving this noble and vital objective for Africa. The continent had enormous potential in terms of biodiversity and a rich culture due to its centuries-old traditions. Where they had been codified, these traditions had demonstrated their real value for humanity, in particular for medicines and healing. Rational exploitation of all these resources and knowledge would considerably support development efforts in the continent and also the achievement of the Millennium Development Goals.

46. The representative of the Food and Agriculture Organization (FAO), speaking, also on behalf of the Secretariat of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture updated the Committee on recent developments and future activities of FAO's Commission on Genetic Resources for Food and Agriculture and on recent developments in the implementation of the International Treaty. The known genetic material in the global gene pool, which had been created through the Multilateral System (MLS) had just crossed one million accessions of plant genetic material. International, regional and national gene banks and Contracting Parties had specifically notified the Treaty Secretariat of this material as being included in the System, whereas in addition more material was already included in the System, by virtue of Article 11, of which the Secretariat did not yet have specific data or notifications. Developments in the implementation of the International Treaty since the last meeting of the Committee had been highly positive. This concerned progress with both pillars of the International Treaty, namely the MLS of ABS, with its SMTA, and the Funding Strategy of the Treaty. As announced at the last session of the Committee, a form letter for the notification of genetic material, that was included in the MLS, had been issued and Contracting Parties had now begun to notify the Treaty of material within their jurisdiction that was included in the MLS by virtue of Article 11 of the Treaty. An increasing number of Contracting Parties had now begun to notify material. For example, Germany had just notified 108,000 accessions of plant genetic material, which were included in the MLS. Namibia, the Netherlands and Zambia had also notified accessions. The second development in the Treaty's MLS concerned SMTA operations. At the present time, there were more than 600 transfers under SMTAs every single day within the System. As was the case with notification of included material, these were only those transfers of which the Secretariat was informed and in reality there were far more transfers taking place worldwide under SMTAs. As regarded the interfaces between these operations of the MLS and IP information systems, the Treaty Secretariat acknowledged the Symposium on Public Policy and Patent

Landscaping in the Life Sciences, held on April 7 and 8, 2008, on which WIPO and FAO cooperated, pursuant to a request of the Commission on Genetic Resources for Food and Agriculture, and subsequently a request from the Interim Committee of the International Treaty. The Symposium included a preliminary technical consultation on patent landscapes commissioned by FAO and WIPO, for close expert review, and a full peer review of the WIPO-FAO patent landscapes and review of future directions in using patent information mechanisms for policy makers in relation to plant GR. FAO acknowledged the draft patent landscapes, which WIPO had produced for the second Interim Committee of the Treaty and which the Interim Committee of the Treaty had found of significant use to the agricultural community. Consequently, WIPO might wish to provide a report to the Governing Body and consider the possibility of presenting such outcomes at the Third session of the Governing Body. The second pillar of the International Treaty was its Funding Strategy, which was implemented through a multi-tracked strategy and from multiple sources, and which included a Benefit-sharing Trust Fund. The Treaty Secretariat had informed the Committee at its last session of an initiative by Mr. Terje Riis-Johansen, the Minister of Agriculture and Food of Norway, 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 are sold in the Nordic country. It appeared that other Contracting Parties were currently equally considering to make contributions to the Benefit-sharing Trust Fund, and if it was so decided, the Funding Strategy of the Treaty might become operational in the near future. These recent developments indicated that the ABS mechanism of the Treaty was working and working well. For the first time, international access to GR and benefit-sharing thereof were being implemented in a transparent and integrated system from the level of international public law down to the level of individual transfers of genetic material and to the sharing of individual benefits resulting from individual products resulting from the use of GR. In further advancing the implementation of the Treaty, the Treaty Secretariat looked forward to continue the existing collaboration with the Committee in the future. The FAO Commission on Genetic Resources for Food and Agriculture was currently the only intergovernmental body specifically dealing with (1) the conservation and sustainable utilization of all GR for food and agriculture, as well as (2) the fair and equitable benefit-sharing derived from the use of GR for food and agriculture, for present and future generations. FAO had reported, at the last session of the Committtee (1) on the outcome of the Commission's eleventh regular session in 2007, (2) on first steps taken in the implementation of its new Multi-year Program of Work, in particular, with regard to ABS for GR for food and agriculture, and (3) on the outcomes of the International Technical Conference on Animal Genetic Resources for Food and Agriculture, held in September of last year: i.e. the Global Plan of Action for Animal Genetic Resources and the Interlaken Declaration. In the follow-up to these events, FAO was currently exploring the role of food and agriculture in existing ABS arrangements and policies, including in existing national laws and international policy processes. In addition, FAO was in the process of commissioning studies on the use and international exchange patterns in the field of GR for food and agriculture. These studies, which should become available during the first half of 2009, would hopefully inform the general debate and, in particular, the Commission's consideration of policies and arrangements for ABS for GR for food and agriculture, scheduled for the Commission's next Regular Session, which would be held from October 19 to 23, 2009. The Global Plan of Action for Animal Genetic Resources stated: "The historic contribution of indigenous and local communities to animal genetic diversity, and the knowledge systems that manage these resources, need to be recognized, and their continuity supported." The FAO Conference when endorsing the Global Plan of Action had stressed this important role of indigenous small-scale livestock keepers, particularly, in developing countries, as custodians of most of the world's animal GR for food and agriculture. It had explicitly requested the Commission on Genetic Resources for Food and Agriculture to

address this issue in a report on the implementation of the Global Plan of Action to the 2009 session of the FAO Conference. The report would first be reviewed at the fifth session of the Commission's Intergovernmental Technical Working Group on Animal Genetic Resources in January 2009 before being submitted to the FAO Conference. In the Committee, in the FAO Commission on Genetic Resources for Food and Agriculture, and in other related processes, such as the Ad Hoc Open-ended Working Group on Access and Benefit-sharing established under the CBD, the issues of ABS and IP were debated in the context of slightly different objectives, social and economic backgrounds. It was, of course, important that policies and instruments resulting from these processes were compatible and coherent. However, for the FAO, it was of utmost importance that they took into account the need to use as widely and wisely as possible GR for food and agriculture. Continued and sustainable utilization of GR for food and agriculture and also their continued exchange were fundamental to the conservation and improved use of these resources, to the preservation of genetic diversity and, thus, essential for long-term food security.

47. The representative of United Nations Conference on Trade and Development (UNCTAD) had commissioned some research which explored elements of an international regime for the recognition of national regulations on access to GR and TK. The purpose of such a regime would be to provide remedial measures in cases where misappropriation (with or without commercial intent) of GR and associated TK had been determined by the competent authority in the country where the resources or knowledge were accessed. The main features of the proposed international regime were as follows: a) it was essentially based on the broadly accepted notion of comity under international law and no extraterritorial application of a foreign law was provided for; b) it would be applicable to a signatory party when a patent involving claims over genetic materials and associated TK accessed in another signatory party had been applied for or granted; c) it would require a party to recognize a final determination made by a competent authority of the party where such resources and knowledge had been accessed in violation of the national law; d) there would be no requirement of substantive harmonization of national access or patent law; signatories would preserve latitude to design and implement their own legal approaches and regimes, in the framework of the international treaties on the matter; e) the proposed regime could be based on an independent international convention or a protocol to an existing one, such as the CBD. This paper, in sum, intended to make a contribution to the solution of an outstanding problem in the international arena: the misappropriation of GR and their associated TK. The proposed international regime would support, through a simple mechanism, the implementation of national measures adopted to curb such misappropriation, while respecting the sovereign rights of States over GR and the territoriality of patents.

48. The representative of the United Nations University (UNU) stated that its mandate was to undertake research and training on emerging issues for the UN system. An important focus of its work related to indigenous and local communities and thus the work of the Committee was of great interest to UNU. It had been working on a number of specific initiatives that complemented the work of the Committee. This included work on registries of TK, promoting research into the role of customary law in the protection of TK and more recently, work towards compiling an annotated collection of TK protocols. A development, at this moment, was the establishment of a UNU research center on TK on which UNU had reported at the ninth session and now reported on subsequent developments. Key aims of the UNU TK center were to support and promote indigenous leadership at the international level and provide a focal point for promoting research and training on issues regarding the retention, maintenance and promotion of TK. The center would support and strengthen research on TK, work on practical ways to address the threats to TK and could provide an additional platform

for indigenous people to provide their views to the UN processes, including WIPO. To demonstrate the types of contributions a UNU center could make, it had initiated a number of pilot activities. These activities, among other things, explored the links between TK and climate change, TK and water management, TK and marine management, and TK and international policy-making. These pilot activities were taking place in Australia, the Pacific, Asia and in key international arenas, such as the UN General Assembly. Details about UNU's activities could be found at www.unutki.org. As a result of these consultations, UNU had decided to explore the feasibility of establishing a decentralized institute that would be hosted at the Charles Darwin University, in Darwin, Australia. UNU was also exploring the possibility of additional nodes for this center in several neighboring developing countries. UNU had already received generous support from State and territory governments in Australia and was currently discussing with the Australian Federal Government over its political, legal and financial support and looked forward to a successful outcome of these discussions. UNU acknowledged the support and interest of all those who had contributed to its work so far on this initiative.

49. The representative of the Ethio-Africa Diaspora Union Millenium Council (EADUMC), provided brief background information on its organization and the Rastafari community in Jamaica. Over the years, Rastafari TCEs had been used by artists, the popular music and cultural tourism industries, which often caused moral and economic harm to the Rastafari community as they survived on their music, arts and handicrafts. The EADUMC supported the Committee in its efforts to finding solutions against the misappropriation of traditional cultures. It furthermore supported the African Group proposal to have inter-sessional meetings and believed that this process should lead to the development of a legally binding international instrument for the protection of GR, TK and TCEs. Lastly, it thanked the Secretariat for the gap analyses documents, which was considered timely.

50. The representative of the Arts Law Centre of Australia hoped there was a new and productive phase of the discussions leading to concrete products for the next Committee review by the WIPO General Assembly. The representative valued the Director General's support and leadership in the Committee and wished him the best in his new position.

51. The representative of Tupaj Amaru stressed that the Committee, which had been established more than eight years previously by a decision of the WIPO General Assembly with the mandate of drawing up a binding international instrument or instruments, had unfortunately not made any tangible progress because of the excessively large number of economic and political interests on the part of Member States. The representative said that the mandate or work of the Committee had an international dimension to draft standards, instruments and agreements on the protection of traditional knowledge, genetic resources and traditional cultural expressions. After eight years of consultation, general debate and rhetorical statements, the Member States should not continue to postpone the drafting of an international instrument or treaty that was coherent, precise and in line with international law. Over the years, there had been a confrontation between two groups: the countries from the North, which advocated simple and non-binding recommendations or guidelines and which had stalled the Committee's work, and the developing countries from the South, which held that there was an urgent need to draw up and adopt an international legal framework. The Western countries had supported Germany on behalf of Group B. In a globalized world that was in a permanent state of crisis, there was a need more than ever for an international legal framework containing a coherent, universal definition of traditional knowledge that was acceptable to the international community, as well as enforcement mechanisms designed to

give legal protection to indigenous peoples and communities, especially for intangible, sacred and secret traditional knowledge. Defining and harmonizing concepts and terms related not only with the preservation of cultural and biological diversity but also with political, ethical and legal issues in the areas of food and agriculture (GMOs), biological diversity and the environment, the use and misuse of the human genome (set of chromosomes making up a cell), innovation and regulation in the field of biotechnology, human rights and neo-liberal policies within sustainable development, was an essential part of the political will of States to create a means of legal support for the new international economic order. At a time when bioprospecting and biopiracy were assuming dramatic proportions in the plundering and misuse of traditional knowledge, it was disappointing to see the systematic opposition of rich countries to the harmonization and adoption of legal protection standards and their incoherent policies that continually asked for more time and greater flexibility so that their pharmaceutical and agro-industrial companies could carry on plundering the genetic heritage and traditional knowledge of ancestral peoples whose survival was in danger. The double standards of such policies revealed the lack of political will in the fight against biopiracy and organized crime at the national and international levels. It also revealed that intellectual property law was a western concept that left out indigenous rights and, through its nature and scope, did not recognize traditional knowledge holders as subjects of law and did not aim to protect the cultural heritage of ancestral civilizations, except as merchandise. The aim of establishing a guide for cataloguing traditional knowledge and genetic and biological resources would be open to real risks without the free and prior consent of aboriginal peoples and it would be impossible to translate the content of such a guide into the hundreds of indigenous languages. Cataloguing traditional knowledge and genetic resources, as proposed by many of the delegations, and putting such knowledge and resources in the public domain would violate the confidential nature of many of the intangible, sacred and secret elements of this living heritage that was passed down through the generations and which was made up of the memory of ancestors. Furthermore, putting indigenous knowledge into the public domain would accentuate the deterioration of cultural values, the misappropriation and misuse of the cultural values of indigenous communities by multinational companies, and consequently the destruction of the indigenous identity.

52. The representative of the Norwegian Council for Traditional Folk Music had studied the WIPO fact-finding missions report and noticed that the western cultures were not included in the report. It conveyed its fear that the western world might be seen as not having any TK or TCEs worth protecting. The European countrysides and the diaspora communities living in the cities still had valuable TCEs and these TCEs were faced with losing their visibility. The representative was therefore concerned whether European TCE holders had sufficient voice to be heard as many of them supported the view of the indigenous and local communities from other parts of the world.

53. The representative of the L'Auravetl'an Information and Education Network of Indigenous Peoples (LIENIP) called for the materials and documents of the Committee to be translated into Russian. It furthermore felt that the community-based organizations and government representatives in the Committee should work more closely together on the issues and be able to share knowledge. As indigenous peoples were prepared to pass their knowledge on from generation to generation, it was of the view that the Committee should develop mechanisms to ensure that the knowledge was transmitted in full respect with the respective indigenous community and in accordance to their customary laws. Indigenous peoples aimed to be on equal footing so that they could transmit their knowledge in an undistorted way for, not only, their own future economic benefit, but also, the environmental

and sustainable development of all civilizations. The indigenous peoples of the Altai Republic had enough experience and wisdom to manage their natural resources, which should not be used purely for economic purposes. Any accruing economic benefits could help the peoples to survive as a civilization and sustain their cultures and knowledge for the next generation. The Committee should therefore not be about giving some kind of benefits or advantages to indigenous peoples, but should rather focus on assisting indigenous peoples to transmit their knowledge in its full and undistorted form to future generations for the sustainability of their cultures and the peoples as the bearers of their cultures.

54. The representative of the Centrao de Culturas Indias del Perú (CHIRAPAC) provided a brief background information on its organization, which was established to ensure the transmission of the cultural heritage and knowledge of its peoples, as these were not being transmitted in the traditional way. Indigenous peoples considered it fundamental to be recognized as the creators and depositories of their various forms of cultural expressions and knowledge so that they could economically benefit from their creations and thereby improve their living conditions. Although progress was being made in this regard, many indigenous peoples still did not have access to information or documents, such as the gap analyses. The representative therefore believed that there was a need for an international legal protection system to ensure the use of and access to information and knowledge. There was also a need for an educational system that reflected the relationship between the pre-colonial generation and the new generation as many schoolbooks in many Latin American countries did not provide such information, which consequently led to the lack of pride and self-esteem among the indigenous peoples. The representative urged the Committee to find solutions to these challenges facing indigenous peoples.

55. The representative of the the Ibero-Latin American Federation of Performers (FILAIE) thought that the gap analysis documents outlined the various existing legal systems and provided for possible ways to granting effective protection to indigenous communities. The representative now wished to see the political will for developing such an instrument of protection. It referred to the WPPT, which protected the rights of performers of EoF. It therefore believed that folklore belonged to the same category as a literary or artistic work and required protection. As there were still many gaps, the representative supported the development of a binding international instrument that could respond to the global problem of misappropriation of indigenous people’s works and be sufficiently flexible in its national implementation. The representative was hopeful that a protection would come into effect soon.

56. The representative of CIEL reminded the Committee of the importance to find solutions against the cross border misappropriation problem of GR, TK and TCEs. It was of the view that there were many documents already available and studies carried out by WIPO, the UNPFII, CDB, WTO and in many academic settings. Any Member State wishing to establish a national system of protection for GR, TK and TCEs could make use of these materials. In addition, the UN Declaration on the Rights of Indigenous Peoples clearly indicated that States should ensure that indigenous peoples’ rights to their TK were protected at the national level. The Committee would therefore not need to replicate this work, but simply seek to complement it. Countries and communities could already use the IP system to protect certain elements of their TK. The mandate of the Committee focused on the international dimension. Nevertheless, the Committee was trying to solve issues related to: A) a national system of protection for GR, TK and TCEs that had (1) defined the subject matter, (2) defined the beneficiaries, and (3) a national definition of misappropriation that included prior informed consent; B) a taking of GR, TK and TCEs by a foreign national or legal person across an

international boundary without the consent of the holder and/or a contract. How would it be possible to ensure the discovery of such a taking, when the foreign misappropriator had crossed the international boundary? What information and mechanisms would be available to notify the relevant bodies of the different countries? How could holders from a country that provided protection enforce their rights in the country of residence/citizenship of the foreign natural or legal person? At present, there were no existing international rules that addressed this issue. The gap analysis documents were a useful addition to the pool of information and clearly laid out this problem. There already existed a strong and broadly supported proposal in the WTO TRIPs Council to amend the TRIPS Agreement to deal with misappropriation of GR and associated TK through the patent system. The Committee therefore needed to find a solution to address the broader misappropriation of GR, TK and TCEs through other mechanisms. CIEL believed that it was now time for the Committee to engage in the substance of the issues and supported, in principle, the African Group proposal (WIPO/GRTKF/IC/13/9) as it encompassed the key elements expressed by the Committee while outlining the areas of convergence and divergence. The representative noted the element of the proposal related tothe participation of indigenous experts, to be nominated by the WIPO Indigenous Caucus. It therefore asked Member States to provide financial support to ensure the participation of indigenous and local community experts, through the Voluntary Fund or the regular P&B. The representative looked forward to concrete actions that reflected Member States' avowals of willingness to move the mandate of the Committee forward and stand ready to provide information and assistance.

57. The representative of Tin-Hinane provided a brief background information on her organization and explained that, in the Sahel region of Africa, their medicinal, artistic and environmental traditions had been marginalized. The representative supported the establishment of appropriate legal instruments as well as the African Group proposal. She was however concerned about the perception African countries had on the indigenous communities in Africa. As the UN Declaration on the Rights of Indigenous Peoples had been adopted by the African Commission of Human Rights Committee, the representative wished to engage in discussions on these various issues with the African Group.

58. The representative of the Secretariat of the Convention of Biological Diversity (CBD) provided an update of ongoing activities under the framework of the CBD. The ninth meeting of the COP was held in Bonn, Germany, in May 2008, in which, a major effort was made to achieve the target for significantly reducingthe current rate of biodiversity loss by 2010, adopted by Heads of States at the World Summit on Sustainable Development in 2002. In particular, the finalization of the negotiations on the international regime on benefit sharing and access to GR for its adoption in October 2010 would be a major contribution to the full and effective implementation of the CBD and its three objectives. Developments in this regard would also be of particular importance to the Committee as well as those related to TK and technology transfer. With respect to benefit sharing and access to GR, the COP-9 Decision on ABS established a roadmap, in which three meetings of the Working Group on ABS, as the negotiating body of the international regime, would be held during the next biennium, for the finalization of the international regime by COP 10. The seventh meeting of the Working Group would be held in Paris, France, from April 2 to 8, 2009, whereas, the eighth meeting would be held at a venue to be confirmed, from November 9 to 15, 2008, coinciding with the sixth meeting of the Working Group on Article 8(j), and the ninth meeting would be held from March 18 to 24, 2009. Each meeting of the Working Group on ABS would consist of two days of informal consultations followed by seven consecutive working days. In addition, it was decided that three meetings of legal and technical experts would be held to inform the negotiation process on key substantive issues. These experts were to assist

the Working Group on ABS by providing legal and technical advice, including options and/or scenarios, where appropriate. The first expert group meeting would address concepts, terms, working definitions and sectoral approaches, to be held in Windhoek, Namibia, from December 2 to 5, 2008. The second expert group meeting would address compliance issues in the context of the international regime, to be held in Tokyo, Japan, from January 27 to 30, 2009, and the third would address issues related to TK associated with GR, to be held in India, from June 16 to 19, 2009. In addition to the adoption of a clear process for the finalization of the negotiations on the international regime, COP 9 also agreed on the basis for future negotiations. This text, annexed to decision IX/12, related to the objective, scope, nature and main components of the international regime. The international regime was then to be adopted at COP 10 in Nagoya, Japan, in October 2010. The representative, turning to TK relevant to biological diversity, stated that in light of the relationship between the work on TK and ABS, the COP had reiterated its invitation to the Working Group on Article 8 (j) to contribute to the negotiation of the international regime on ABS. Thus, the ad hoc open-ended Working Group on Article 8(j) and related provisions remained mandated to "to continue to collaborate and contribute to the fulfillment of the mandate of the Ad Hoc Open-ended Working Group on ABS by providing views on the elaboration and negotiation of the international regime on ABS relevant to TK, innovations and practices associated with GR and to the fair and equitable sharing of benefits arising from their utilization." (Decision IX./13_A paragraph 12). COP 9 also requested that the Executive Secretary collaborated with the UNFPII, UENSCO, and WIPO, to address the potential benefits and threats to the documentation of TK and make the results available to the Working Group on Article 8(j) and related provisions at its sixth meeting. The SCBD was also keen to collaborate with WIPO on the WIPO toolkit, which would address this subject and the request to the Working Group on Article 8(j) to develop a draft code of ethical conduct to promote respect for the cultural and intellectual heritage of indigenous and local communities and to submit them to the COP at its tenth meeting for its possible adoption. For the purpose of this code, "cultural and intellectual heritage" referred to the cultural heritage and IP of indigenous and local communities and was interpreted within the context of the CBD, as the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. With regard to the *sui generis* systems for the protection of TK, innovations and practices, the COP mandated the Working Group on Article 8 (j) to continue its work in this field and asked parties, governments, indigenous and local communities and relevant organizations to share experiences in the development, adoption or recognition of such systems, and to submit to the Executive Secretary concise case-studies and other experiences that underpinned the elements of *sui generis* systems relevant to the conservation and sustainable use of biodiversity contained in the note by the Executive Secretary on development of elements of *sui generis* systems for the protection of TK, innovations and practices (UNEP/CBD/WG8J/5/6), including means to ensure PIC and had requested the Executive Secretary to make the case-studies and experiences available through the TK Information Portal in the clearing-house mechanism of the CBD and other means. The decision thereby requested the Executive Secretary to update his note on the subject (UNEP/CBD/WG8J/5/6), for consideration by the Working Group on Article 8(j) and related provisions at its sixth meeting. Furthermore, COP 9 noted the clear linkage in many countries between effective *sui generis* systems as might be developed, adopted or recognized and the implementation of the ABS provisions and the need to prevent the misuse and misappropriation of TK, innovations and practices of indigenous and local communities (see decision V11/6 H). Some Parties suggested that *sui generis* systems might be a possible contribution to the protection of TK within the context of the international regime on ABS, whilst others suggested that the draft elements of a code of ethical conduct might be a useful contribution. However, some alluded to uninitiated tasks in the program of

work, but presently there was no consensus on these issues. With regard to the possible future directions of Article 8(j) and related provisions, including a multi-year program of work post-2010, COP 9 decided to start work on uninitiated tasks 7, 10 and 12 in which parties, Governments, indigenous and local communities, and other relevant organizations were invited to provide submissions on how to take these tasks forward, identifying the effective contribution of the Working Group on Article 8(j) and related provisions to ongoing work, in particular, concerning *sui generis* systems, the code of ethical conduct and the international regime on ABS, and requested the Executive Secretary to compile these views and make them available to the sixth meeting of the Working Group for its consideration. These tasks included: 7) the development of guidelines for developing mechanisms, legislation or other appropriate initiatives to ensure: (i) that indigenous and local communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge, innovations and practices; (ii) that private and public institutions interested in using such knowledge, practices and innovations obtain the prior informed approval of these communities; (iii) advancement in identifying the obligations of countries of origin, as well as parties and Governments where such knowledge, innovations and practices and the associated GR are used. 10) the development of standards and guidelines for the reporting and prevention of unlawful appropriation of TK and related GR. 12) the development of guidelines to assist parties and Governments in the development of legislation or other mechanisms, as appropriate, for implementing Article 8(j) and its related provisions (which could include *sui generis* systems), and definitions of relevant key terms and concepts in Article 8(j) and related provisions at international, regional and national levels, that recognize, safeguard and fully guarantee the rights of indigenous and local communities over their TK, innovations and practices. Finally, COP 10 also decided to initiate task 15 to facilitate the repatriation and recovery of TK relevant to biological diversity; and invited parties, Governments and international organizations, indigenous and local communities and other stakeholders to provide the Secretariat their views and requested the Executive Secretary to compile these views and make them available to the Working Group on Article 8(j) and related provisions at its sixth meeting for its consideration and the development of terms of reference in order to address this issue. Task 15) the Ad Hoc Working Group to develop guidelines that would facilitate repatriation of information, including cultural property, in accordance with Article 17, paragraph 2, of the CBD in order to facilitate the recovery of TK of biological diversity. Taking all this into account the COP 9 decided at its tenth meeting to conduct an in-depth review of the tasks in the program of work of Article 8(j) and related provisions with the purpose of continuing the work of the Working Group on Article 8(j), and placing greater focus on the interlinkages between the protection of TK, innovations and practices, the conservation and sustainable use of biological diversity and, the fair and equitable sharing of the benefits arising from the utilization of TK, innovations and practices. The work of the CBD on TK and the work of the Committee, therefore, continued to be highly complementary. With regard to technology transfer and cooperation, the representative recalled that a technical study on the role of IP had been prepared in cooperation with UNCTAD and WIPO. The study was considered by the COP at its ninth meeting in which it noted with appreciation the cooperation of UNCTAD and WIPO in preparing the study and, based on the proposals made, extended an invitation to relevant international organizations and initiatives, research institutions at all levels, and NGOs, to undertake further research on the role of IP in technology, such as: a) more in-depth analysis on new open-source-based modes of innovation, as well as other additional IP options; b) more empirical studies on the extent of use of patent data information in R&D in different sectors; c) further empirical analysis on the scope and extent of patent clustering on technologies and other associated biological materials that were necessary inputs to desired technology development processes, and on how prospective technology users in developing

countries coped with patent clustering; d) further examination by relevant international organizations on the overall trends in the application of flexibilities provided by the TRIPS. The study provided a review of the different impacts, and the associated benefits and costs, of IP that might arise during the different phases of technology transfer under the CBD, and identified potential options to increase synergy and overcome barriers to technology transfer and cooperation. A number of these options was included in the strategy for the practical implementation of the CBD program of work on technology transfer and scientific and technological cooperation, which was annexed to the COP decision on technology transfer. The strategy should serve as a preliminary basis for concrete activities by parties and international organizations. The representative thanked WIPO for its cooperation and hard work preparing this important study, and for the invitation to present the study at the WIPO symposium on patent landscaping and technology transfer under multilateral environmental agreements, which took place on August 26, 2008 in Geneva. The COP also took note of the progress made in enhancing the clearing-house mechanism of the CBD as a key mechanism in technology transfer and technological and scientific cooperation, including provision of information on patent registry systems, and requested the Executive Secretary to continue the work. The representative looked forward to continued cooperation with WIPO in the framework of the MoU between the two institutions in relation to this important area, and in the ongoing development of a PatentScope® search tool geared to the needs of the CBD. There were many areas of mutual interest in the work of the Committee and in the work of both organizations in general. The representative was confident that the deliberations at this thirteenth session would 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.

Indigenous panel presentations

59. In accordance with the decision of the Committee at its seventh session (WIPO/GRTK/IC/7/15, paragraph 63), the thirteenth session was preceded by a half-day panel of presentations, chaired by Mr. Albert Deterville, a representative of Indigenous People (Bethechilokono) of Saint Lucia Governing Council (BGC), and these presentations were made according to the program (WIPO/GRTKF/IC/13/INF/5). At the invitation of the Chair, the Chair of the Indigenous 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 Knowledge and Folklore addressed the issue of the indigenous and local community initiatives in protecting TK, TCEs and GR, and, in doing so, applying the practical lessons of community experience. The panel consisted of six representatives of indigenous peoples and local communities, namely, Ms. Cristiana Louwa, representative of the El-Molo Eco-Tourism, Rights and Development Forum, Mr. Arthuso Malo-Ay, representative of the Mamacila Apo Ginopakan Higoanon Tribal Council, Inc., Mr. Danil Mamyev, representative of the L'auravetl'an Information and Education Network of Indigenous Peoples (LIENIP), Ms. Ann Sintoyia Tome, representative of the Maasai Cultural Heritage Foundation (MCH), Mr. Greg Young-Ing, representative of the Creator's Rights Alliance, and, Mr. Mikhail Todyshev, representative of the Russian Association of Indigenous Peoples of the North. The panelists recounted the adoption of the UN Declaration on the Rights of Indigenous Peoples and its importance to the work of the Committee. The panelists focused on the importance and role of indigenous women in the protection and transmission of TK

within their communities. The panelists highlighted the inappropriate behaviour by some States and other non-state actors in denying indigenous peoples access to their sacred and cultural sites, resulting in the desecration of these sites, including rock art and petroglyphs. The panelists also focused on the effects of the misuse and misappropriation of indigenous peoples' artwork by non-indigenous entities on the rights holders. In the area of sustainable livelihoods, the panelists highlighted the effective use of TK by indigenous peoples in forecasting improved and acceptable levels of food production. The panelists were concerned about the implementation of the UN Declaration on the Rights of Indigenous Peoples for the peoples residing in countries that voted against the Declaration. The panelists requested the Secretariat to provide working documents in their common national languages."

Voluntary Fund for accredited indigenous and local communities

60. 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 GA in its 32nd session to create a Voluntary Fund to support the participation of indigenous and local communties' representatives. This Fund has now been formally established in line with the GA decision and was now successfully in operation. The Chair drew the attention of the Committee to the fact that recommendations on funding were not taken by WIPO, but by an independent Advisory Board whose members served 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, with past members being eligible.

61. The Secretariat , introduced documents WIPO/GRTK/IC/13/3 and WIPO/GRTKF/IC/13/INF/4, in which the first document provided a factual update on work done since the last session on the implementation of the Voluntary Fund. This document invited the Committee to take note of that implementation, to welcome the pledges and contributions made to the Voluntary Fund, to undertake the election of the Members of the Advisory Board of the Fund and to encourage the Committee and all interested entities to pledge or contribute to the Fund. The Secretariat added that the second document was an Information Note that was required by the rules of the Voluntary Fund. It set out in full details the financial balance of the Fund and the degree of support provided to the recommended beneficiaries.

62. The representative of the Indian Movement "Tupaj Amaru" recalled that during the last two years nominated candidates from his ranks had been investigating biopiracy and defending GR and TK against misappropriation by multinational corporations. He noted that the Advisory Board had not provided those candidates with a positive response and had been totally silent. He also noted that three candidates from the same country received funding. The representative insisted that geographical distribution be applied, so that all countries could have a chance, especially those countries, like Bolivia, Peru, Guatemala and Mexico, where the majority were indigenous peoples with strong traditions. He added that his organization had participated in UN gatherings during the past twenty-five years and contributed to the UN Declaration on the Rights of Indigenous Peoples. It never received financial support from the Voluntary Fund, which it thought this was due to a double standard treatment. The representative wondered how this method could have applied to a person who contributed intensively to the Committee and who came to Geneva to work. He noted that many claimed to be indigenous, in order to receive a grant and felt discriminated.

63. The Chair opened discussions on agenda item 8, the protection of TCEs, which was the first of the substantive items, and recalled the decisions taken by the Committee at its last session. He encouraged the Committee to concentrate on the aims and purposes of this item, taking into account the documents made available by the Secretariat for this session.

64. At the invitation of the Chair, the Secretariat, introduced documents WIPO/GRTKF/IC/13/4(a), WIPO/GRTKF/IC/13/4(b) Rev. (the "gap analysis") and WIPO/GRTKF/IC/13/6.

65. The Delegation of Germany, on behalf of Group B, considered WIPO/GRTKF/IC/13/4(b) Rev. an important contribution to the discussion of the Committee as it would help establishing a constructive dialogue among the Member States. Group B recognized the concerns expressed by indigenous and local communities with regards to their TCEs. Group B stressed that the draft gap analysis on TCEs showed that: i) a considerable number of the concerns raised by indigenous and local communities could already be addressed by existing international instruments; ii) the requests made by indigenous and local communities related to a wide variety of legal and policy areas of which a large number did not fall within the sphere of IP, but rather concerned the preservation and promotion of the intangible cultural heritage (ICH); and iii) many solutions could be found at the different levels, including the local, national, regional and international level. For these reasons, Group B considered that the exchange of views and experiences should continue in order to benefit from successful solutions at these levels. The Group believed that the Committee should continue its efforts to: i) agree on a working definition of TCEs; ii) clarify the scope of protectable TCEs; and, iii) identify the objectives sought. Since at this stage few systems had been implemented at the national level, Group B felt that it would be inappropriate to consider a potential solution only at the international level. Lastly, Group B considered that the draft gap analysis pointed that a single solution comprehensively resolving all issues relating to the protection of TCEs would be very hard to develop and implement. Group B looked forward to further consideration of the full range of options, including options at the local, national, regional and international level. Furthermore, it noted the importance of capacity-building initiative at all levels and emphasized its readiness to participate constructively in this process.

66. The Delegation of Romania, on behalf of the Group of Central European and Baltic States, believed that the protection of TCEs would require a comprehensive definition of TCEs, which would clearly set out the distinctive features of the works that could qualify as TCEs. The Group therefore expected the Committee to carry out further work, with a view to attaining the necessary legal certainty in this respect. On the substantive matters, such as the decision to be made on beneficiaries, the Group considered this to be a challenging but essential task to carry out. With regards to the objectives, the Group felt that more efforts were needed to reach a definite understanding on what the Committee wished to aim at. In the Group's view, that would facilitate the debate on the means to address the gaps identified in relation to the protection of TCE holders' interests. Lastly, the Delegation stated that the Group was willing to engage in the elaboration of guidelines or recommendations on TCEs, which would allow reasonable flexibility to Member States at the national level.

67. The Delegation of Algeria, on behalf of the African Group, thanked the Secretariat for the TCE draft gap analysis (document WIPO/GRTKF/IC/13/4 (b) Rev.). Despite an increase in the number of instruments that aimed to protect TCEs, the draft gap analysis showed that those instruments were inadequate on more than one level. Copyright, the tool devoted by the IP system through the Berne Convention for the protection of literary and artistic productions, also had notable limitations. Applying the criteria of originality and ownership, which were fundamental to copyright, was incompatible with TCEs, given their pre-existing nature and their collective ownership by a traditional indigenous community. Although Article 15(4) of the Berne Convention granted copyright protection to unpublished works where the identity of the author was unknown, the voluntary nature of the Article limited that protection's effectiveness. It was further reduced by the provision, in Article 7(3) of same Convention, that countries "shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years", although they were free to legislate for longer periods. Again, that was not adapted to TCEs, as it did not guarantee perpetual protection. The many exceptions and limitations of copyright considerably reduced the protection available to TCEs to which indigenous people aspired. In that regard, the African Group considered that copyright was better suited to protecting contemporary literary and artistic works, which incorporated new elements and whose authors were, in general, living or identifiable. Furthermore, protection for recordings of TCEs (such as proverbs, traditional music and legends) was conferred through related rights to the producers of such recordings, who then enjoyed exclusive reproduction and distribution rights. Similarly, protection was exclusively conferred to artists using TCEs in their performances by the Berne Convention and the WPPT. The indigenous communities from which the folklore originated were excluded from that protection. If no formality was undergone when copyright protection for designs was granted, registration and renewal could be required, which could be obstacles to the use of IP systems by indigenous communities. Other gaps that hindered the protection of designs related to originality, the term of protection, and exceptions and limitations. In terms of the protection of secret TCEs, the document referred to Article 10*bis* of the Paris Convention and Article 39 of the TRIPS Agreement, which contained measures to protect against unfair competition, including protection against the disclosure of confidential information. Nevertheless, such measures were better suited to commercial and industrial information than to cultural and spiritual works. In terms of existing or possible solutions to the gaps featured in the draft analysis, the African Group made the following points: i) the effect of national laws to protect TCEs was limited, as their scope did not extend beyond national borders; ii) initiatives taken at the regional and inter-regional level clearly demonstrated that the challenges to TCE protection were of a transnational nature and, consequently, a global response was required. That was clearly reflected in the Committee's mandate, which recognized the international dimension of the issues that it dealt with; iii) the solutions mentioned in the draft analysis should be adapted in order to take into account the unique characteristics of TCEs, such as their pre-existing character, collective authorship and the perpetuity of that authorship. Many instruments were not suited to protecting TCEs; iv) the draft analysis did not study the reasons why the 164 countries party to the Berne Convention did not have recourse, for anonymous works, to a "competent authority" to represent the author through a written statement to the WIPO Director General (only India had done so). The draft analysis could also study the link between such a procedure and the collective management system; v) many WIPO Member States were not members of the WTO, so they could not use the TRIPS Agreement as a tool to protect TCEs from unfair competition; vi) establishing registers and databases could help to preserve TCEs and help them to be passed on to future generations; vii) existing codes of conduct and good practices had a limited effect, given their non-binding

legal status; and viii) the interests of indigenous, local and traditional communities were often poorly represented in the contracts concluded between community representatives and different stakeholders. The African Group considered that the adoption of national and regional legal texts, the establishment of registers, databases and codes of conduct, and the conclusion of contracts were transitory measures pending the adoption of a global solution. Such a solution could be found in the form of a legally binding multilateral treaty that would satisfy the aspirations of the majority of indigenous, local and traditional communities in the Member States, in particular, for the protection of their TCEs against any unauthorized use, especially for commercial gain.

68. The Delegation of Peru stated that the gap analyses on TCEs and TK were comprehensive documents, which responded to the mandate given to the Secretariat. The Delegation was therefore surprised at the statement made by Group B that it was necessary to continue clarifying the issue by examining specific cases and to continue examining national experiences before getting on to the international and multilateral nature of the problem. The reason for this multilateral forum at WIPO was to discuss what was missing at the international level. There was no perfect national regime, nor one at the regional or international level. It was not necessary to discuss national systems. The TCE gap analysis showed there were a number of initiatives that could be taken at the national level, but if the Committee did not discuss what could be done at the international level, then it would be in the same situation as it was seven years ago when the Committee was set up. As the African Group had said, it was urgent to take measures now to find solutions at the international level. If the Committee could work seriously in plenary or in groups that might be set up to work between sessions, then it would not be difficult to identify the gaps at the international level and work on them. If not, there was no need for this forum.

69. The Delegation of El Salvador considered document WIPO/GRTKF/IC/13/4(b) Rev. to be an excellent summary of the issues. With regards to the African Group proposal to establish a team of experts to define the concepts of TK and TCEs, the Delegation was of the view that the team could work in parallel, while work and discussions continued to clarify differences and devise legal instruments, in order to make the definition more flexible. That was the basis for continuing with the processes under way in the Committee. It was not a question of starting from scratch as the Committee already had a document containing, amongst others, the characteristics and forms of TCEs, for which reason, it was simply necessary to revise and take into account in order to establish definitions that would be of use in the continuation of the Committee's work.

70. On the issue of TCEs, the Delegation of China appreciated the large amount of constructive and effective work carried out by the Secretariat, and believed that these efforts would play a positive role in deepening understanding and building consensus on the issue under discussion. The Delegation endorsed document WIPO/GRTKF/IC/13/4(b) Rev. as a basis for further deliberations, and pledged its commitment to continuing work in this respect. As regards the approach to the deliberations on GRs, TK, TCEs and other inter-related issues within the mandate of the Committee, it supported a separate rather than unified approach, as this would facilitate breakthroughs by making it possible for any results achieved earlier in one specific area than in other areas to be adopted separately. The Delegation appealed again that TCEs and TK be clearly distinguished from one another, which it noted had been a common concern by many Member States. It believed that it was high time for the on-going debate to gradually shift its focus towards substantive provisions. It could go along with any system that would benefit the protection of folklore, be it IP law, anti-competition law, a *sui generis* system, or even administrative protection to conserve and safeguard folklore. It

suggested once again that it would be useful to discuss in more detail and clarify some specific concepts, definitions and terms, such as differences between folklore and TK, "misappropriation", "folklore that is secret or of special value and significance", "rights" and "place of origin of folklore", registration of folklore and so on. It proposed that the existing IP system be improved in those areas, such as provisions on moral rights (express provisions against distortion, mutilation, slander and dishonor of folklore would be needed), provisions on limitations and exceptions as well as on the duration of protection, so as to make the system more adapted to the specific characteristics of folklore. The Delegation went on to inform the Committee on the legislation programme of the State Council for 2007 and 2008, according to which the National Copyright Administration of China (NCAC) accelerated its drafting process of the proposed Regulations on the Protection of Folklore, and set up a Drafting Group in September 2007, which convened a legislative meeting on the protection of EoF. At this meeting, a timetable on the legislation process and the model of protection on EoF had been agreed upon. The Delegation added that in November 2007, NCAC set up a fact-finding group with participation of some experts, and organized 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, and held, in March 2008 in *Fenghuang* County of *Hunan* Province, a seminar for the south-eastern sub-region on the legislative work on copyright protection of EoF, 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 situations in respect of the existence and commercial exploitation of folklore in the region. A revised draft of the proposed Regulations was being prepared on the basis of those meetings and findings, and would soon be issued for comments, after which a further revised version would be submitted to the State Council for consideration. NCAC 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. On the TCE gap analysis document WIPO/GRTKF/13/4(b) Rev., the Delegation noted that according to the new categorization of TCEs in paragraph 14 of the document, TCEs covered: (a) literary and artistic productions, such as music and visual art; (b) performances of TCEs; (c) designs embodied in handicrafts and other creative arts; (d) secret TCEs; and (e) indigenous and traditional names, words and symbols. It was observed that in document WIPO/GRTKF/IC/7/3 on the "Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview Of Policy Objectives And Core Principles", a different categorization of TCEs was used, according to which TCEs was understood as including verbal expressions, musical expressions, expressions by action, and tangible expressions. The question to be raised was whether the two categorizations could match; which categories in the new list could those in the former categorization go, such as games, rituals or musical instruments; and, if the two lists did not match, whether it was better to use consistent categorizations in different documents. The Delegation further noted that paragraph 28 of the document in question listed six examples of needs of the local communities and other stakeholders, to which it would like to add their needs in respect of sharing the benefit arising from the commercial utilization of TCEs.

71. The Delegation of Canada thanked the Secretariat for having prepared the draft analysis of gaps in relation to TCEs in WIPO/GRTKF/IC/13/4(b) Rev., which was a useful tool in order to improve understanding of the stakes involved in TCEs and to identify points of convergence on the issues. As there were certain limitations placed on government activities during a general selection process, Canada had not been in the position to submit written comments on the gap analysis on TCEs, but considered doing so in the near future. The gap analysis affirmed that the international IP system did afford TCEs some level of IP protection.

In addition, there were non-IP mechanisms that might also offer some level of protection, such as contract law and community protocols. While potential gaps were identified, an assessment of whether these gaps in protection required additional IP protection and whether this protection should be afforded at the international, regional or local level depended in large measure on coming to a consensus on a number of fundamental issues, such as the objectives and scope of protection. To that end, Canada believed it would be worthwhile for the Committee to look at the gap analysis in conjunction with the draft policy objectives and general guiding principles in order to consider whether these gaps identified needed to be addressed or not. The Committee should also take into account the information compiled in the factual extraction on TCEs. The gap analysis highlighted that the protection of TCEs might impact other important policy areas, and in particular Canada would like more discussions on the issues of public domain and access to knowledge. The gap analysis clearly pointed out that holders of TCEs already enjoyed the right to commercially exploit their creations. One of the issues that the Committee might wish to examine in more detail was whether the issue was that there was a gap in the international IP regime that prevented holders of TCEs to commercially exploit their creation or whether the issue might be better framed as a lack of capacity or awareness to use the existing IP regime to do so. Finally, it believed that it was time to structure the discussions and move forward on all three substantive items, including TCEs. The Delegation looked forward to finding a process, which would allow this to happen in a step-by-step manner.

72. The Delegation of India appreciated the efforts taken by the Secretariat to prepare such a comprehensive document on the gap analysis on the protection of TCEs. The document clearly brought out the possible provisions in the existing IP treaties, which provided limited protection to TCEs and the gaps that existed in these laws. These provisions were brought out in earlier documents as well, but the present document was more focused. Hence it could be used as a base document for further discussion. There was a change in the focus of the gap analysis when compared to the earlier documents produced for the Committee. In the earlier documents, there were attempts clearly to state the need for a *sui generis* treaty and even the elements for such a treaty were identified. India wished to highlight the following points: a) the explanation of TCEs in paragraph 8(f) tried to exclude many items with a linkage to the heritage of the community and spiritual and religious purposes. This was not acceptable as all forms of TCEs should be covered in the definition; b) it had been mentioned that there was a possibility of finding solutions to the protection of TCEs based on the existing IP treaties. Instead, there was a need to develop a *sui generis* law and avoid overlaps with the existing IP treaties; c) it was true that in paragraph 34 it was made clear that “the suggested focus on these specific technical perceived shortcomings in existing IP systems is not intended to distract from more profound conceptual divergences between the aspirations and perspectives of indigenous peoples and the conventional IP system”. The problems identified in paragraph 39 on locating ownership of TCEs that was shared by more than one community either in the same national territory or in different territories were also worth looking, but the subsequent analysis in Part III showed that the solutions were available within the existing system rather than in a new *sui generis* system. If this happened, there was a possibility of converting existing TCEs into private property using the formal IP laws and this had to be prevented; d) the document also clearly brought out the gaps in existing IP systems (see paragraphs 55 to 67), but left the issue of finding solution to it open to the Member States (see paragraph 69). The references to the earlier work done by the Committee were worth noting and the earlier documents must be made the basis for further discussion to find solutions to the gaps identified; e) the focus of the future discussion must be to develop and finalize a legally binding international instrument that included *sui generis* laws for the protection of the TCEs and not to find limited solutions based on the provisions in the existing treaties. The mixed

approach of the use of existing provisions as far as possible and finding solution to other areas based on *sui generis* law will defeat the very objectives of the Committee in finding a comprehensive solution to prevent the misappropriation of TCEs and protecting the interests (developmental needs) of the local and indigenous communities.

73. The Delegation of France, on behalf of the European Community and its Member States, reiterated that it was committed to contributing to the Committee's work in the most constructive way possible. It thanked the WIPO Secretariat for having prepared the TCE draft gap analysis (WIPO/GRTKF/IC/13/4 (b) Rev). The European Community and its Member States had sent their comments on the earlier draft to the Secretariat, and wished to emphasize a few important points. The text demonstrated that legal instruments providing satisfactory solutions to a large number of the concerns expressed by indigenous communities already existed, such as Article 15(4) of the Berne Convention, and that the requests made by those communities concerned a wide variety of issues, not all of them related to copyright. Many of those issues concerned secrecy, unfair competition and the preservation and promotion of intangible cultural heritage (ICH). It also emphasized that solutions could be found at the national or even regional level. The European Community and its Member States therefore considered that further discussions on current experiences would be useful. Before looking at ways of protecting TCEs, it was essential, for legal purposes, to define the notion of TCE protection, to specify the scope of such protection and to make a clear decision on the objectives to be achieved. At present, few systems had been implemented at the national level, so it was considered premature to contemplate a solution at the international level. The draft gap analysis showed that one binding solution would be very difficult to find. The position of the European Community and its Member States was that the Committee's work on protecting TCEs should not aim at concluding a binding international legal instrument, but that it should pave the way for actions, such as the production of guidelines or recommendations on improving the efficiency of national systems.

74. The Delegation of Japan appreciated the Secretariat's efforts devoted to the TCE gap analysis in response to proposals/questions presented at the previous meeting. This analysis would help to deepen the understanding of the Committee as the arguments were organized in a more specific and brief manner, and it took up some examples of the measures that had been implemented by each nation. In addition to analyzing protections already existing at the international level, this analysis presented various options in describing what sort of measures can be used to protect TCEs at the national level. These options could make Member States understand that they had the flexibility to choose measures for protecting TCEs domestically on the basis of their own political and policy decisions, including measures for safeguarding preservation, and promotion of cultural heritage, which had not been sufficiently discussed in the analysis. It was left up to the Member States to decide whether to introduce a legally binding instrument at the national level for protecting TCEs. In promoting the domestic efforts of Member States, it would be very important to continue exchanging information on good practices. On the other hand, Japan believed that before some kind of consensus at the international level could be formed, it would be indispensable to deepen the understanding of fundamental issues, such as definitions that were not addressed for promoting this analysis. Therefore, Japan believed that fundamental discussions based on the list of issues concerning problems extracted through this analysis should be continued. It was important to advance discussions on fundamental issues, while giving special consideration to basic concepts, such as the definitions of "TCEs" and of "community". Japan wished to point out that there were some questions that could not be adequately discussed, because these fundamental issues remained unclear. Even before attempting to finalize the details of the wording of certain terminology, the problem remained that a common understanding or perception about their

meanings had yet to be formed. The argument, that under these circumstances, complete settlement of the detailed wording of definitions was unnecessary or that the definitions should be left to the national laws of each State was tantamount to not facing the issue of protecting TCEs at the international level squarely. Japan believed that it was essential to clarify the fundamental issues that were not addressed in this analysis, in order to make this analysis more useful and to decide whether identified potential gaps should actually be filled or not.

75. The Delegation of Switzerland believed that the TCE gap analysis addressed in a careful and comprehensive way the issues specified in the relevant decision of the 12th session of the Committee. The gap analysis was well structured and provided a very useful overview of the issues that the Committee needed to address in its discussion on TCEs. Chapter II on definitions was of great value, as it clearly indicated the need for clarifying terminology and concepts, something Switzerland had been continuously pointing out during the discussions of the Committee. Chapters III to VI were helpful as well, as they provided an overview of what obligations, provisions and possibilities for protection were already in place, where and what gaps existed, and in what manner these gaps could be addressed. The distinction between IP and other areas of public international law in Chapter III was a promising approach, as it allowed the Committee to focus its work on those areas within its mandate. The contents, structure and chapter titles of the gap analyses on TK and on TCEs should, to the extent possible, be drafted in a parallel manner. The same applied to the working definitions of relevant terms, such as in particular the definitions of “gap” and “protection.” This parallelism would simplify the comparison of both gap analyses and the ensuing discussions in the Committee. Switzerland submitted substantive written comments on the first draft of the gap analysis on TCEs made available on May 30, 2008. It regretted that only a very small number of written comments had been submitted by members of the Committee on this draft gap analysis. The Delegation also welcomed the explicit mentioning of the conceptual divide in paragraphs 36 and 37. It was important that alternative solutions through non-IP mechanisms were listed in paragraph 37. The operational divide referred to was also of importance. Switzerland agreed with the view expressed in paragraph 41 that these gaps should be discussed in greater detail, as they were crucial for the finding of solutions. Thus, a revised version of the gap analysis regarding TCEs should address these gaps in greater detail, as is, for example, done in paragraphs 104 and 111 of the TK-gap analysis concerning the issue of “practical gaps.” In addition, the Delegation would submit in writing a few purely editorial comments to the Secretariat.

76. The Delegation of the United States of America was confident that this useful working document would facilitate the work of the Committee. Over the last several sessions, the United States and many other delegations had stressed the importance of focusing the Committee’s attention on concrete, achievable outcomes to address specific issues and concerns related to the protection of TCEs/EoF. By cataloguing and describing existing legal and other options for the protection of TCEs/EoF, the Secretariat would help to accelerate the Committee’s work. Consistent with the request of the Committee, this document was largely descriptive in nature, appropriately drawing on information in other documents. In the view of the United States, gathering and organizing this relevant information in a single place itself would facilitate deliberations within the Committee. One of the most useful features of this document, in the view of the United States, was the identification of certain “options” that the Committee might wish to consider in addressing an identified gap, if any, in the international framework. Like the Delegation of Switzerland, the United States also was disappointed that more delegations did not take the opportunity to comment on this document prior to the meeting. Nonetheless, the United States was hopeful that the Committee would have the

benefit of their views during the discussions this session. The difficult task of substantively evaluating the identified gaps in the international framework, along with the options to address those gaps and related policy issues, must take place in the course of the Committee's deliberations. Looking ahead, much work remained to be done. First, in the view of the United States, the Committee needed to closely examine each identified gap, with a view toward reaching an enhanced mutual understanding of these unmet needs. As this analysis correctly pointed out, a consensus had yet to emerge within the Committee on these important issues. Second, the Committee would need to match the identified gap more closely with the options to address it. The United States continued to believe that this aspect of the deliberations would be enriched significantly by the exchange of national experiences, bearing in mind that what might appear to be a "gap" in national law might, in fact, reflect important policy considerations, such as freedom of expression and the protection of the public domain. Third, the Committee needed to explore in greater depth the specific options and related policy considerations briefly discussed in this document. Finally, mindful of the need to accelerate its work, the Committee would need to prioritize discussion of those options that held the greatest promise of delivering concrete outcomes or otherwise significantly advancing the work of the Committee.

77. The Delegation of the Islamic Republic of Iran stated that the gaps, which were identified regarding the protection of TCEs were significant and should be address by this Committee. In fact, the gaps of originality, protection of style, ownership, term of protection, exceptions and limitations, defensive protection and ownership of recordings and documentations showed the different concept and nature of TCEs and other IP productions, which were protected under literary and artistic laws. Accordingly, the existing international provisions regarding literary and artistic works, which had been explained under section 3 of WIPO/GRTKF/IC/13/4(b) Rev. could not solve the international problem and the concern of TCE stakeholders. This was usual, because the subject of TCEs had not been well-known at the time of the conclusion of the existing international conventions. Accordingly, TCEs needed a new legally binding international instrument. This situation also existed regarding performances of TCEs, designs and secret TCEs. In relation to the protection of TCEs under the designs system, there were also conceptual differences between industrial designs protected under the Hague system and old designs, which existed in TCEs. Even if one assumed the possibility of protection of some kind of old designs under the Hague system, this protection was not an appropriate one because of the different economic value of industrial designs and old designs. On the protection of TCEs under other international instruments, such as UNESCO conventions, the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169, these instruments were concluded with different aims, so they could not provide protection. The issue of TCEs infringement was an international problem, and should addressed at the international level through a legally binding international instrument.

78. The Delegation of Turkey found the gap analysis document WIPO/GRTKF/IC/13/4 (b) Rev. useful for expediting the work of the Committee. It believed that the gaps identified in the analysis should be addressed. The Delegation reiterated that it would be ready to accept any outcome that could guarantee the protection of rights arising from TCEs. However, there would ultimately be a need to have a legally binding international instrument as the protection of the rights of indigenous peoples and the misappropriation of TCEs required the intervention of States. This was also pointed out in the gap analysis. The Delegation then referred to page 3 of document WIPO/GRTKF/IC/13/6 and quoted the following, "the Committee and the WIPO General Assembly do not themselves have the capacity to create binding international law". The Delegation believed that the way in which this comment was

written might be misleading as it believed that draft treaty provisions could be taken up by the Committee and once the Committee had reached its final stage, the GA could decide to convene a Diplomatic Conference for the finalization of a treaty in this area.

79. The Delegation of Tunisia pointed out that the gap analysis document WIPO/GRTKF/IC/13/4(b) Rev. provided a technical analysis on the congruency of the existing IP system to protect TCEs. Many gaps had been highlighted and a number of options had been presented. The Delegation hoped that the gap analysis could contribute to advancing the work of the Committee and be of use for the intersessional meetings the African Group was calling for. The Delegation furthermore believed that the Committee should concentrate its efforts on the development of an international instrument and not on national laws. Whilst implementation would be a sovereign matter, the legal framework for the protection of TCEs should be an international one. The Delegation therefore believed that the African Group proposal and the development of such an international binding instrument should be considered seriously.

80. The Delegation of Norway associated itself with the statement made by the Delegation of Germany, on behalf of the Group B. Norway hoped that the gap analysis document WIPO/GRTKF/13/4(b) Rev. could help the Committee move forward as it demonstrated what possibilities existed and what options could merit further consideration. In particular, the Delegation thought it was perhaps important to explore further what was referred to as the "conceptual divide", i.e., the divergence between some aspirations and the IP system; so as to ensure that the Committee would continue dealing with IP-related issues at WIPO. On the other hand, the Delegation found it very helpful and appropriate that the gap analysis underlined the importance of moral rights as rightful attribution was essential when dealing with TCEs. Norway reiterated that the main objectives behind any regulation on TCEs at any level should be to prevent misappropriation and preclude unauthorized IP rights and that the concepts of misuse and misappropriation required further clarification. It might be an idea to single out and explore further certain identified gaps such as the: a) originality requirement, b) question on the protection of "style", c) ownership, including ownership of recordings and documentation. The Delegation agreed that these questions had an international dimension and remained open to solutions at any level, including the international level.

81. The Delegation of New Zealand found the draft gap analyses to be useful working documents that contributed to the broader work programme of the Committee. They were constructive in the sense that they examine the existing IP regime in light of the issues and concerns that had been raised so far in the process of the Committee and raised potential options to address these. They were useful policy problem definition documents, helpful not only for the Committee but also in informing domestic policy development processes, as undertaken by the Ministry of Economic Development's Traditional Knowledge Work Programme. There were, however, some concerns in relation to the relevance of the draft gap analyses in the broader process and objectives of the Committee and with the premises upon which the gap analyses were based. The draft gap analyses were an assessment of how existing IP legal frameworks could and could not support the protection of TK and TCEs. The analyses began in existing legal frameworks, rather than with the holistic needs of indigenous and local communities. Considering this perspective on the issues, indigenous and local communities' priorities, customary laws, protocols and values associated with their TK and TCEs were not the focus or main premises of the analyses. There was, therefore, a risk that they would not be completely and appropriately taken into account. Framing the issues from an indigenous and local communities' perspective and paradigm was more likely to effectively identify and prioritize different issues and potential solutions, based on customary

values, laws, and protocols. Furthermore, existing legal IP paradigms failed to address the entire policy problem and therefore could not constitute the whole solution to the issues and concerns relating to the protection of TK and TCEs. This questioned the relevance and effectiveness of the gap analyses and the approach taken to identify where *sui generis* mechanisms might need to be developed. Further discussion and analysis was needed on what the Committee meant by the development of *sui generis* mechanisms and solutions. Although it was recognised that some existing legal provisions might have potential to address some of these issues, the primary basis upon which potential existing solutions should be assessed, in terms of their viability, should be the needs, priorities, and customary laws, values, and protocols of indigenous and local communities who were the holders of TK and TCEs. Some of the existing legal provisions that had been identified as potential options were not created to address the needs of indigenous and local communities. As pointed out in the gap analyses, these existing legal mechanisms would still require changes either in their substance or in their interpretation and application for them to be fully aligned with the needs and priorities of indigenous and local communities. For these reasons, New Zealand continued to favour a holistic, community-based and from-the-ground-up approach to the identification of issues and to the development of potential solutions. New Zealand also considered that the draft gap analyses, on their own, might not be particularly helpful in terms of advancing the work of the Committee. A further step was now required to determine a process through which the Committee could prioritise its work in a constructive manner that would illuminate and assist it in assessing if, and where, there was a convergence of views towards potential solutions. This process map should be informed not only by the policy gaps in existing IP law, but also by all the priorities and concerns of indigenous and local communities.

82. The Delegation of Brazil emphasized that the protection of TCEs should be addressed at the international level so as to correspond to the global problem of misappropriation. The gap analysis document WIPO/GRTKF/IC/13/4 (b) Rev. was a good basis for facilitating and intensifying the Committee's work. There was a gap in the international protection of TCEs and that the best way to bridge this gap was through the adoption of an effective international instrument within the international IP system. There was an emerging consensus on the need to strengthen and step up the protection of TCEs, and this consensus departed from the fact that existing IP treaties failed to provide an adequate protection for TCEs. Existing international legal instruments in other policy areas, even though useful, fell short in providing comprehensive and effective protection within the IP framework. On the scope of protection and related definitions, the Delegation understood that these definitions should be construed in a comprehensive manner. Effective international protection should ensure respect, conservation and preservation of TCEs and provide for the necessary tools to curb and remedy cases of misappropriation. Preservation and protection were not identical notions, even though both should be dealt with at the international level. Brazil believed that the protection of TCEs required different and innovative solutions and should go beyond measures aimed only at preservation. Although the gap analysis pointed out that some protection within the IP domain was already provided for through, for instance, the WCT and the WPPT, the objective and specific scope of these international agreements, however, were not specifically aimed at the protection of TCEs.

83. The Delegation of South Africa supported the statement made by the Delegation of Algeria, on behalf of the African Group. The gap analysis (WIPO/GRTKF/IC/13/4(b) Rev.) clearly highlighted gaps in the existing IP regimes as identified in the African Group's document WIPO/GRTKF/IC/13/9. Although certain current IP regimes did provide for protection of TCEs, existing model laws and guidelines also provided for some form of

limited protection. TCEs, however, would require a comprehensive and holistic *sui generis* mechanism. Existing regimes, therefore, remained transitory and a broader international binding instrument would be needed. Document WIPO/GRTKF/IC/13/9 converted the various discussions and proposals made by the Member States during the Committee's process into a clear and comprehensive distillation in which areas of convergences and divergences had been consolidated so as to provide for a good basis in advancing a consensus building approach. For each of the issues, a concrete way forward was proposed. South Africa therefore proposed to move forward as presented in the African Group document. It remained of the view that intersessional work was critical in order to work towards an internationally legally binding instrument for the protection of TCEs. The Delegation was ready to work on the finalization of the terms of references for the intersessional work as the African Group proposal had already provided the means to do so.

84. The Delegation of Mexico thanked the Secretariat for its efforts in producing the TCE draft gap analysis (document WIPO/GRTKF/IC/13/4(b) Rev.). The Delegation considered that, in order to guarantee effective protection for TCEs, it was important to include the principles of FPIC and recognition of TCEs holders, as stated in the analysis. It suggested that, in terms of guaranteeing international protection, useful points of reference could be found in, for example, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) and the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989). Similarly, the UN Declaration on the Rights of Indigenous Peoples should also be taken into account. It considered that a relevant international instrument that gave sufficient protection to TCEs was necessary and that such an instrument would provide a basis for each country to seek to overcome gaps at the national level. At the present time, various instruments existed that did not fully meet the needs of indigenous communities. One such example was the WIPO proposal to provide protection to TCEs through the WPPT. In Mexico, Article 92*bis* of the Federal Copyright Law guaranteed payment to the author for future sales of his or her work. However, it was difficult to use that practice with indigenous communities and for them to obtain remuneration because it was impossible to identify the author or authors and the works belonged to the community.

85. The Delegation of Ecuador stated that in relation to what had been said concerning existing gaps in TCE protection, although attempts had been made to satisfy requests for such protection, more careful revision of the measures taken was still required, especially because an instrument such as the one under discussion related to the needs and expectations of TCE and TK holders, who were principally indigenous and local communities. A task that certainly needed to be completed was to bring together all the possibilities that the IP system offered. The communities in question were unaware of that system and for centuries had conserved and passed on their TCEs and TK through their own customary laws and practices, which did not provide sufficient protection. Ways of working with conventional and non-conventional protection systems were necessary and solutions should not be looked for solely in existing IP rights. Such a system should, as a result, be *sui generis* and innovative and should include, among others, the intrinsic value of TCEs, the traditional organization of indigenous peoples and the role of the community authorities. Along with other Committee delegations, Ecuador would support a binding international legal instrument for the protection of TCEs and TK.

86. The Delegation of Pakistan felt that the gap analysis document WIPO/GRTKF/IC/13/4(b) Rev. crystallized the Committee's discussion on TCEs over the years and adequately identified the existing gaps. It hoped that the gap analysis document could facilitate the Committee to work towards a concrete outcome. Pakistan felt that TCEs

should be protected at international level by means of a legally binding instrument(s). The Delegation consequently sought clarification on how the Committee should proceed further with its work on TCEs. It asked whether the purpose was to improve the gap analysis document or to develop measures to fill the gaps identified. The Delegation urged the Committee to move its work towards developing a concrete outcome and supported the African Group proposal.

87. The Delegation of Morocco believed that WIPO/GRTKF/IC/13/4(b) Rev. was a good basis to make progress in the Committee's discussion. However, it believed that the gap analysis also contained certain "gaps" in the interpretation of its content. The Delegation believed that TCEs needed an international mechanism of protection and that the Committee was the natural and appropriate forum for developing such protection. It reiterated that documents prepared and drafted by other international bodies were insufficient, and that national laws were only applicable within the borders of a particular state. National laws lacked the ability to prevent cross-border misappropriation and misuse and since these could go beyond national borders, an international legally binding mechanism would therefore be required. As indicated by the Delegation of Algeria when introducing the African Group proposal, the Committee's objective should not be to exchange national experiences, as the Committee had already done so over many years, but to work towards a mechanism at the international level.

88. The Delegation of Mexico stated that with regard to discussions and consultations on the way forward, they should focus on: i) how the Committee wished to make substantive progress, and ii) how the Committee wished to approach "process". On the question of substance, the gap analysis was very productive and useful for discussing substance. On the process question, and in regard to the African Group proposal, should there be any intersessional meetings taking place, it would be important to ensure funding for the participation of experts from the capitals.

89. The Chair stated that it intended to discuss substantive matters with the coordinators of the regional groups and that matters related to future work would be discussed under the appropriate agenda item. The Chair then invited the Delegation of Algeria to introduce WIPO/GRTKF/IC/13/9.

90. The Delegation of Algeria, on behalf of the African Group, presented document WIPO/GRTKF/IC/13/9, which had been drafted pursuant to the Durban meeting held in June 2008. The document had been based on the lists of issues and presented a framework for adopting the scope and object for protection of TCEs and TK. The purpose of this document was to formulate proposals with regards to the future procedures for the Committee to consider and ensure better convergences between Member States on the lists of issues. It was believed that this would enable the Committee to make considerable progress in its future work.

91. The Chair thanked the delegations for their statements and suspended the meeting in order to start the consultations with the regional group coordinators.

92. Following the Chair's consultations, the Delegation of Thailand supported the Chair's initiative and thanked the Secretariat for having put together the gap analysis document WIPO/GRTKF/IC/13/4 (b) Rev., which it found very comprehensive and useful. The gap analysis shed light on many technical issues concerning the legal and moral protection of TCEs and could serve as a basis for national consideration and development. Various "gaps"

had been thoroughly analysed and presented at the request of the previous session of the Committee. Thailand had submitted its comments on the draft gap analysis and may wish to submit any additional comments later. Thailand furthermore expressed its appreciation to the specific citations of model laws, examples of national laws and cases from the rich experiences of many countries and organizations contained in the gap analysis. It however felt that the gap analysis as presented would require further consideration and study by experts at the national, regional and international levels. The Delegation therefore supported the proposal to hold intersessional expert meetings at WIPO where various themes could be debated and discussed so that the Committee would be able to find convergences and move forward in a more positive manner. The Delegation thanked the Chair for its initiative to consult with the regional groups coordinators. It believed that it was time to have an achievable and concrete outcome before the Committee's current mandate would expire. The Delegation extended its trust to the leadership of the Chair in bringing about a consensus amongst the members of the Committee.

93. The Delegation of the Russian Federation considered that document WIPO/GRTKF/IC/13/4(b) Rev. provided a good basis for further constructive discussion by the Committee of the important problems relating to protection of TCEs. The gap analysis showed the possibilities for applying existing international instruments to protect TCEs. The document contained a list of examples of forms of TCEs as well as indicating the international treaties which could be used to protect such expressions, for example, Article 15(4) of the Berne Convention. At the same time, the document showed the gaps, which prevented the full application of the international instruments in question, for example, the requirement of "originality" and identification of the author (creator) of a literary or artistic work in copyright. Other gaps included the limited period of protection for performances and the performance of formalities for industrial designs. The document was valuable in that it also contained possible ways to solve problems relating to the use of existing international treaties. In relation to the proposed methods of use, based on the experience of implementing Russian legislation, comments could be made on the method relating to payment for the use of public property[1]. In Law No. 5351-I of the Russian Federation on Copyright and Related Rights (1993), there existed a provision on the possible payment of remuneration for the use of works which were in the public domain. However, for a period of almost fifteen years during which it had existed the provision in question had not been implemented, as a result of the fact that the new legislation of the Russian Federation on IP, which had come into effect in 2008, did not contain a provision on the possible payment of remuneration for the use of public domain works. As regards the moral rights of communities[2], it should be pointed out that, in existing Russian legislation, moral rights were presented as personal non-proprietary rights, which were enjoyed by individual citizens, but not by communities. As to the proposal to create registers and databases for TCEs (Paragraph 105, page 32 of document WIPO/GRKTF/IC/13/4(b) Rev.), that method was considered to be one of the most forward looking. The creation of registers and databases would allow problems to be resolved, and provide protection and preservation of TCEs. The Russian Federation was currently working on a project regarding the conception of the preservation and development of the non-material cultural heritage of the peoples of the Russian Federation, in accordance with which there was included the formation of databases on the non-material cultural heritage of the peoples. Furthermore, the Russian Federation had positive experience of the use of appellations of origin, which were used including in relation to material TCEs, in particular, objects of

[1] Paragraph 93, page 29 of document WIPO/GRKTF/IC/13/4(b) Rev.
[2] Paragraphs 87-88, pages 27-28 of document WIPO/GRKTF/IC/13/4(b) Rev.

decorative and applied art. On the whole, all the methods proposed in the document under discussion were worthy of attention and should be analyzed.

94. The Delegation of Algeria, on behalf of the African Group, referred to documents WIPO/GRTKF/IC/13/9 and WIPO/GRTKF/IC/13/10. With regard to the gap analysis document WIPO/GRTKF/IC/13/4(b) Rev., the Delegation referred to the table in Annex I, in particular, to bullet point (iv) in the section of "Desired Protection" and commented that the phrase "prevention against lack of indication of source" should be used instead. The Delegation supported the proposal of the Chair on having consultations with the regional groups.

95. The Delegation of Nigeria commended the Secretariat for the quality of the draft gap analysis, which provided a more focused and better structured examination of the specific issues that had been under consideration by the Committee. A clear outcome of the analysis was that existing international legal instruments did not adequately cater for all the concerns of TCE holders. Nigeria fully supported the statement of the African Group on the gap analysis. It would be a disappointment in the view of the Delegation to return to mere discussions without advancing towards the provision of an appropriate instrument or instruments for the protection of TCEs. It would amount to double speaking to assert, on the one hand, that there were no gaps to be filled while at the same time accepting that there was need for further discussions on national or regional experiences. The question was: if indeed there were no gaps to be filled through the work of the Committee then one would wonder the Committee to be a mere talk shop. As the document rightly observed, there was no settled definition of TCEs. It was not likely that there would ever a universal agreement of the exact definition of TCEs and a single definition was not only unachievable but unnecessary. This was understandable since there were very few terms and concepts that enjoyed any universal acceptance. However, the Committee had in the course of its work referred to various descriptions of the nature and scope of TCEs sought to be protected. It might be helpful to bear in mind the need to draw clear lines between protectable TCEs and other cultural expressions that might exist within a local community. This was an approach that was favored in the 1960s when a clear distinction was made between folklore (being the more general ways of life within local or indigenous communities), and EoF. While the former had always embraced the wider cultural manifestations of indigenous and local communities, the latter was considered to be the proper subject of protection, at least in the IP sense. There was some usefulness in identifying the characteristic elements not only because they gave a fair idea of the scope of protection but because they would also help in defining the outer boundaries of the subject matter. There was no doubt that discussions on the protectable subject matter had often strayed into other areas with little more than mere historical and cultural relevance in a norm setting process. It was important to note that the characteristics of TCEs were defined a little more narrowly so as to remove them from contemporary works that would qualify under the copyright regime either as anonymous works or derivative works. To that extent, while traditional creativity was a "dynamic interplay between collective and individual creativity", contemporary works should not become TCEs merely because they were tradition-based or rendered in the traditional context. A good example would be musical compositions, which merely drew from traditional experiences and were rendered in the local language. Like the idea/expression dichotomy in the field of copyright, it might be worth considering whether traditional style alone should be regarded as protectable TCE. Some of the elements listed in WIPO/GRTKF/IC/13/4(b) Rev., although generally derived from the characteristics of TCEs as formulated in time past might blur the picture. For instance, to suggest that they were often primarily created for spiritual and religious purposes or that they often made use of natural resources in their creation and

reproduction did not help much in understanding the subject matter. So often, there were aspects of a community's way of doing things that was better addressed as TK and need not be confused with TCEs. And one of such areas acknowledged in the document was the inclusion of a community's method of manufacture, even in the case of handicrafts, musical instruments and textiles. Similarly, it might be helpful to limit the aspects of traditional instruments and handicrafts to their artistic expressions or designs. TCEs could be reduced to two broad categories, namely: i) literary and artistic productions, such as music, visual art and designs (including designs embodied in handicrafts and other creative arts); and ii) performances. Secret TCEs were not necessarily a separate form of TCEs but merely a special condition, which compels separate protection. For instance, a TCE may qualify as a literary musical or artistic production. In the same vein, symbols would almost always qualify as artistic productions. The Delegation had in the past expressed its reservations regarding the inclusion of traditional names and words as such as separate subject matters of TCEs. Perhaps these were valuable and vulnerable elements of the intangible cultural heritage (ICH) of a community. The gap analysis had confirmed the well-known position that the IP system was not designed to accommodate TCEs and was therefore ill-equipped to cater for these expressions. The focus was more on the individual rather than the community and the subsistence of rights and their benefits were dictated largely by narrowly defined interests. The irony was that while the original TCE holders were not recognized or protected under the present IP system, those who plundered and appropriated these expressions were protected under the thin veil of originality or fixation. The Delegation was particularly pleased to note the conceptual divergences between the aspirations of indigenous people (including local communities) and the conventional IP system and was of the opinion that these divergences were very germane in the understanding of the inherent gaps in the IP system. The role of customary laws and protocols in the determination and allocation of rights had greater relevance in the context of TCEs and offered an added reason why the present IP system could not entirely address the concerns. Because of the low threshold of originality provided for copyright works, many tradition based expressions might qualify for protection but as rightly pointed out in the analysis there was nothing in the existing IP regime to protect the underlying TCEs. Even in those cases where the courts had granted relief, they had almost always been for contemporary expressions and adaptations by identifiable individuals or groups and for that reason the benefit of protection did not avail the entire community as such. This drew attention first to the absence of protection of TCEs as such and to the inherent flaw in allocating rights to secondary users of TCEs while denying the primary TCE holders and transmitters any claim to protection or a share in the economic gains derivable from their TCEs. The same could be said for the availability of protection to mere collections, compilations and databases while the materials embodied in them were denied protection. On the term of protection, most of the existing international instruments reviewed in the gap analysis provided for fixed terms for copyright. The durations were also generally identified with the life of the author or the date of production, both of which would not ordinarily exist in the case of TCEs. The very character of TCEs required that the determination of duration must be author neutral and could not be measured from the point of creation. A non-predetermined duration, which was tied to the life of the TCE as reflecting the collective expression of a community, was preferred. Reference to moral rights was hardly helpful since those rights were tied to the author of the work and moral rights presupposed that the work in question was a copyright work. On exceptions and limitations, the "public domain" elements of the IP system could indeed be misleading in the context of TCEs that had never been granted protection and had not been made available for unauthorized use by those outside the traditional holding communities. On the fears already expressed by some distinguished delegations on the possible clashes of TCE protection with other interests, such as freedom of speech, the Delegation had always accepted that the determination of the limits of rights and

the proper definition of the available exceptions must be built into the emerging mechanism for protection. It should be possible within the framework of an international instrument to negotiate appropriate exceptions and limitations for the greater good of the society. However, any exceptions and limitations that should evolve must take cognizance of the fragile nature of most TCEs and the manner in which they were used in the traditional contexts of the originating communities. As rightly noted in the gap analysis, there were a number of provisions in existing IP regimes that might have adverse consequences on the continued existence and integrity of TCEs. One of such was the exception relating to works of sculpture that were in public display. On the recognition of communal rights, while there were brave judicial pronouncements recognizing communal interests in copyright works as in the Australian case cited in gap analysis, this presupposed that the work in question would qualify for protection under the copyright law. As well-articulated in the gap analysis, the requirements for copyright protection were not easily adaptable to TCEs. The same might be said of the possibility of finding communal moral rights. It was true that moral rights could be in perpetuity and might be available to the author as against the legal owner of copyright, but problems would arise where the author of the work was unknown or could not be identified as was the case with most TCEs. As was often the case, the author of a copyright work was generally defined as the person who created the work in question. Although there was always a provision for joint authorship, the legal and technical issues associated with the determination of this posed additional challenges for TCEs. It was doubtful if this could provide realistic protection for TCE holders. In fact, as the various national experiences discussed in the gap analysis showed, any attempt to merely grant IP-type respect to holders had never been a popular choice because it did not work. On Article 15(4), the real usefulness of the Article was clearly borne out of the fact that only one State found it worthy to engage in the process. One or two other countries that incorporated the provisions in their national copyright laws and there was no suggestion that even this was applicable to TCEs as against copyright works whose authors were merely unidentifiable. On the usefulness of the WPPT, it was the view of the Delegation that the WPPT provided very limited protection not so much to TCEs but to the performers of TCEs who might not necessarily be the holders of the TCEs concerned. The document had identified a number of shortcomings including: (i) the narrow definitions of beneficiaries; (ii) the limited scope of protection available; (iii) the limited duration of the rights. The many gaps identified in the document could hardly be addressed without a radical shift in the philosophy and elements of protection. Those changes could not be merely cosmetic. This was why a *sui generis* regime within the context of an international instrument would be desirable. Once again, the Delegation was of the view that the few cases that gave hope to the protection of TCEs under existing IP regimes were cases that fell within the realm of copyright and the mere fact that such works fortuitously belonged to a group or a community should not mislead one to believe that the concerns of traditional communities could be addressed under them. While national experiences and case studies would always provide the welcome relief from the more tedious examination of substantive issues, they hardly advanced the work of the Committee in any significant measure. Rather, national experiences further showed the inadequacy of the IP regime for addressing the issues of TCEs in a comprehensive manner. The outcome of the gap analysis in addition to the other supporting documents should complement the response of delegations to the list of issues and the initial discussions on the principles and objectives with a view to developing an international instrument.

96. The Delegation of Brazil raised a question concerning documents WIPO/GRTKF/IC/13/9 and WIPO/GRTKF/IC/13/10. It sought clarification on how to interpret the African Group proposal as it had understood that it should read the proposal as

having two parts since the latter seemed to be closely related and complementary to the former.

97. The Delegation of New Zealand raised concerns as to: i) the characterisation of TCEs as creations that were not 'owned' by the individual but fell within a shared sense of collective and communal responsibility, identity, and custodianship; ii) the emphasis on the current use and description of TCEs as identifying a living tradition and a community that still bore and practiced it; and iii) the definition of TCEs as having had an author at some stage, but that author was now unknown or simply unlocatable. These characteristics did not quite fit the New Zealand context. New Zealand's domestic experience demonstrated that in fact the TCE holders viewed their relationship to the TCEs that they created as a mixture of individual and collective/communal rights and responsibilities. Individual creators of TCEs did not necessarily want to prevent copyright from applying to contemporary works derived from TCEs, but rather wanted the collective/communal customary laws, values and obligations to also be taken into account, respected and exercised. It was a mixture of individual and/or communal rights and responsibilities, therefore, it was not an either/or context of protection. The individual and collective/communal forms of protection were simultaneous; and the relationship between the two was often dictated by the customary laws and values of the community. The creators of TCEs were both individual and communal creators. In relation to the emphasis on current use, some TCEs might not be used for periods of time for a number of reasons. Some TCEs might be inactive for spiritual reasons, or due to war or conflict, or due to oppression or historical injustices. Some TCEs might go 'underground' for several generations before they were picked up again and revived. Some indigenous and local communities were also in the process of rediscovering their cultural heritage, which had been lost, due to misappropriation or prohibitions during the process of colonization. Requiring indigenous and local communities to demonstrate current use or that the community was still in existence were unreasonable criteria, given the cultural and social context of some indigenous and local communities around the world was unreasonable. New Zealand wished to reiterate its proposed criteria that so long as there were still descendants who associated with the TCEs and could assert holder status. In relation to the characteristic set out in the gap analysis document on the protection of TCEs which described TCEs as having had an author at some stage, but that the author was now unknown or simply unlocatable, that part of the definition was not accurate. New Zealand's domestic experience was full of examples where the author of the TCE had been and still was well-known, but he or she had been deceased for longer than the existing copyright period of 50 years. These TCEs were therefore outside of copyright and although they might still benefit from moral rights, the existing moral rights did not take into account the communal customary laws, values and protocols associated with them. These TCEs were now part of the so-called "public domain". The characteristics of TCEs should also include these circumstances.

98. The representative of the Indian Movement Tupaj Amaru lamented the fact that the Committee had not made tangible progress because of the economic and political interests of Member States. The mandate of the Committee had an international element for the drafting of standards, instruments and agreements. Member States should not continue to postpone the drafting of an international instrument. There was a confrontation between rich countries, which advocated non-binding recommendations, and developing countries, which favoured an international legal framework. In a globalized world, there was a need for an international legal framework containing a coherent, universal definition of TK, as well as enforcement mechanisms, especially for intangible, sacred and secret TK. The incoherent policies of rich countries allowed pharmaceutical and agro-industrial companies to plunder the GRs and TK of ancestral peoples. IP law was a western concept that left out indigenous rights, did not

recognize TK holders as subjects of law and did not aim to protect the cultural heritage of ancestral civilizations, except as merchandise. Establishing a guide for cataloguing TK and GRs would be open to real risks without the FPIC of aboriginal peoples and it would be impossible to translate such a guide into the hundreds of indigenous languages. To catalogue TK and GRs, as proposed by many delegations, and put them in the public domain would violate the confidential nature of many intangible, sacred and secret elements of the living heritage that was passed down through the generations and which was made up of the memory of their ancestors. Additionally, putting TK into the public domain would accentuate the deterioration of cultural values, the misappropriation and misuse of the cultural values of indigenous communities by multinational companies, and consequently the destruction of the indigenous identity. At the beginning of the draft gap analysis (WIPO/GRTKF/IC/13/4(b) Rev.) it was stated that "There is no internationally settled or accepted definition of a 'traditional cultural expression'". From reading the document, it could be inferred that there were different definitions of the protected material concerned within different national systems. Attempts to harmonize domestic legal systems on an international basis were headed for failure as a result of the economic and political interests of the rich countries, which had the monopoly on technology. Although different points of view existed among States, it did not mean that different definitions of TCEs to be protected had to be invented. The TK and folklore of local and indigenous communities, which was passed down through the generations, was outside the scope of national legal protection and IP law. IP offices had granted, and continued to grant, many patents for innovations based on TCEs and TK, mainly to multinational companies. It was not the first time that WIPO, UNESCO and the FAO had discussed the need for an international mechanism to protect cultural heritage and EoF. The representative referred to the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982), as well as Article 15(4) of the Berne Convention. The Berne Convention had not been sufficient to guarantee the possession, control, preservation and restitution of cultural assets, in particular, EoF. Other conventions had also been signed, such as the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage (1972) and the Convention on Biological Diversity (CBD). The Committee should use these as inspiration. The representative then quoted extensively from the UN Declaration on the Rights of Indigenous Peoples, especially Articles 11, 12 and 13.

99. The representative of the Ibero-Latin American Federation of Performers (FILAIE) stated that the TCE draft gap analysis (WIPO/GRTKF/IC/13/4(b) Rev.) and the summary of options (WIPO/GRTKF/IC/13/6) were excellent, as well as essential to the Committee's work. FILAIE stated that its position in previous sessions had always been the same with regard to adequate protection for TCEs, which was that, given the specific nature of the subject, the adoption of a binding international instrument, in other words, a *sui generis* legal treaty, was necessary. It recalled that the decisions adopted by the WIPO General Assembly in 2003, 2005 and 2007 had given the Committee a mandate with a strong international aspect that stated that no outcomes should be excluded in its work to protect TCEs, in relation to IP, including that of producing an international instrument or instruments. With that in mind, the Committee's options were: i) a binding international instrument or instruments; authorized or persuasive interpretations or explanations of existing legal instruments; ii) a non-binding international instrument or instruments; iii) a high-level resolution, declaration or decision, such as an international political agreement to defend fundamental principles, stipulate rules against misappropriation and misuse and establish the priority needs and expectations of TCE and TK holders; iv) strengthening international co-ordination through guidelines or model laws; and v) co-ordinating development in national legislation. It further recalled that the WPPT classed those who performed or delivered a literary or artistic work or EoF in any form

as performers. That being so, FILAIE considered that those who performed EoF were IP rights holders when they undertook such activities. In that regard, affiliations as rights holders were being considered for when TCEs were performed. The Committee's work had been taking place over a period of more than seven years and, until the present meeting, no documents had been drafted in treaty language. For that reason, the representative was of the view that the African Group's proposal seemed to provide a basis from which the Committee's work could be advanced. For FILAIE, the solution for protecting TCEs was to draw up an international binding instrument, especially when suitable technical legislation could be used to draft a treaty that could include reservations on certain questions in order to facilitate its signing and approval. In view of time constraints, it suggested applying the following legal reasoning: if it could be done, and it was advisable to do it, then it should be done. On substantive issues, the representative referred to, particularly paragraph 35 of the TCE gap analysis, which discussed the specific, technical limitations of the IP systems that were most relevant to TCEs. It was doubtful that TCEs met the requirement of originality that was essential for copyright protection. However, in paragraph 35(b) of the draft gap analysis, it was recognized that TCEs were communally created and held. That showed a contradiction between the previous expression and the possible absence of originality, as originality was a consequence of creation, given that it was not possible for an original thing not to have been created, and *vice versa*. The representative considered that there were sufficient original elements in TCEs and that it was precisely that originality that distinguished one community from another in terms of culture. Therefore, the requirement of originality for TCEs was not insurmountable. TCE ownership should go to the community that had created and held their particular TCEs. Another issue to be considered was the legal treatment that the authorship of the community, as the IP rights holder, should have, because the legal drafting process could give joint and related authorship to a community of persons constituting an ethnic group, instead of to just one person. The gap analysis also referred to issues such as the term of protection and the commencement date for calculating that, which was particularly important. TCEs could not be in the public domain because that would contradict their core essence, which was that they were passed down and adapted from one generation to another. Their commencement date could not be defined and to protect it for a defined period would eventually put an end to the existence of TCEs. In order to move forward, a legal development, possibly founded on a right to remuneration for the community, had to be produced. In addition, a public domain payment system that was subject to conditions such as prior knowledge on the part of the community and consent for use or disclosure should be considered. The legal tools to grant protection to TCEs did exist.

100. The representative of the Bethechilokono Governing Council (BCG) referred to WIPO/GRTKF/IC/13/9 and WIPO/GRTKF/IC/13/10, and proposed that the terminology used in WIPO/GRTKF/IC/13/9 be modified to reflect the views of the indigenous peoples as holders of TK, TCEs and GR. The representative furthermore proposed that the UN Declaration on the Rights of Indigenous Peoples be used as a template to provide for an appropriate and accessible meaning of terms. With respect to WIPO/GRTKF/IC/13/10, the African Group proposal for the establishment of an intersessional expert working group, the representative believed that such a working group would allow for an interface between the Member States and indigenous peoples.

101. The Representative of the Indian Council of South America (CISA) took note of the African Group proposals concerning the protection of TK, TCEs and GR, as well as the recommendations concerning the intersessional work of the Committee. It thanked the Group for its work, which it considered very relevant for indigenous peoples. CISA expressed particular support for the recommendations for examining the issues more thoroughly and for

drafting recommendations through intersessional work and the creation of a group of experts that would include accredited observers from indigenous communities.

102. At the invitation of the Chair, the Secretariat ,introduced documents WIPO/GRTKF/IC/13/5(a), WIPO/GRTKF/IC/13/5(b) Rev., WIPO/GRTKF/IC/13/6 and WIPO/GRTKF/IC/13/7.

103. The Delegation of India reminded the Committee that the Secretariat had completed a number of detailed analyses of the entire scope of TK and TCEs since the first session of the Committee in 2001. More than 15 documents could be listed relating to this issue from the first session onwards. It should therefore be remembered that the comments on the draft gap analysis would only be in addition to the exhaustive and informative list of studies already carried out by the Committee. India, along with other developing countries, was looking for a legally binding international instrument so that the issue of misappropriation of their TK and GR could be addressed. As was well known, India was extremely rich in TK and GR. Its systems of traditional medicine, i.e., Ayurveda, yoga, Unani and Siddha were known internationally and were extensively being misappropriated at the international level. India had in the past shared with the Committee and the international IP community the problem of wrong patents granted at the international level which were based on Ayurveda, Unani and Siddha systems of medicine. Extensive expert studies had revealed that more than two thousand wrong patents were granted every year at the international level based on their codified systems of knowledge. India had developed a five language (French, Japanese, German, English and Spanish) TK Digital Library (TKDL) containing two hundred thousand medicinal formulations with the information running into thirteen million pages. The TKDL was now being made accessible to international patent offices under an access agreement. This would address the issue of misappropriation of TK in their systems of medicine. However, an optimal solution would be an international binding instrument for TK and TCEs. Through TKDL and with the cooperation of the international patent offices, the issue of misappropriation of their TK in the future would largely be addressed. However, they were equally concerned about the necessity for the rectification of past wrongs, that was the invalidation of patents which were granted due to non availability of information on prior art to examiners. For resolving these concerns and to make GR, TK and TCEs a tool of wealth creation for the holders of these knowledge systems, the Delegation urged the international IP community to develop a legally binding international instrument for the protection of GR, TK and TCEs.

104. The Delegation of France, speaking on behalf of the European Community and its Member States, reaffirmed its commitment to make a constructive contribution to the Committee's work and thanked the Secretariat for the new version of the draft gap analysis on the protection of TK, a document on which the European Community had already made a number of written comments which had been submitted to the Secretariat. The Committee had before it several documents: draft factual extracts drawn up based on the observations which had been made on the list of issues relating to the protection of TK; a set of draft objectives and principles for the protection of TK; a summary of the practical options concerning the international dimension of the Committee's work; a draft recommendation on the recognition of TK in the patent system; and a draft gap analysis on the protection of TK. The European Community considered that the examination of these documents, in particular the document concerning the general objectives and principles, was important work for the

Intergovernmental Committee and should in the long run help to define and promote appropriate protection for TK. A significant amount of information and numerous paths and options were developed in these documents by the Secretariat and by Member States. The documents showed that certain existing intellectual property rights already offered possible forms of protection. They also identified possible gaps in TK protection, as the Secretariat had outlined in the draft gap analysis. The Secretariat's task had proven to be increasingly complex given that the Committee had not yet reached agreement on several basic concepts such as definitions or the objectives pursued. The European Community considered that the Committee was on the right track and that the gap analysis was an invaluable contribution to the Committee's work. However, to find effective solutions, it was necessary for the Committee to continue to work more on the basic concepts. In view of the varied points of view expressed by the Committee's Member States, the European Community considered that it would be very difficult to find a single, binding solution. Moreover, the European Community reiterated its preference for the development of international *sui generis* models or other non-binding options for the legal protection of TK and its desire for the final decision on the protection of TK to be in the hands of each contracting party.

105. The Delegation of Romania, on behalf of the Regional Group of Central European and Baltic States, stated that in order to make progress further discussions on the essential concepts were needed, with a view to achieving a better understanding and the necessary degree of legal certainty. Once agreed by all, the definition and objectives of TK would help identify the appropriate modalities for addressing the protection gaps. The Group could support the elaboration of *sui generis* models or other international non-binding options in this field. Therefore, it was looking forward to developments meant to get the Committee closer to that end.

106. The Delegation of the Peoples Republic of China considered that the issuance of the carefully prepared gap analysis constituted a valuable initial achievement in itself, which would help identify the gaps and problems, thus laying down a new foundation for the discussions to make substantial progress. The Delegation hoped that with the sincere efforts by all Member States, the Committee would be able to discuss the issues on the protection of TK in more detail. It noted the diversity in terms of the types and presence of TK due to the geographic, cultural, historical and even natural and environmental differences of various countries, and appealed for such diversity to be fully taken into account in the related discussions in this area.

107. The Delegation of Algeria, speaking on behalf of the African Group, had previously commented on the draft gap analysis on the protection of TK. The African countries considered that the draft analysis concerned revealed many gaps which needed to be filled. Although appropriate solutions had been put forward, some of them remained insufficient and unsuitable for TK in view of the international dimension of such protection. For this reason, the Group considered that the solutions put forward in the document were merely interim measures while a comprehensive solution was being worked out. In this regard, the African Group reaffirmed that only the drafting of a legally binding international instrument would ensure effective protection of the rights of the native communities holding this knowledge. Furthermore, document WIPO/GRTKF/IC/13/9, which had been presented by the Group, stressed the ways and means of bringing about a convergence of views and the approach to adopt to forge ahead with the Committee's work. The Group remained convinced that inter-sessional meetings were essential to make substantive progress in the negotiations under way and hoped to make a positive and constructive contribution in this regard.

108. The Delegation of Germany, on behalf of Group B, fully agreed with the finding in the gap analysis that the difficulty of identifying and defining TK to be protected was one of the major obstacles for the determination of whether enhanced IP-related TK protection was needed. The Group had constantly stressed that legal certainties were of paramount importance in this context. The Comittee should usefully agree on a working definition of TK. Further efforts should be spent on clarifying the potential objectives of TK protection. Clarity of the objectives would make it easier to decide whether the existing forms of TK protection were adequate or not. With regard to the question "which means are suitable for TK protection?", the gap analysis listed a broad range of options that existed or might be developed to address the potential gaps identified in the document. Progress in that field would help to asserting whether identified gaps in the existing framework of TK protection should still remain as gaps. For good reasons, the gap analysis refrained from any recommendation as to which measures were preferable. The Group voiced its support again for continued work on developing options for the protection of TK. It reiterated the need for Member States to maintain the appropriate flexibility to adapt options to the national circumstances. Since all aspects mentioned above were to some extent entwined, the road ahead would be a difficult one. These fundamental questions needed to be answered before deciding which path one should take. The Group was willing to make this journey.

109. The Delegation of the Islamic Republic of Iran stated that the Secretariat fairly classified the gaps which existed in the definition of TK, the objective of protection and the gaps existing in the international legal mechanisms for protection of TK. Taking into consideration the specification of TK, which made it different from other fields of knowledge, the current IP system could not provide protection for this branch of knowledge. In this regard, section 4 of WIPO/GRTKF/IC/13/5(b) Rev. also indicated that the current IP system was not adequate for protecting TK. Accordingly, it was important for the Delegation to move this Committee in the direction of concluding an international legally binding instrument to tackle these gaps. In relation to section 3 of the document regarding existing obligations, provisions and possibilities for protection of TK, the protection of TK under current patent system was unfeasible. The enlightenment of the document about flexibility and differences that existed in national, regional and international patent laws, which may provide protection to specific innovations developed within the traditional context, was true in theory. However, it was very difficult or impossible to provide practical protection for such innovations at the international level. Paragraph 36 of the document correctly referred to the issue that, presently, there was no international binding law for TK - hence, it was indispensable that the Committee moved to the direction of concluding a binding instrument to fill this gap. In relation to the protection of TK under international provisions regarding undisclosed information, taking into account that at the time of conclusion of the Paris Convention and the TRIPS Agreement the protection of TK had not been intended by participants, currently it seemed difficult to provide protection of undisclosed TK under these provisions. There was no doubt that unfair competition provisions were important for protecting IP products, however, these provisions were a complementary system, which could be used alongside with the main system for the protection of TK. On the subject of the protection of TK through distinctive signs, the document truly pointed out that the trademark system could not provide protection for TK, however, the document asserted that the system may provide indirect protection to TK. In September 2007, the WIPO GA gave the Committee a new mandate to focus, in particular, on a consideration of the international dimension. At this time, after two sessions as indicated above, the Committee clearly came to a conclusion that there were gaps in the international mechanism. Accordingly, a reasonable answer to the question of options that existed or might be developed to address the identified

gaps was to tackle these gaps. Therefore, it supported the conclusion of a legally binding international instrument as other options could not meet the objective of the Committee.

110. The Delegation of Pakistan supported the development of an international legally binding instrument for the protection of TK. It was encouraged by the constructive comments made by developed countries, of their will to move forward on this issue towards a positive outcome or concrete results. It looked forward to the discussions and the comments made on TCEs, the future work, were still valid for TK as well.

111. The Delegation of Canada considered that the draft gap analysis on protection of TK (WIPO/GRTKF/IC/13/5(b) Rev.) was a useful tool to achieve greater understanding and consensus on the work of the Committee. As there were certain limitations placed on government activities during a general election process, Canada had not been in a position to submit written comments on the gap analysis on TK but was considering sending a written submission in the near future. As highlighted in the gap analysis, TK cut across different laws and jurisdictions. The gap analysis also highlighted that while gaps may exist, it may not be desirable to fill these gaps. Canada recognized that certain aspects of TK that may not necessarily be subject to IP protection but may still be protected under, for example unfair competition laws, language charters, education law and policy, and cultural property import and export legislation. For this reason, the gaps may not exclusively lie in the IP system. In fact, gaps may exist in terms of capacity and awareness, namely the ability for aboriginal groups to make use of existing laws and mechanisms. Canada supported the development of capacity to use such laws and mechanisms, including the IP system. In fact, Canada had already engaged in such activities. In June 2008, officials from the Department of Industry and Canadian Heritage participated in two workshops in British Colombia with two indigenous communities, the Sliamon and the Ktunaxa, to explain the benefits and limitations of the IP system. Given the importance expressed by the Committee to continue its work on TK, there was reason and support for the Committee to move ahead on this issue, particularly, on the draft policy objectives and general guiding principles, as well as, the list of issues. It was important that this be done in an inclusive manner that reflected interests and concerns of Member States. In this regard, the Committee could consider revising the draft policy objectives and guiding principles through practical technical inputs from experts. Such inputs would help ensure their relevance and utility at both the national and international levels. It may also be worthwhile for the Committee to look at the gap analysis in conjunction with the draft policy objectives and general guiding principles in order to consider whether the gaps identified needed to be addressed or not. Canada encouraged the development of options, which would allow the Committee to benefit from additional technical review of the issue. This could assist in focusing the work, for instance, by limiting the number of draft objectives and guiding principles that were non-IP in nature. As the Chair previously mentioned, the Committee was invited to consider an appropriate process to further the work of the Committee for the present biennium. Canada was ready to work towards setting a critical path for the work of the Committee to progress in a structured and organized manner. With regards to document WIPO/GRTKF/IC/13/7, several recommendations proposed the need to further enhance patent examiner's access to TK-related information, for example: Recommendation I suggested that new initiatives should be undertaken to ensure the validity of patents, which may contain TK; Recommendation IV proposed that patent examiners working in the relevant technical fields should have greater awareness of TK and TK systems; Recommendations VI and VII called on patent authorities to take full account of diverse TK sources when assessing patent validity, especially with regards to novelty and inventiveness. In Canada's view, the improvement of prior art databases was an important step in achieving better access to pertinent prior art sources, as well as, ensuring greater patent validity. Japan's

proposal, presented in WIPO/GRTKF/IC/9/13 and WIPO/GRTKF/IC/11/11 in the context of GRs, called for 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.

112. The Delegation of the United States of America agreed that the revised gap analysis identified the issues in a helpful and constructive manner and provided a useful structure for discussion as the Committee moved forward. It also thanked the Secretariat for incorporating the comments that the United States and others had submitted on the draft gap analysis available for review. These comments were constructive and informative. It was disappointing, however, that few comments were received on the draft gap analysis. It hoped that the period for providing comments would continue to be open so that others may also provide comments. The revised gap analysis and the comments filed in response thereto would be useful as the Committee proceeded with its discussion on the substance and options relevant to TK.

113. The Delegation of Colombia reiterated its point of view with regard to TK that international coordination should be strengthened through guidelines or model laws. The Committee should develop model clauses which were designed to eliminate the misappropriation and misuse of TK, characterizing such acts as violations of international law.

114. The Delegation of the Republic of Korea expressed the importance of exploring the options available under the existing IP system. However, WIPO/GRTKF/IC/13/5(b), page 40, only referred to Article 10*bis* of the Paris Convention as an option available under the existing IP system. On the other hand, page 26 of the same document mentioned other relevant documents. This part of the document was very important in studying the future protection of TK. The Delegation asked the Secretariat to summarize this document, which meant the possibility of protection of TK under the existing IP system with various options. It wanted to incorporate all those parts into this document as it would be very helpful for the future discussions on the protection of TK.

115. The Delegation of Brazil reiterated its position on TK. The gap analysis had been elaborated in a comprehensive and well structured fashion. It demonstrated the mature and advanced stage of the Committee's discussions on the legal concepts and working definitions relating to the protection of TK. The protection of TK must be addressed at the international level, as misappropriation was a global problem. There was clearly a gap in the international protection of TK and the best way to breach this gap was by the adoption of an effective international instrument within the IP system. There was an emerging consensus on the need to strengthening and establishing an international framework for the protection of TK. This consensus departed from the fact that existing IP treaties failed to provide adequate protection. Existing international legal instruments in other policy areas, even though they may be useful, fell short of providing a comprehensive and effective protection.

116. The Delegation of Switzerland pointed out that it had submitted written comments on the gap analysis on the protection of TK and that it would submit further comments in writing. It regretted that only a few other States had taken the opportunity to do the same. It indicated that the existence of TK and TCEs was not limited to countries with indigenous populations, and that such knowledge and expressions were also found in countries such as Switzerland. Furthermore, it supported the draft recommendations for patent authorities

contained in document WIPO/GRTKF/IC/13/7. It maintained that these recommendations would help authorities dealing with patent applications relating to TK. With regard to paragraph 48 *et seq.*, under the heading "Practical issues relating to searching for traditional knowledge as prior art", the Delegation referred to its proposal for the establishment of an international Internet portal for traditional knowledge. This portal would provide an electronic link between existing local and national databases on TK and thus facilitate access by patent authorities to key information on TK stored in such databases. When establishing the international Internet portal, proper precautions would be taken to prevent the misuse of the information contained in it. Further details about this proposal were contained in paragraphs 30 to 32 of WTO document IP/C/W/400 Rev. 1. Finally, with regard to the definition of traditional knowledge mentioned in paragraph 15 of the document mentioned above, it reiterated the need for international consensus on a practical definition. The Committee had been discussing these "draft recommendations" for a long time. In Switzerland's view, they could be published under this title on the WIPO website and made available to the stakeholders, particularly patent offices. Their publication would enable the Committee to conclude its work on the "draft recommendations" for the time being, but this would not prevent it from revising or amending them where necessary and therefore republishing them.

117. The Delegation of Indonesia reaffirmed its position that an effective and efficient protection on TK would be achieved through the establishment of an international legally binding instrument or instruments. Keeping in mind the views among Member States, the Committee had pledged its commitment to establish such a desired international instrument or instruments within a certain time frame. On the gap analysis, the Delegation shared the views of others that the discussion should bring the Committee to concrete outcomes and not merely a matter of improving documents. It was furthermore in line with the African Group proposal, particularly, on the consideration of the factual extractions under the ten issues on TK as main instrument to expedite the establishment of a desired international legally binding instrument or instruments. The Group's proposal on the "way forward" would allow for the convergence of the diverging views. Regarding the specific issue of elements on the protection of TK, Indonesia generally considered the establishment of a special and stand-alone law for the protection of TK as manifested in its national draft bill on the protection and utilization of TK and TCEs supported by a database and documentation mechanism, taking into account the protection of sacred and discrete TK. Work at both the national and international level should in parallel be maximized in order to achieve a protective outcome at the end.

118. The Delegation of El Salvador noted that the gap analysis was extremely important and that it had confirmed what had been said in that meeting and in others. In fact, the forms of IP, meaning copyright or industrial property, that were currently available were not sufficient to protect intangible knowledge. Among other characteristics or considerations in the case of copyright, for example, was that, due to the very nature of TK, the form of transmission, the form of ownership and the length of protection, it was not possible to define it and categorize it as a protected work. On the other hand, in the case of industrial property, meaning patents, it would also be very difficult to consider protection for a limited period, knowing that, after that period, it would pass into the public domain. With such a background, El Salvador considered that the solution was an international *sui generis* instrument that could cover the variety of subjects dealth with by the Committee.

119. The Delegation of Japan believed it was essential to further discuss fundamental items, including the definition of certain terms. In order to deal with such basic points as "the kinds of knowledge that are eligible for protection" and "the beneficiary of TK", an agreement

should first be reached on "the objectives for protection of TK." A common understanding in this regard was necessary for constructive and productive discussion. In this regard, the gap analysis was a very useful approach to formulate such a shared understanding. The analysis referred to working definitions of TK. Nonetheless, it did not sufficiently tackle fundamental points, such as the definition of certain key terms in order to proceed with the analysis. Those working definitions might be helpful for general discussions. However, when the Committee would examine whether or not the identified gaps were to be filled, it should consider the following questions: "to what types of TK protection should be extended" or "how should the word 'tradition' be defined" based on actual individual cases. Such an inductive approach would help to establish shared definitions of TK. It was crucial to clarify fundamental items in the list of issues from the viewpoint of making the gap analysis meaningful and examining if the identified gaps were really to be filled.

120. The Delegation of South Africa supported the statement made by the Delegation of Algeria, on behalf of the African Group. The gap analysis highlighted the limitations of IP protection in its current form. For this reason, it supported the view that a comprehensive and holistic *sui generis* instrument needed to be developed to provide for the overall protection of TK. South Africa, in line with the African Group document WIPO/GRTKF/IC/13/9, considered the text provided in WIPO/GRTKF/IC/9/5 to be a good basis for further discussions. Key areas of focus within TK were: 1) definitions and object of protection; 2) exceptions and limitations and duration; 3) PIC and moral/economic rights; 4) beneficiaries; and 5) *sui generis* options for protection. In view of the conclusions of the TK gap analysis, South Africa reaffirmed the need for intersessional work to address these gaps non-prescriptively to work towards the development of an internationally binding instrument. The intersessional work in view of the Committee's current mandate should remain focused and conducted within a clear time frame and work program. The work of the Committee on TK should take into consideration the complimentary work currently being conducted in other fora, particularly the CBD.

121. The Delegation of New Zealand continued to support a menu of options rather than a one size fits all approach. Its domestic experience to date demonstrated that a menu of measures would be needed at the international level, as well as at the domestic level, to address the objectives of indigenous and local communities for the protection of their knowledge. It was interested in exploring in more depth the range of options and mechanisms, existing IP-based and *sui generis* solutions. As mentioned, New Zealand would submit detailed written comments to the Secretariat for consideration by the Committee. It raised the following few issues for consideration by the Committee: Page 17, sub para 26 (v) and (vi of the draft gap analysis document contained two sections, which domestically would associate more with the concept of TCEs. Signs, symbols, words or names, and designs of indigenous and local communities were intangible TCEs, especially when looking at their use in the context of Trade Marks and Industrial designs, but it went even further and stated that even in the context of patents they were still TCEs. The Delegation therefore considered that the analysis on page 17 should have formed part of the TCEs document. This highlighted the difficulty that existed in distinguishing between TK and TCEs and especially when doing so for the purposes of looking at existing IP laws (paragraph 43 on page 22). In some circumstances, the customary laws, values, and protocols associated with some knowledge may prohibit certain uses, which might in effect impede some forms of innovation. An example of this in New Zealand would be innovation based on genetic modification processes (page 24 subpara (c)). New Zealand did not consider a requirement for disclosure in patent applications to be a gap but rather a potential solution. The actual gap in relation to the issue of disclosure could be more explicitly described and defined in which New Zealand would

define it as the inability for patent examiners, given existing sources and processes for examination, to assess whether an invention, in its research and development, was based on or contained elements of TK, TCEs, and to determine the source of GR used. A potential solution to this gap in the current IP system could be the requirement to disclose. New Zealand reiterated the following objectives it considered should be sought to be achieved through the IP protection of TK: i) to prevent misappropriation, misuse, and misrepresentation of TK by providing communities with the means to control the ways in which TK was used beyond the traditional context; ii) to foster and encourage more respectful practices by individuals and organizations who wished to use TK; iii) to strengthen and recognize the application of collective/communal customary laws and protocols associated with the use of TK; iv) to recognize the contribution to innovation and creativity that TK holders make and ensure proper attribution of rights; and v) to promote fair and equitable management and sharing of benefits (economic or otherwise) flowing from the use of TK.

122. The Delegation of Ecuador considered that the prevailing IP systems protected private rights and did not cover the value *per se* and of collective nature that TK had for indigenous peoples. The patent system, for example, was not suited to protecting TK as it protected private rights for derived products or processes. TK was collective, intergenerational and imprescriptible over time, and it provided collective benefit throughout the ages. Ecuador's recently adopted Political Constitution was explicit on this point, and established *sui generis* protection mechanisms for TK. That was why Ecuador had stipulated that TK protection systems should be *sui generis* in nature and should combine both conventional and unconventional protection options, in line with the means of conserving and protecting TK that were provided for in the United Nations Declaration on the Rights of Indigenous Peoples. As part of the development of national standards for the protection of TK, Ecuador considered collective commercial marks and appellations of origin that came from indigenous communities' original products as legal protection options that gave the *sui generis* nature of the protection set out within the Committee and in the CBD.

123. The Delegation of the Russian Federation believed that WIPO/GRTKF/IC/13/5(b) would provide a good basis for further discussion, as it was well structured and contained a list of existing forms of protection, which could be applied to a TK subject, and a list of the corresponding international instruments for the implementation of the corresponding forms of protection. In that regard, it also highlighted the gaps in the application of one or other form of protection or one or other existing protection instrument. As other delegations, the Delegation would submit its written comments.

124. The representative of the United Nations University (UNU) stated that to support the work of the Committee, the UNU Institute of Advanced Studies TK Initiative (UNU-IAS TKI) was compiling an annotated collection of TK protocols. The compilation would be accompanied by an analysis of trends in protocol development. It would also be accompanied by a practical guide for those wishing to better understand the mechanics and role of TK protocols. By bringing together an array of protocols in the one place, it expected that they would be better able to identify changing understandings and framings of TK by communities, external institutions, governments and others. They would also consider the types of consultative processes being used in protocol development, and the main decision points that those developing protocols faced. While there were many examples of protocols or codes of conduct/ethics by research institutions and others, there were fewer widely known and publicly available examples of protocols that had been designed and implemented by local or indigenous communities. The UNU sought the participants' assistance in identifying

protocols for inclusion in the compilation. They were seeking community protocols especially those whose development had been community led, but were also interested in other types of protocols and codes in place in the Member States' jurisdiction, or currently in the process of development. They would be greatly appreciative of the Member States' assistance in identifying protocols for inclusion in the compilation. Further details and contact information could be found at www.unutki.org.

125. The Delegation of Nigeria supported the statement made by the Delegation of Algeria on behalf of the African Group. It would be submitting its written comments on the gap analysis to the Secretariat.

126. The Delegation of Norway associated itself with the statement made on TK by the Delegation of Germany on behalf of Group B. The gap analysis outlined a list of possible options the Committee could use to follow up on. In this respect, it echoed the Delegation of New Zealand that a menu of options would be beneficial. Some of the core issues regarding TK, including misappropriation, definitions, objectives and fair use and scope, would benefit from further clarification in order to reach common understanding. Norway remained open to any outcome at any level.

127. The Delegation of Ecuador, on behalf of the Andean Community, stated that Ecuador currently held the Chairmanship of the Andean Community (CAN) and, in that capacity, it made the following declaration on behalf of the member countries, Bolivia, Colombia, Ecuador and Peru. It recalled that, in the recently concluded General Assemblies, it had expressed an interest in organizing regional meetings, through which its countries would benefit from the valuable work undertaken by the Committee. In the subregion, a joint Andean system for the protection of collective and integral TK was currently being developed, with the direct participation of the indigenous peoples of the four member countries, as well as the respective government authorities. To that end, national workshops were being organized as part of a consultative process that would culminate in a regional workshop in the second quarter of 2009 in Lima, Peru, during which the regional proposal that would be be submitted to CAN's decision-making bodies would be endorsed. That Andean subregional proposal had taken the results of the work carried out by the WIPO Committee into consideration. It considered, however, that it would be useful for the Andean countries if WIPO participated in the above-mentioned regional workshop in Lima, so that the Andean Community could be made aware of the work of the Committee, given that the objective was to have different opinions in order to draw up an Andean decision on protection for collective TK; something that was increasingly requested by member countries and indigenous peoples.

128. The Delegation of Peru associated itself with the statement made by Ecuador in its position as the current Chair of the Andean Community. It thanked the Secretariat for the excellent work carried out on document WIPO/GRTKF/IC/13/5(b), as it gave a better understanding of existing gaps and possibilities concerning solutions to current problems in the IP system. From reading the document, it was clear that there were certain gaps to fill, some of which would or should be filled at the national level, and others at the regional level, although there was also work to be done at the international level. That was why the WIPO Committee existed, because otherwise it would be denying its own existence. It did not understand why some delegations had said that they needed to work more at the national or regional level, or that they needed more time. The document had already indicated several options. Peru was clear on which option it preferred: a binding instrument, but it was prepared to discuss other possibilities. It was concerned that some delegations had said that further

studies were still needed; it did not know what more could be asked of the Secretariat. The document had to be read in conjunction with the document on objectives and principles that had been presented at the seventh session more than three years previously, which contained precisely the objectives and principles that could help ensure that means of helping to solve existing problems in the IP system in relation to TK were agreed at the international level.

129. The Delegation of Mexico thanked the Secretariat for its efforts in producing the gap analysis on TK protection, which clearly showed the areas that could be protected as part of WIPO's work. It reiterated its recognition for the Committee's work and for the depth and standard it had achieved in terms of the following: the description of traditional knowledge as subject to protection within a holistic vision; the consideration of additional means of protection and preservation; the establishment of specific characteristics of the protection or Model of Protection that clarified the concept of misappropriation; and the requirements for protection, in particular that such protection should be based on customary practices, standards and approaches, as well as the principle of national treatment for foreign holders of TK who complied with the criteria authorizing them to be subject to protection. In terms of the drafting of definitions, it considered that the terms "protection of TK" had been made clear in document WIPO/GRTKF/IC/13/4(b), page 7, paragraphs 22 and 23, while the word "protection" had a wider meaning than "safeguarding", "preservation" and "promotion". In Mexico, IP rights included copyright and industrial property rights. However well indigenous groups had used different IP instruments, they had not been sufficient to cover the protection needs of their TK as a result of its diversity, as the instruments did not respond to the world vision and the way in which the 62 indigenous peoples of Mexico valued their TK as a part of their culture and their essence and identity as indigenous people. Given that Mexico lacked a national set of legal provisions that specifically regulated the intellectual protection of traditional knowledge, it reiterated that all the achievements made by the Committee would be a great help and an essential guide for the future drawing-up of a national law to protect traditional knowledge. In knowledge of the Committee's previous session, in follow-up to the national law that required the Government to consult its indigenous peoples and communities about any policy or project that affected them, and in response to the Mandate of the Committee in the sense of States asking their indigenous peoples and communities for their opinions on issues related to the protection of TK, TCEs and the associated genetic resources, Mexico, through its National Commission for the Development of Indigenous Peoples, had begun a consultation on those subjects with its indigenous peoples and communities. That consultation consisted of three stages, and it was hoped that it would conclude in 2009. The first stage of the consultation included holding two fora (southern and northern), which aimed to "bring together authorities and indigenous and non-indigenous community experts in order to give them an overview of the current situation in terms of TK protection", and had the following specific objectives: (a) to find out the authorities' and indigenous community experts' opinions on the subjects to be discussed; (b) to determine the approaches to the subjects to be discussed; (c) to establish the scope of the subjects to be discussed; and (d) to find out the possibilities and limitations for recognizing TK, in accordance with existing regulations. On September 22 and 23, the Southern Forum took place in the city of Veracruz. Almost 100 indigenous leaders took part, many of whom were holders of TK originating from the Federal District (Mexico City), Morelos, Veracruz, Oaxaca, Guerrero, Yucatán, Quintana Roo, Chiapas, Tabasco, Campeche, Puebla and Tlaxcala. That region was where most of the country's indigenous peoples lived, hence the importance of the information collected there. Thanks to that first forum, first-hand knowledge was gained of the way in which those consulted defined TK; the importance that such knowledge had for them, held by those inside the villages and communities; the form that it took; the threats it faced, in particular the effects that climate change was perceived as having on it; the forms in which it was being

preserved by the indigenous peoples and communities; and their opinion on the form of protection that they considered practicable within both the national and international legal frameworks. The Northern Forum would take place in November, during which representatives of indigenous peoples in the States of Baja California, Sonora, Sinaloa, Nayarit, Michoacán, Chihuahua, Estado de México, Hidalgo, Durango, Coahuila, Jalisco, Colima, San Luis Potosí, Nuevo León, Querétaro and Guanajuato would be informed and consulted on the same subjects, therefore concluding the first stage of the consultation in 2009.

130. The representative of the Tulalip Tribes stated that its position on the issue of TK databases was well known and could be found in the records of previous sessions of the Committee. The draft gap analysis provided an excellent review of the issues. It included that, while indigenous peoples were concerned with the unjust enrichment that might occur with patent monopolies, they were also concerned with inappropriate use of their knowledge outside of the patent system. Many had been wary of the construction of such databases, due to spiritual and cultural issues arising from their customary laws and ways of being, and since the revelation of TK contained in databases could lead to non-monopolistic third party uses in ways that violate their cultural norms or threaten their access to cultural resources that were critical to the continuation of their cultures. The Tulalip Tribes did not fundamentally oppose the creation of such databases, as they believed it was a matter of indigenous self-determination to evaluate their potential merits and make their own decisions on participation. However, it believed that the terms of reference for constructing TK registers in an international system needed to be subject to the PIC of indigenous peoples, and that rules must be in place to fully respect and protect their cultural heritage rights in their knowledge. This also related to issues on the use of TK in the patent system. The draft gap analysis and discussions within the Committee had focused on what they called the “input end” of the patent process, the use of TK in patent examinations for defensive protection against the approval of patents that were inappropriately based on indigenous prior art. It appreciated that the legal tools proposed or to be constructed recognized the need for protection of TK submitted for the purpose of patent review. What was less clear was the eventual status to TK that was used in the patent system, particularly on the “output end”. In the normal course of affairs, knowledge incorporated into patents had a distinctive career. After a 20 year period of monopoly and restrictions on use, the knowledge generally became available for use without restrictions. These uses may conflict directly with customary law associated with the knowledge since time immemorial. Indigenous peoples may be interested in supplying knowledge and genetic materials for some processes. IP regimes that contributed to the development agenda may be compatible with traditional beliefs about the proper use of indigenous peoples’ knowledge and resources, but they may not be willing, if at the end of a patent period the knowledge they had been provided became part of the public domain that could be used without restriction in ways that were incompatible with their beliefs. It believed that further elaboration on this draft analysis should address these issues.

131. The Representative of INBRAPI said that suitable protection of their TK must give wide-ranging protection to the entire cultural heritage of indigenous peoples and local communities. The protection systems available for their knowledge offered two possibilities: making it public or converting it into the private heritage of people or organizations through the IP system. Neither of those mechanisms took into account the need for collective protection for that learning. Registering their knowledge in databases was not acceptable, considering the non-existence of legal security for that initiative. The main gap in terms of the protection of their knowledge was the urgent need to create a binding international instrument separate from IP. Such a *sui generis* instrument should take into account the

collective character of their knowledge as well as international human rights legal frameworks, mainly ILO Convention No. 169 on Indigenous and Tribal Peoples, and the United Nations Declaration on the Rights of Indigenous Peoples. The Representative invited the Parties to continue with their work of developing a *sui generis* protection system for their knowledge that should include consultation processes involving indigenous peoples and local communities, and of earmarking funds for skills training that would allow them to participate fully and effectively in those processes. The Representative considered that their own legal systems should be included in the future *sui generis* TK protection through the relevant contributions that they could have, mainly in resolving conflicts. The indigenous and local communities that INBRAPI represented remained very willing to further the process of creating legal security for the protection of their TK.

132. The Representative of the Indian Tupaj Amaru Movement supported the position of the Delegation of Peru. He said that the same thing had been debated for eight years and there was no consensus between governments or between the countries of the North and those of the South. He maintained that a break for reflection should be declared in the Committee so that it could return with concrete proposals and would not waste time and human and financial resources.

133. The Representative of CONGAF quoted an African proverb that concerned the vital, endless and impassable field of TK and TCEs in order to explain the issue and its importance for Africans. The proverb went as follows: "Only those who live by a river know its true depth". He also commented on the document presented by the African Group. The document had come just at the right time, representing a tedious job of locating, defining, and clarifying points in order to maintain focus and thus have a clear picture of an area that was so complex and so often identified as a source of old, new and, without a doubt, future conflicts, given the way in which the world was developing. The African Group was anxious to present accurately the trends and the major problems that were a feature of the issues of TK, TCEs and GR, and therefore initiate their conclusive resolution. Knowledge of their own situations and those of their natural and global environment allowed the Group to draw attention to the point submitted for discussion, to appreciate and to highlight further the African Group's proposal. As for what that meant in practice, for Africans it was essentially horizontal development that aimed to, among other things, fight against "the structural impoverishment of the rural world". Professor Joseph Ki-Zerbo had said that "Development, far from being the automatic result of a transfer of gadgets and formulas […] or of blind and indiscriminate consumption of the products of others, is the result of a collection of factors, or conditions, of which the most obvious for us today are endogenous research and development. In short, 'turnkey' development does not exist; the only kind of development that is valid and viable is step-by-step development". That is what, in Africa, was called endogenous development: an open and multidisciplinary concept in which TK and TCEs were the noble path or the vein from which all the other fields of African societies radiated. As Professor Ki-Zerbo had also remarked, "The simple fact that 85 per cent of research on Africa takes place outside of Africa clearly shows that this continent is disconnected from itself, in particular in terms of its grey matter." The mass draining of natural elements, and even genes, towards the North was such an example, he had stated bitterly.

134. The representative of the International Chamber of Commerce (ICC) welcomed the documents produced by the Secretariat, which were extremely useful. The ICC had followed these discussions closely since their inception eight years ago, intervened in several meetings and made written comments, most recently on the gap analysis on TK (WIPO/GRTKF/IC/13/6). The representative sympathized with the impatience of many

countries and observers at the slow progress that had been made, but this resulted from fundamental disagreements between delegations. Many wanted a legally-binding international instrument to protect TK. Others doubted if this was possible or appropriate, given the different situations countries found themselves in, and the lack of clarity on the objectives of protection (the need for clarity about objectives was a point which the ICC emphasized in its earliest contributions to the discussion). Accordingly, the ICC supported some points made by the Delegation of Japan in the present meeting. In their introductory statement, Japan suggested that it was important to consider the effect of the work on other important public policies, including their effect on existing IP laws and the public domain. Such consideration was needed before it could be decided how, or even whether, perceived gaps in protection should be filled. In all spheres, the rights of right-holders must be in proper balance with the rights of the general public (a point often, and very properly, put to existing IP rights holders). The ICC also supported Japan's request for clearer definitions of terms. It might be possible to agree on the objective to prevent misappropriation of TK, but not without first carefully defining both terms (TK and misappropriation). The represntative appreciated the African Group's document WIPO/GRTKF/IC/13/6 and heartily commended their attempts to find consensus for a way forward. However, the ways forward proposed were in some cases too optimistic with regard to the level of consensus so far achieved. Although slow progress was frustrating, it did not help to ignore disagreement. The ICC supported the proposals of the African Group and others for intersessional work. This offered a chance to move forward and also to tackle issues in more detail. The African group had listed five issues. Another that might be added to the list was the question of disclosure of origin in patent specifications. This was widely canvassed as at least a partial solution to the problem of misappropriation. The ICC doubted it would help much. Even if they were wrong about this, it was not the simple matter to implement that many seemed to think. There were numerous questions to be decided. The Secretariat had produced an excellent and impartial review of the options that were available: "WTO Technical Study on Patent Disclosure Requirements related to GR and TK – Study No. 3". If patent disclosure requirements were to be implemented, these options needed to be discussed. Few of them had been discussed in any detail in this Committee. Intersessional work would allow detailed work on this and other topics. NGOs of all kinds should have the opportunity to contribute to the intersessional work.

135. The Chair introduced documents WIPO/GRTKF/IC/13/8(a), WIPO/GRTKF/IC/13/8(b) and WIPO/GRTKF/IC/13/8(c).

136. The Delegation of Romania, on behalf of the Regional Group of Central European and Baltic States, was pleased to see that a debate on the relationship between IP and GR could take place during the present session of the Committee. WIPO had a role to play in respect of this specific topic and discussions should continue in a constructive manner. It thanked the Secretariat for the relevant documents on GR and expressed its gratitude to all those who put forward proposals in relation to a mandatory disclosure requirement. The Delegation recalled the proposal submitted by the European Community and its Member States, which called for adoption of the requirement that all patent applicants would disclose the source of origin of genetic material and associated TK, legal consequences being foreseen outside the scope of IP law. It supported that proposal and expressed hope that new developments could lead to a breakthrough.

137. The Delegation of the Russian Federation, said that document WIPO/GRTKF/IC/13/7 had not been presented by the Secretariat, but was worthy of attention. The document provided a full picture of the work of the Committee and other WIPO committees with a view to the recognition of TK in patent applications. It was valuable in that it enumerated the work done in that direction and contained references to documents that could be consulted for more complete information on specific issues. In addition, it contained information on the work being done in parallel by other international fora to that end, which gave a fuller picture of such a multifaceted issue. The document was not a simple enumeration but also examined the reasons for the problems which had arisen, the ways in which they were solved and the results of each stage of the work done. The section entitled "coordination, consultation and cooperation" was interesting as it contained details of the experience of New Zealand in relation to the development of "guidelines" for inventions, which used local flora and fauna and traditional or local knowledge. The document also referred to the experience of China, which examined a large number of applications in the field of traditional Chinese medicine and where, for that purpose, a special group had been set up. Also of interest were the recommendations on formal and informal cooperation between patent offices. The section entitled "examining specific disclosure requirements for genetic or biological material or resources and TK" was important. The Delegation agreed with all the information given in the paragraph 61 and beyond, and with their observation sections, for example, the principles forming the basis for the requirement of disclosure of the aforementioned information (paragraph 65), and the consequences of the refusal to submit to such requirements (paragraph 69). Paragraphs 71 to 74 detailed problems and contained key issues. Those were precisely the questions to which responses were of interest and which the Delegation wished to receive. It was therefore in agreement with paragraph 75 on "further areas for clarification" and the following draft Recommendation on the exchange of experience relating to the practice of implementing special disclosure measures from the point of view of search and examination.

138. The Delegation of France, speaking on behalf of the European Community and its Member States, emphasized that it placed great importance on the issue of genetic resources and was delighted about future developments that would be possible thanks to the Committee's decision to examine that point in detail during its 13th session, by according it equal treatment as part of the three issues that the Committee was mandated to examine. The Delegation also thanked the Secretariat for redistributing document WIPO/GRTKF/IC/12/8(a) as WIPO/GRTKF/IC/13/8(a) and updating document WIPO/GRTKF/IC/12/8(b) as WIPO/GRTKF/IC/13/8(b). The Committee had important work to do on the subject of genetic resources in relation to IP. Several proposals had been made to the Committee, including a proposal by the European Community and its Member States on disclosure of the origin or source of genetic resources and associated traditional knowledge in patent applications (WIPO/GRTKF/IC/8/11). Several European Union Member States had already introduced provisions concerning the disclosure of the origin of genetic resources into their national patent legislation. In that regard, the European Community and its Member States wished to recall some important elements of their proposal. The European Community and its Member States proposed implementing a legally binding disclosure requirement concerning the disclosure of the country of origin or the source of the genetic resources and associated TK in patent applications. The scope for the application of this requirement was wide, given that it had to apply to all international, regional and national patent applications. In addition, as long as it was done in good faith, the applicant would be able to state that he or she did not know the origin or the source of the genetic resources. However, if it transpired that the applicant had provided incorrect or incomplete information, sanctions would have to be provided for, outside of patent law. In order for the disclosure requirement to be an

effective incentive for respecting the rules on access and benefit-sharing, it was anticipated that the patent offices would notify a central body, which could be the Clearing-House Mechanism of the CBD, of information relating to the disclosure of the origin or the source of the genetic resources or associated TK. Such a link would facilitate supervision, in particular by the countries of origin and the holders of TK, of respect for benefit-sharing agreements. The Delegation also recalled that, of the options presented in document WIPO/GRTKF/IC/13/8(a), it wished the Committee to focus on option (i), which concerned the development of a mandatory disclosure requirement. Discussions could be held on the basis of the Member States' proposals that had already been submitted to the Committee.

139. The Delegation of Germany, on behalf of Group B, thanked the Secretariat for the documents on GR, namely the list of options for continuing the work on GR and the factual update of international developments. This latter document provided an excellent overview of the efforts of relevant international fora with regard to GR. It looked forward to continuing technical discussions at this session in order to deepen our mutual understanding of the complex interplay between IP and GR. It underscored the importance of the issue of GR for Group B. All three items on the agenda of the Committee were on equal footing and should all receive equal treatment and the proper attention they deserved. It reiterated that the relationship between IP and GR was an IP issue. The Delegation therefore looked forward to seeing it being discussed in this forum.

140. The Delegation of Colombia considered that the international dimension and area of GR should look at option 5 of WIPO/GRTKF/IC/13/6. The document made reference to the strengthening of international coordination through different guidelines so that the work could complement, be adjunct, to what had been done in other fora such as the CBD. The Committee could focus on arriving at fair limitations when it came to the use of GR, biological resources and access thereto on the basis of technical knowledge and scientific research. Regarding patent applications with regard to that type of resource it suggested that when dealing with pure knowledge of nature there was no protection as set forth in the Andean region but when it came to direct exploitation, extrapolation of these resources, there had to be very clear information and disclosure. Over and above disclosing the origin of the resources they had to talk about the scope of the invention and the dimension that was directly linked to the biological resource, it could be protected in other ways so there could be adequate use and also retribution of the country from which the resource came. When it came to later development of the resources that information should be sufficient, but regarding the preventive protection of genetic and biological resources the measures had to be directed to other types of indications, such as disclosure of the sources. There should be an inventory for each country. Furthermore, the interconnection of the various instruments was important. Coherence between the various provisions and the necessary infrastructure was important so that there could be development to have a proper response to deal with all the requests forwarded by the various countries.

141. The Delegation of Brazil held that GR were an issue to which it attached the utmost importance. Its national legislation foresaw a mandatory disclosure requirement in patent applications when the invention derived from GR and associated TK. Recently, Brazil was working on enhancing and strengthening its national legislation on the issue of PIC and ABS which were the two principles of the CBD. There was a new project of law which had been discussed with civil society and representatives of indigenous and traditional communities and it had been a democratic discussion. It hoped to have new legislation to enact the principles of PIC and ABS in the near future. However, national legislation was not sufficient to address the global problem of misappropriation of GR. It was an international problem that

required a global solution, which should be based on a mandatory disclosure requirement in patent applications. It should be introduced as an amendment in the TRIPS Agreement. Brazil had been striving for that in the context of the Doha Rounds. The Secretariat correctly reflected the latest developments within the context of the Doha Round in its document in paragraph 39 on page 11: "on the eve of the 21/29 July 2008 WTO Ministerial meeting a coalition of developed and developing country members led by Brazil, the European Union, India and Switzerland presented document TNCW 52 covering the three current IP issues: The relationship between the TRIPS Agreement and the CBD, extension of the protection of geographical indications and establishment of a multilateral system of notification and registrations". And that coalition was integrated by over two thirds of the WTO membership. Any future work or any decision relating to it that would be taken in the Committee should take into account what was happening in other fora, in particular in the WTO. It was with that preoccupation and that concern that the Committee should discuss GR.

142. The Delegation of Indonesia looked forward to further discussion and substantial progress on the protection of GR, in line with the mandate of the Committee. In this respect, WIPO's cooperation with other relevant organizations was highly commendable. It underlined the need to ensure their mutual supportiveness and their maximum and fair contribution to the interest of all Member States. Discussions on this issue had identified cases of acquisition of GR in the country of origin/provider and subsequent patenting such materials in other countries. That has caused problems for Member States, especially the mega bio-diverse countries. That was not to mention erroneously granted patents due to patent examiners that were unaware or failed to detect the existence of TK. Misappropriation would certainly hinder developing countries to reap the full benefit from their own GR in fostering development. An enhanced disclosure requirement relating to patent in connection to GR and associated TK used in the inventions would be one useful tool to address the problem of bio-piracy.

143. The Delegation of Algeria, speaking on behalf of the African Group, thanked the Secretariat for its substantive contributions in the area of genetic resources as it related to intellectual property (IP). The future work of the Committee concerning genetic resources should take into account the substantial developments within other international fora. In that regard, the African Group welcomed the process of developing and negotiating an international regime on access and benefit sharing in the context of the Convention on Biological Diversity (CBD). The Delegation also emphasized the links that existed between WIPO, the CBD, FAO and WTO. It encouraged these organizations to communicate and participate actively in each other's activities, within their respective mandates, to create synergy in the implementation of related activities. WIPO should consider (i) developing a range of options for the IP aspects of access and benefit-sharing arrangements that could ensure benefit sharing and also developing a structured menu of options to guide the custodians of genetic resources to facilitate their decision-making process; (ii) developing disclosure requirements and other proposals for dealing with the relationship between IP and GR as required under the CBD; (iii) developing guidelines and procedures on how to deal with the IP aspects of access and benefit-sharing arrangements; (iv) supporting demand- and needs-driven capacity-building initiatives in Africa in relation to IP and GR as well as to the links between WIPO, the CBD, WTO and FAO.

144. The Delegation of China believed that although the incorporation of the protection of GR into the IP regime was only one of the links in the whole chain of such protection, the role it played was irreplaceable. In particular, the inclusion of the requirement to disclose the origin of GR in patent applications further improved the existing IP system, and would

contribute to monitoring and eliminating unfair exploitations of GR, especially in the case of exploitations across borders, and would in turn make sure that the three principles enshrined in the CBD, such as national sovereignty, PIC and equitable benefit sharing, would be respected and implemented, thus furthering the long-term objectives of protecting biodiversity and keeping human development sustainable. Although the IP system was not the sole approach to the protection of GR, it was an important and indispensable one of complementary nature, which should play a unique role in that regard. The issue of protection of GR was currently under discussion in various international fora, including the CBD, WTO and the Committee, but such discussions were still insufficient rather than superfluous. Otherwise the delay in the making of concrete results and the birth of an international *sui generis* regime could not have taken place. The issue was being discussed at those fora from different angles and with different focuses, and the Committee could bring a unique perspective to the question of protecting GR. The Secretariat should therefore join hands with Member States in bringing into full play its important role that was irreplaceable by other fora.

145. The Delegation of Japan reiterated that as a solution for preventing erroneous granting of patents, it had been proposing the establishment of a one-click database, which would allow patent examiners to more effectively perform prior art searches for applications related to GR and associated TK. At the eleventh session of the Committee, it supplemented its original proposal to avoid inappropriate access to the database from third parties, which had been based on its experiences of access limitation measures. Following the discussions at the Committee, it now believed that an effective way to address the concerns expressed by some delegations was to take a step-by-step approach when developing a database in such a way that the security level could be verified at each step. The development process for the database was divided into two phases, in other words, the initial pilot phase followed by the second implementation phase. Currently, the WIPO website included various GR-related national databases of Member States, which were open to the public. In the initial phase, a pilot portal site should be set up by linking some of those publicly-open databases for search purposes. The overall database structure would be the same as proposed at the eleventh session as dcoument WIPO/GRTKF/IC/11/11. One important aspect was that only examination authorities, such as the IP offices would be given access to the portal site. During the initial phase, WIPO would examine if there were any cases of inappropriate access by third parties to the pilot portal site. WIPO would also conduct a questionnaire survey on to what degree the portal site was user-friendly with a view to determining what improvements should be made and, then, the result of the pilot phase would be evaluated. If the result of the evaluation was positive, the second phase would follow in which for the implementation, more databases of Member States would be linked to the portal. The aforementioned databases might include some databases containing unpublished information. “Unpublished” information meant that only the parties who were allowed to use the databases may have access to the information. In this connection, it was also proposed that a function to distinguish published data from unpublished data be added to the portal site, for example, indicating unpublished data with a flag. Furthermore, a filtering function may also be applied to hide unpublished data. Another function to be added to the portal site was machine translation, which would enable an examiner to use it more smoothly and easily. When the portal site had entered into the full implementation phase, the security measures to block third parties' access to the portal, especially toward unpublished data, would be checked. When the relevant information identified by the examiner corresponded to unpublished entry, the particular information may not be cited in the office action for the purpose of denying patentability. However, the following measures could be taken to circumvent this situation. First, an examiner may wish to request WIPO to provide publicly-known documents

containing the same information as the corresponding non-literature information retrieved using the portal. In such a case, WIPO would forward that request to the relevant Member States to which the GR belonged and ask them to supply information, which was publicly known for the examiner. Second, WIPO, on behalf of the examiner, may provide relevant authorities in concerned Member States with information on the existence of applications to which stored information in the portal site had been identified as prior art. These measures were expected to function as triggers, which encouraged concerned Member States to furnish alternative useful information for the examination. The Delegation expressed hope that the additional explanation would contribute the better understanding of its proposal for a one-click database.

146. The Delegation of Mexico thanked the Secretariat for its efforts in producing documents WIPO/GRTKF/IC/13/8(a) and WIPO/GRTKF/IC/13/8(b), and highlighted the importance of ensuring that the work of the Committee complemented the negotiation processes that were going on as part of the CBD, given that the issues of genetic resources and IP were directly linked to international regulations on access to genetic resources. Likewise, as part of the terms of reference of the Committee, it had to give continuity to the debates on the options available to further its work, including alternatives to approaching the relationship between IP systems and access to genetic resources. It added that, on that particular point, it was important to establish the link between the authority that authorized access to genetic resources and IP rights authorities. Therefore, as a working method, the Committee should explore mechanisms for exchanging information between authorities for the purpose of helping to achieve the third objective of the CBD, relating to the fair and equitable sharing of benefits arising out of the utilization of genetic resources. In terms of the technical aspects, the Delegation was in favour of creating databases of already disclosed traditional knowledge and of genetic resources, so that they were accessible to IP authorities; however, inclusion in such databases of non-disclosed TK had to be subject to the free, prior and informed consent of the indigenous and local communities that held them, as well as to mechanisms that safeguarded the integrity and confidentiality of the information. The creation of a database of genetic resources could be a practicable option in the short term; however, in terms of both its creation and its possible uses and applications, it had to be taken into consideration that genetic resources could be shared between different countries. That issue should be a topic for discussion within the Committee.

147. The Delegation of Singapore noted that at previous meetings of the Committee there had been discussion on an international database of GR and TK to assist patent examiners when they examined applications containing GR and TK. Such an international database was a possible means to prevent the grant of patents in applications involving GR and/or TK where the patentability requirements of “novelty” or “inventive step” were not met. This could, in turn, possibly lead to the grant of fewer patents involving “misappropriated” GR or TK. Member States should focus on and enhance the depth of discussions on databases so that the matter could be more fully considered. To this end, it had grouped the following key issues to facilitate discussions: (1) technical aspects of the international database - Member States may wish to consider previous proposals that had been submitted with regard to matters, such as the architecture of the international database (e.g. a system linking various international databases), on the language and search capabilities of the international database or table fresh proposals for discussion; (2) contents of the international database - what fields of information would the international database contain? Would the database contain only publicly known information so that such information could function as a source of prior art? How would the information be classified and organized on the database?; (3) content development and accuracy verification of the content that was submitted to the international

database – what parties would be responsible for content development, accuracy verification and the submission of content for the international database? How should the issue of conflicting claims to particular GR & TK be handled? What procedures would there be, and who would bear the costs, for content development, accuracy verification and the submission of content for the international database?; (4) access to the international database – who would be able to view the data on the international database, and download and upload data to the database? What controls to access should there be, if any? In that regard, there were two important issues to be considered: There was a risk that if not properly managed, the database may be misused to facilitate GR and TK misappropriation. What measures may be taken to prevent this? Notwithstanding the need for any access restrictions, adequate means should be provided for the general public to carry out prior art searches on the database; (5) who would maintain and fund the operations of the international database? – the issue of maintenance and funding was likely to be affected by the architecture of the international database; It was evident that some of these issues were interrelated with each other. The list of issues was not exhaustive and the Delegation welcomed further comments and elaborations. Perhaps the WIPO Secretariat could prepare a list of issues relevant to the development of an international database of GR and TK, for circulation and discussion by Member States. It hoped that the listing of issues would be useful towards enhancing the depth of discussions on a possible international database of GR and TK to assist patent examiners when they examined applications containing GR and TK.

148. The Delegation of India complemented the work done by WIPO Secretariat in preparing valuable documents on GR. The IP regimes needed to become more sensitive to the aspirations of the holders of GR and associated TK. The mandatory disclosure, PIC and benefit sharing were the three basic tenants to make the patent system more transparent and credible. Other ideas were also important, but could not be allowed to shift the focus away from these core issues. The Indian Patent Act had a specific provision requiring mandatory disclosure of the source and geographical origin of the genetic material contained in an invention. Disclosure of GR should be required in clarifying prior art relevant to any inventive step. A number of cases had been documented where patents had been issued with respect to GR and known products and processes used by traditional and local communities for many years or centuries. Biopiracy was a global problem as it involved not only the acquisition of genetic material in one country and seeking patents using such material and associated TK in another, but also use of such material for derivative inventions. The discussion in the TRIPS Council on the issue of 'disclosure' had gone into considerable detail with a number of ideas and proposals for dealing with the complex issue. The Delegation supported the statement made by the Delegation of Brazil that the discussions at WIPO should take into consideration the details already emerged at the TRIPS Council.

149. The Delegation of Switzerland thanked the Secretariat for document WIPO/GRTKF/IC/13/8(b). That revised factual update of international developments provided an excellent overview of the efforts of relevant international fora with regard to GR. As mentioned in its opening statement, all three agenda items of the Committee were on equal footing. Thus, 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/13/8(a) included the issue of disclosure requirements. In that regard, the Delegation recalled the proposals it submitted on the disclosure of the source of GR and TK in patent applications. Switzerland, not a demandeur, submitted its proposals because it recognized the importance of increased transparency with regard to ABS. The Delegation referred the Committee to document WIPO/GRTKF/IC/11/10.

150. The Delegation of Norway supported the statement made by the Delegation of Germany, on behalf of Group B. It thanked the Secretariat for the excellent documents presented, in particular, the list of options. It would be beneficial to have a focus for further work. The issue of GR was one of the three pillars of the Committee and its further attention. In Norway, as mentioned in previous meetings, the disclosure requirements in patent applications remained a focus. Norway had previously made amendments in national legislations and proposals in both the WTO and WIPO to make it a mandatory requirement in patent applications. It was important that the work of the Committee was mutually supportive to the work in other fora and updates in particular of the work in other foras were beneficial and should be taken into account.

151. The Delegation of El Salvador thanked the Secretariat for producing documents WIPO/GRTKF/IC/13/8(a), list of options, and WIPO/GRTKF/IC/13/8(b), factual update of international developments. It said that the list of options was a good document and that it should be one of the documents used as a basis for WIPO decisions. The Delegation appreciated the update of international events and the objectivity with which recent, related events in other arenas, such as the WTO, had been reported in document WIPO/GRTKF/IC/13/8(b). Finally, it reiterated its satisfaction at the document's dedication of an equal amount of time to each of the topics addressed by the Committee.

152. The Delegation of South Africa congratulated the Committee for successfully dedicating equal time to discussing all three issues in a transparent manner. The discussion was beginning to show progress and confidence in the future work. It supported the statement made by the Delegation of Algeria, on behalf of the African Group. It referred to WIPO/GRTKF/IC/13/9, which contained recommendations on the work on GR. Currently, amendments to the IP rights that included mandatory disclosure, ABS and PIC in parliament to get them into law so as to move the national matters and find synergy with activities at the international level.

153. The Delegation of the United States of America aligned itself with the statement made by the Delegation of Germany, on behalf of Group B. It thanked the Secretariat for WIPO/GRTKF/IC/13/8 (a) and WIPO/GRTKF/IC/13/8 (b). These documents would be useful as the Committee continued its work. It strongly supported continued work of the Committee in the area of GR in working toward concrete outcomes of the Committee. The merits of mandatory disclosure requirements were not clear. As explained in past sessions, there was insufficient information as to the utility of such requirements in avoiding inappropriately granted patents. Given that some Offices had these requirements for some time, it would be useful, however, for Offices to share their experiences in this regard. More information should be provided as to when an invention was considered to be derived from GR or TK. Furthermore, the United States had long observed that concerns about misappropriation arose more broadly than in the context of products or methods under patent protection. The more appropriate and all-encompassing approach for any kind of 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. How would national governments address situations that did not involve patenting? What recourse was available to the holders of GR/TK to prevent misuse of their resources? The Committee should also continue to explore options that would more directly prevent the erroneous granting of patents. The most discussion to date had not provided evidence of "misappropriation", such as the use of resources without the permission of the owner of the GR. There appeared to be a presumption by some, without empirical evidence, that an

invention related to GR was automatically based upon illegal access or misappropriation. A reference to a GR in a patent, especially in the background section of the patent, was not evidence of misappropriation. Furthermore, many GR were bought and sold, and thus legally obtained and independently researched and developed into inventions. Still others were legally obtained and only incidentally related the novelty or inventive step allowing for a patent to be granted, but still included within the broad disclosure of the invention in order to have a complete disclosure. Perhaps as a result of the erroneous presumption, instead of being provided with facts demonstrating misappropriation, information was presented about patents that had been granted that would not have been granted if the IP office had more information. To address the concern of erroneously issued patents, the United States supported the proposal made by the Delegation of Japan regarding a web portal or "one-click" database. It was concerned about inclusion of information that was not publicly known in the database. Inclusion of undisclosed, nonpublic information could significantly complicate the examination process. Perhaps for the initial pilot, the web portal could ensure that only documents that could be used as prior art would be accessible to patent examiners. As indicated by the Delegation of Mexico, undisclosed information may be added later, after PIC had been obtained, and once it was clear how the documents could be used. As indicated by the Delegation of Singapore, the inclusion of some information would raise additional complications, and if confidential information was included, additional questions would need to be addressed. The United States supported the suggestion of the Delegation of Singapore for WIPO to collect a list of issues regarding databases, but noted that these questions pertained to information that was not public and that work should continue in ensuring that public information was made available to patent examiners in a readily retrievable manner. Other measures, such as quality guidelines, may also be useful in ensuring that patents were of high quality. The Delegation would also submit written comments regarding GR, reiterating questions previously asked regarding a disclosure requirement. It was noted that the Biotechnology Industry Organization had submitted a document for consideration by the Committee at that meeting. It would be helpful if other delegations and observers did as well, updating, as necessary previous statements made with facts helpful in the analysis of this issue.

154. The Delegation of Canada associated itself with the statement made by the Delegation of Germany, on behalf of Group B. Building upon the work already done by the Committee and mounting international evidence that there was a need for greater expert input and analysis of IP-issues related to GR and disclosure, the Delegation encouraged the Committee to make reasonable, technical progress in the area of GR. It thanked the Secretariat for preparing the documents at hand, as they were a concrete first step in deepening the Committee's understanding of issues related to GR. Unfortunately, as there were certain limitations placed on government activities during a general election process, Canada had not been in a position to submit written comments on the list of options on GRs, but considered sending a submission in the near future. WIPO/GRTKF/IC/13/8 (a) listed ten options for continuing or furthering the work on GR. It had concerns that some of these options assumed that there were clear linkages between the patent system and ABS. Such linkages were not well established and a fact-based approach favouring the sharing of national experiences in relation to the protection of GR was necessary, as such an approach could deepen its understanding of the issue. Time and consideration should be given to a full scoping of the issue before proceeding further. Canada had a strong interest in learning about the effectiveness of disclosure mechanisms in countries that already had such procedures as well as alternative models. This process could be one method of ensuring that the Committee's work remained within the terms of its mandate on GR in a constructive and productive fashion. It reiterated the importance of the issue of GR in the Committee as all three items on

the agenda of the Committee were equally important. In view of the calls to further the work of the Committee and to achieve concrete outcomes, an inter-sessional process on GR could assist in focussing work in that regard.

155. The Delegation of the Islamic Republic of Iran stated that negotiation regarding GR and finding the way to campaign against biopiracy at the international level was one of the main aims of the establishment of the Committee. Accordingly, any option and mechanism should consider the concerns of GR holders and provide a practical mechanism. In this regard, any option should include a mandatory disclosure requirement, PIC and benefit sharing of the GR holder. The three main principles, which were explained in Article 3 of the CBD, especially the sovereignty of States on their GR, should be respected.

156. The Delegation of Chile considered that paragraph 40 of document WIPO/GRTKF/IC/13/8(b) set out the reaction of some WTO Member States to the proposal led by Brazil, India, the EU and Switzerland (TN/C/W/52) concerning the three IP issues that were being discussed in the WTO, namely the existing relationship between the TRIPS Agreement and the CBD and the two subjects concerning geographical indications. It said that the paragraph was based on the Report by the Director-General to the Trade Negotiations Committee and the General Council (WT/GC/W/591 and TN/C/W/50). In that report, and in paragraph 40 of the Committee document, it was correctly stated that a group of countries, including Chile and other Latin American countries, rejected the proposal for the artificial parallelism that had been made in the proposal between the three issues. It said that each issue had its own terms of reference and subject matter, and therefore many technical issues remained unresolved, with the interest of Members in each varying considerably. It stated that it firmly rejected the proposal because it brought issues together that had nothing to do with each other. However, the second part of paragraph 40 of the Committee document on genetic resources described the substantive position of only some WTO Member States, but attributed it to all those who rejected the proposal because of a formal issue, without mentioning the merit of the individual proposals. The Report by the WIPO Director-General to the General Council and the Trade Negotiations Committee described that substantive position, but as one of a varied range. In the same way, the Committee document gave the impression that all those who had opposed the artificial parallelism also had fundamental objections to the three issues that were being analyzed in the WTO. That was not the case, for Chile or any other country. The Delegation asked the Secretariat to revise that paragraph and to consider the Chilean position.

157. The Delegation of New Zealand associated itself with the statement made by the Delegation of Germany on behalf of Group B. The IP issues relating to the use of GR and associated TK were of considerable consequence for New Zealand, as it had both a high degree of endemism and a significant indigenous interest in the preservation of GR and the protection of TK. These issues were at the heart of a very substantial commission of inquiry in New Zealand (WAI 262 claim). It was following the discussions in the Committee, as well as in the TRIPS Council and the CBD with great interest. It shared the objectives that GR and TK not be misappropriated, and that appropriate mechanisms provide for equitable ABS. The New Zealand Government was at the early stages of a policy development process to address domestic issues relating to bio-prospecting, including the use of GR in the R&D of patentable inventions. It had listened carefully to the specific case-studies presented and had shared information about its own domestic experiences. It encouraged further discussions and analysis to ascertain how mega-diverse countries could address issues of misappropriation of GR and associated TK through their institutions; understand the successful processes and standards used in the search of patents in various countries, thereby helping Member States

who might wish to initiate similar efforts; gain knowledge of the large number of inventions referring to resources of specific origin that might elucidate the IP issues that were of concern in relation to biopiracy. It welcomed the continuance of the Committee's work program to assess the implications of the various proposals for the various stakeholders and indicated that it would welcome the opportunity to comment on them at future sessions. That agenda item should equally form part of any intersessional work to which the Committee may agree. It thanked the Secretariat for its useful and constructive work in putting together the documents on GR and disclosure and in proposing a list of options for continuing our further work; and stated that it would continue to give this careful consideration.

158. The Delegation of Bolivia was in favor of the protection of GR, TK and TCEs. However, it had some specific difficulties as regards the first theme because for Bolivia these resources were collective resources and it could not be summarized to private ownership because that would be contrary to the very concept of community of its indigenous people. They represented more than 60% of the population and were the holders of that TK. However, patents conferred private ownership over biological diversity. That meant to extend the concept of private property to natural elements essential for life, for the life of every living organism. These were collective resources shared by indigenous communities. That would translate into privatization of life and nature held in foreign hands, a result totally unacceptable to its indigenous community. Since the Government of Boliviawas the first indigenous government in South America for many years, the Delegation voiced its concern and the concern of the indigenous communities. The Committee had to envisage other solutions, creative solutions to protect GR, resources not going through individual and private ownership, but which were adjusted to the needs and applied in accordance with the views of the indigenous communities. The Delegation stated its intention to send written comments and to add one more option which was not a patent of living resources. That was very important for indigenous populations. The Delegation endorsed Ecuador's proposal concerning TK and folklore and proposed that theme to the Secretariat in 2009. A declaration including a few amendments would be transmitted to the Secretariat.

159. The Delegation of Brazil thanked the Delegation of Japan for having presented once again its proposal of a one-click database. It said it appreciated the good spirit and intents that underlied the proposal. However, the database failed to provide an adequate response to the problem of misappropriation of GR. It was difficult to calculate and assess the amount of GR available worldwide. It would be even more difficult to collect and include in a database relevant information or relevant data about the worlds collection of GR and it was also difficult to imagine that all the information available about GR would be made available to patent examiners in one-click only. Another problem was to set up a database without a legal framework. Taking the FAO mechanism regarding seeds and GR as an example, the FAO had created a database, but access to that base was regulated by a treaty. The misappropriation of GR should be inhibited rather than creating a database.

160. The representative of the Eurasian Patent Office said that as GR and related TK were, to an increasing extent, becoming the subject of patent law, the opinion was being ever more persistently expressed that specific changes in the adopted practice of filing patent applications would serve as an effective measure to prevent the unlawful appropriation and use of GR and/or TK. However, the new requirements for the disclosure of an invention relating to GR, in particular, the compulsory indication in a patent application of the source of origin of GR did not, in its existing wording, achieve the desired aim. That related above all to the fact that the patent laws of many countries already contained exhaustive rules relating to compulsory disclosure of an invention in a patent application such that it could be carried

out by a person skilled in the art. In particular, in the case of an invention relating to biological material or a method involving the use of biological material, the application must disclose the origin of the material and the method by which it was obtained, or indicate where and/or how the claimed material could be obtained (so-called requirement of open access). If biological material could not be disclosed in an application such that an invention could be carried out by a person skilled in the art, and if there were no open access to such material, the application should contain information or a document concerning the deposit of such biological material with the depositing authority. Thus, the requirement to indicate the so-called "secondary source" of origin of GR, where the "primary" source was unknown, as defined in the declaration by Switzerland (WIPO/GRTKF/IC/11/10), and which also covered different collections, had already been reflected in patent law. On the other hand, references to scientific literature, which also constituted the "secondary source" of origin of GR in accordance with the statement made by the Delegation of Switzerland, could prove to be insufficient for a decision to be taken on the grant of a patent. Citing another example, Eurasian application 200300784 was filed for a method of treating an illness caused by human immunodeficiency virus, which was based, in particular, on the administration to a subject of a Mycobacterium w microorganism, i.e. the invention in question was based on indirect use of GR, according to their existing definition (microbial genetic material with practical value). The patentability of that invention was evaluated according to established rules and, primarily, it was verified whether the invention was disclosed in the application materials sufficiently fully and clearly for it to be carried out by a person skilled in the art. As the invention in question related to biological material, it was essential to establish whether there was open access to the material, i.e. where and/or how the claimed material could be obtained by any third person. If there were no such access, the application should disclose the origin of the material and method by which it was obtained, or contain information or a document on the deposit of such biological material with the depositing authority. The application materials did not contain information on open access to the microorganism, they did not disclose the method by which it was obtained (an indication was provided only that the microorganism was obtained from the soil) and no deposit information or document was referred to. In response to the examiner's request for the provision of the corresponding data, the applicant stated that the microorganism used was well known and consequently available, and the applicant provided copies of the articles which were devoted to the study of the characteristics of that microorganism. The examiner repeatedly stated that there was insufficient information for carrying out the invention. The examiner could have accepted the reference to scientific literature, if it had contained information on open access to the microorganism with the guarantee that such access would be provided for the whole period of the patent's validity (for example, the microorganism was in commercial circulation, the supplier was known and it was confirmed that the microorganism could be obtained from the supplier before the priority date). The applicant had refused to provide the requested information and the examiner had refused to grant a patent, stating that the claimed invention was based on the use of a microorganism to which there was no open access, the microorganism had not been deposited and the method by which it had been obtained was not disclosed. It was therefore not possible to carry out the invention. Thus, current patent legislation adopted an even stricter approach to evaluating the patentability of inventions relating to the use of GR than it was assumed would be done with the help of the new requirement of compulsory disclosure presupposing the introduction of a new concept "source of origin of GR without defining it", the division of the sources of origin of GR into "primary" and "secondary", and an indication of the "secondary" source where the "primary" source was unknown. There was therefore a clear need to define which GR were referred to in the requirement for compulsory indication of the source of their origin and what specifically was meant by such a source. In the absence of appropriate wording, it was

unjustified to refer to the compulsory inclusion of the source of origin of GR in patent application materials. Amendments to existing patent legislation should be approached with great care, considering the rules which already existed for the examination of applications filed for the grant of a patent for an invention relating to biological material, in order to avoid unclear and ambiguous situations when evaluating their patentability. The representative expressed the hope that the search for mechanisms to regulate relations concerning access and use of GR/TK, and, in particular, the conditions for the commercialization of goods and services, devised on the basis of such use, would be successfully completed. The representative thanked the Secretariat for the highly professional work it had done and wished it further creative success.

161. The representative of the International Union for the Conservation of Nature (IUCN) informed the Committee that in its 4th World Conservation Congress held in Barcelona on October 5-14, 2008, it had endorsed among its policies, the recognition of the links between biodiversity and cultural diversity (which included TK) to support biocultural diversity conservation as a key part of nature conservation and of sustainability. IUCN had also endorsed the UN Declaration on the Rights of Indigenous Peoples.

162. The representative of Tupaj Amaru said that the Committee, which had been established in 2000 by the General Assembly of WIPO, had been and still was mandated to examine the issue of genetic resources within the framework of intellectual property and the sharing of benefits derived from the use of said unprotected resources. However, the Committee had not made substantive progress. In order better to understand the extremely complex problem, it was necessary to recall the definition of genetic resources contained in the CBD and other international instruments. For the purposes of the CBD, genetic resources were understood to mean genetic material of real or potential value. Genetic material was in turn defined as any material of plant, animal or microbe origin, or of any other type, which contained functional units of heredity that would allow the characteristics of an ancestor to be passed on to a descendant, from one generation to the next, through the permanent reproduction of said resources. Why was it necessary to protect them? Because the diversity of genetic resources was the material and spiritual source of the survival of humanity, but in the modern age man continued to destroy biological resources, which were the fount of all life on Earth. The Preamble to the CBD (1992), ratified by 160 States, recognized “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components”. In the materialistic conception of the history of indigenous peoples, the biological and genetic resources and traditional knowledge which comprised an infinite number of living organisms and other forms of life in permanent transformation throughout more than four million years, constituted the collective heritage of Aboriginal nations and local communities, and was the common heritage of humanity. Consequently, the Committee should examine genetic material not only in terms of the market, earnings and profitability, and investments between providers and receivers of those intrinsic values, but also in the spirit of its conservation and sustainable development for the survival of humanity. As mentioned in document WIPO/GRTKF/IC/13/8 (b), at the first session of the Committee, the Member States of WIPO had put forward the possibility of preparing “contractual practices, guidelines and model intellectual property clauses” which would permit access to genetic resources and benefit sharing. Although the purpose of the targeted contractual practices was to help parties to produce legislative or administrative measures or model clauses on access for and participation of beneficiaries and the drafting of contracts, that in no way resolved the biopiracy and bioprospecting which were practiced with

complete impunity and within the sphere of neoliberal policies. Those people who freely engaged in the unlawful use of genetic resources would never subject themselves to the rules and laws of receiving countries in order to subscribe to and guarantee mutually agreed contracts, as long as international standards and binding regulations did not exist. The formulation of the principles defined in WIPO/GRTKF/IC/8 relating to the preparation of targeted contractual practices and benefit sharing appeared in actual terms to be a very simple technical and legal methodology. In practice, that was the opinion of native communities and indigenous peoples who did not have telephones, electricity, or much less computers and Internet access, since technologies and mechanisms, together with legal terms, were too complex in their interpretation and application, and inaccessible to indigenous communities. It was wondered how in that correlation of forces between the market and protection for life, indigenous and local communities could have the capacity to negotiate contracts or arrangements with pharmaceutical, bioprospecting and agro-industrial firms, such as Monsanto etc. In reality it would be impossible and improbable to draw up and respect such and such a contract between the parties. Owing to their legal nature, such contracts, agreements and licenses, either through action or omission, would be unfair, and the advantages and benefits would be awarded to only one party to the contract, other than where a mechanism existed for safeguarding the agreements. Moreover, the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity (CBD), which had been set up in Bonn in 2001, had devised the Bonn Guidelines on access to genetic resources and the fair and equitable sharing of benefits resulting from their use, but these had not produced any tangible results to date. According to the documents mentioned, the Committee had approved a work plan to devise model intellectual property clauses which simply proposed options relating to the establishment of targeted non-binding contractual practices and non-mandatory model intellectual property guidelines and clauses. The Committee had stated at the time that the practices and clauses would not be mandatory. The guidelines had a purely informative purpose and had no legal value. In the guidelines no mention was made of what was patentable and what was not patentable, or of the requirements for disclosure of information relating to genetic resources. The mandate which the Committee had received at its sixth session had been to produce and submit a draft international legal framework. Why were a binding instrument and the fair sharing of benefits a matter of urgency? In a globalized world where multinational companies constituted supranational States within national States, in a world where wars tore humanity apart through the appropriation of natural resources in flagrant violation of the principle of sovereignty of peoples over their natural resources, in a terribly selfish world where biopiracy was practiced with complete impunity, in a world where financial crises were threatening the closure of companies, a global response was required to the pillaging, misuse and misappropriation of genetic resources and TK, and there was an urgent need to establish codes of conduct to regulate the blind laws of the market. As with users, multinational pharmaceutical and agro-industrial firms, together with businessmen disguised as anthropologists, were not subject to the jurisdiction of the host country. Secondly, the receiving States among developing countries had lost the capacity for negotiation and could not legally claim jurisdiction over such firms and their subsidiaries set up in their territories, owing to the fact that their legislation had been dismantled and there was no frequent reference to the concept of multinational ownership, nor did legal protection exist for genetic resources against biopiracy. The Committee should also recognize and specify, in an additional document, the full and free informed consent of indigenous peoples and communities in the process of negotiating possible agreements and their actual participation in devising legal mechanisms designed to protect genetic resources and guarantee the sharing of benefits. The procedures for the application of intellectual property rights should require patent applicants to submit proof of prior consent from the owners of genetic resources and TK. As emphasized on other

occasions, indigenous peoples categorically opposed the inclusion of "human genetic resources" in the database, such as samples of human blood or tissue, for reasons of ethics and respect for human dignity. The attempts to transform human beings into one more commodity that was sold and purchased in the vast free zone of the globalized world were incompatible with the rules of *jus cogens* of international law. In conclusion, the complex technologies, methods and procedures which were inaccessible to indigenous peoples and communities concealed the major economic, strategic and financial interests of the Western powers, as well as the attempt of neoliberal governments to privatize and transfer basic genetic resources and traditional knowledge to a reduced circle of multinational firms.

163. Informal discussions on agenda item 11 were undertaken with reference *inter alia* to document WIPO/GRTKF/IC/13/10 ("Intersessional Procedures: Proposed Modalities and Terms of Reference"). Following these informal discussions, no decisions were taken under this item.

164. The Chair of the Indigenous Caucus was given the floor. He stated that the Indigenous Caucus was disappointed that it had been excluded from the informal discussions that had taken place under Agenda Item 11, and that he wished for this to be formally recorded in the report.

165. The Chair closed the thirteenth session of the Committee on October 17, 2008.

INDEX OF INTERVENTIONS*

* 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.

[Annex follows]

ANNEXE/ANNEX

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Conference des Nations Unies sur le commerce et le développement (CNUCED)/United Nations Conference on Trade and Development (UNCTAD)

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