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

Second Session
Geneva, December 10 to 14, 2001

REPORT

adopted by the Committee

1. Convened by the Director General in accordance with the decision of the WIPO General Assembly (see document WO/GA/26/10, paragraph 71), and of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter referred to as "the Committee") at its first session (see document WIPO/GRTKF/IC/1/13, paragraph 176), the Intergovernmental Committee held its second session in Geneva, on December 10 to 14, 2001.

2. The following States were represented at the meeting: Algeria, Argentina, Australia, Austria, Azerbaijan, Bahrain, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Japan, Kenya, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Mexico, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom,

United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zambia, Zimbabwe (97). The European Community was also represented in the capacity of a member of the Intergovernmental Committee.

3. The following intergovernmental organizations and secretariats took part in the meeting in an observer capacity: African Intellectual Property Organization (OAPI), African Regional Industrial Property Organization (ARIPO), European Patent Organization (EPO), Food and Agriculture Organization of the United Nations (FAO), League of Arab States (LAS), Office of the United Nations High Commissioner for Human Rights (OHCHR), Organisation for Economic Co-Operation and Development (OECD), Organisation internationale de la francophonie (OIF), Organization of African Unity (OAU), Organization of the Islamic Conference (OIC), Pacific Islands Forum Secretariat, Secretariat for the United Nations Convention to Combat Desertification (UNCCD), Secretariat of the Convention on Biological Diversity (SCBD), Secretariat of the Pacific Community, United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Africa (UNECA), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), World Health Organization (WHO), World Trade Organization (WTO) (21).

4. Representatives of the following international non-governmental organizations took part in the meeting in an observer capacity: Aboriginal and Torres Strait Islander Commission (ATSIC), American Association for the Advancement of Science (AAAS), American Folklore Society, Asian Patent Attorneys Association (APAA), Berne Declaration, Biotechnology Industry Organization (BIO), Brazilian Association of Intellectual Property (ABPI), Center for International Environmental Law (CIEL), Centre for International Industrial Property Studies (CEIPI), CropLife International, European Chemical Industry Council (CEFIC), First Nations Development Institute, Friends World Committee for Consultation and Quaker United Nations Office (FWCC), Genetic Resources Action International (GRAIN), Health and Environment Program, Ibero-Latin-American Federation of Performers (FILAIE), Indian Movement “Tupaj Amaru”, Indigenous Peoples’ Biodiversity Network (IPBN), Institute for African Development (INADEV), Institute for Agriculture and Trade Policy (IATP), International Association for the Protection of Intellectual Property (AIPPI), International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Confederation of Music Publishers (ICMP), International Federation of Industrial Property Attorneys (FICPI), International Federation of Musicians (FIM), International Federation of Pharmaceutical Manufacturers Associations (IFPMA), International Federation of the Phonographic Industry (IFPI), International League of Competition Law (LIDC), International Literary and Artistic Association (ALAI), International Organization for Standardization (ISO), International Plant Genetic Resources Institute (IPGRI), International Publishers Association (IPA), International Work Group for Indigenous Affairs (IWGIA), Inuit Circumpolar Conference (ICC), Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Médecins sans frontières (MSF), Mejlis of the Crimean Tatar People, Promotion des médecines traditionnelles (PROMETRA), SAAMI Council, Union of Industrial and Employers’ Confederations of Europe (UNICE), World Conservation Union (IUCN), World Federation for Culture Collections (WFCC), World Self Medication Industry (WSMI), World Wide Fund for Nature (WWF) (47).

5. The list of participants is contained in the Annex to this Report.

6. Discussions were based on the following documents and information papers prepared or distributed by the Secretariat of WIPO: "Draft Agenda" (document WIPO/GRTKF/IC/2/1 Prov. 1), "Accreditation of Certain Organizations" (document WIPO/GRTKF/IC/2/2), "Addendum to Accreditation of Certain Organizations" (document WIPO/GRTKF/IC/2/2 Add.), "Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing" (document WIPO/GRTKF/IC/2/3), "Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge" (document WIPO/GRTKF/IC/2/5), "Progress Report on the Status of Traditional Knowledge as Prior Art" (document WIPO/GRTKF/IC/2/6), "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore" (document WIPO/GRTKF/IC/2/7); "Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore" (document WIPO/GRTKF/IC/2/8); "Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge — Preliminary Analysis and Conclusions" (document WIPO/GRTKF/IC/2/9); "Position Paper of the Asian Group and China" (document WIPO/GRTKF/IC/2/10), "Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity" (WIPO/GRTKF/IC/2/11), "International Treaty on Plant Genetic Resources for Food and Agriculture" (WIPO/GRTKF/IC/2/INF.2) and "Table of Responses to *Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge* (WIPO/GRTKF/IC/2/5) and *Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore* (WIPO/GRTKF/IC/2/7)."

7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made.

Opening of the session

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

Election of a Chair and two Vice-Chairs

9. Upon a proposal of the delegation of the United States of America, on behalf of Group B, with the support of all other groups of Member States, Mr. Henry Olsen (Sweden) was elected as Chair, and Mrs. Homai Saha (India) and Mr. Petru Dumitriu (Romania) as Vice-Chairs. Mr. Pires de Carvalho (WIPO) acted as Secretary to the second session of the Intergovernmental Committee.

Adoption of the Agenda

10. Before submitting the Draft Agenda to discussions, the Chair said that, given that some representatives had come to Geneva just to participate in the debate on expressions of folklore, this particular topic would be dealt with in the afternoon session of December 12. Furthermore, because new developments had taken place in other fora which were generally related to all the substantive items covered by the agenda, he would give the floor to the representatives of the CBD and the FAO immediately after agenda item 4. The floor would then be open for general statements from Member States, Intergovernmental Organizations and Non-Governmental Organizations. Furthermore, the Secretariat would be given the floor under agenda item 6, to explain the committee why document WIPO/GRTKF/IC/2/4, on "Operational Definitions" had not been finalized by the Secretariat, and request information from the Committee Members in that context.

11. The Delegation of Venezuela asked whether the first part of item 6 would be withdrawn from the agenda. The Chair clarified that in view of the explanation that Mr. Gurry would provide about the work on operational definitions, there would be no debate on that particular topic.

12. The Draft Agenda (document WIPO/GRTKF/IC/2/1) was adopted with the modifications proposed by the Chair.

Accreditation of Certain Organizations

13. As set out in documents WIPO/GRTKF/IC/2/2 and WIPO/GRTKF/IC/2/2/Add., seven organizations had expressed the Secretariat their wish to obtain ad hoc observer status for the sessions of the Intergovernmental Committee: the *American Folklore Society*, the *Copyright Research and Information Center (CRIC)*, the *Fondation Africaine pour le renouveau moral, l'apprentissage professionnel, universitaire international et le commerce electronique, et la coordination des trades points aux Rwanda, R.D.C., et Grands Lacs (FARMAPU — Inter & CECOTRAP — RCOGL)*, the *International Cooperation for Development and Solidarity (CIDSE)*, the *International Council for Science (ICSU)*, the *International Environmental Law Research Center (IELRC)* and *The Netherlands Centre for Indigenous Peoples (NCIV)*. The accreditation of the organizations in question as ad hoc observers for the sessions of the Intergovernmental Committee was approved unanimously.

General Statements

14. The representative of the Secretariat of the Convention on Biological Diversity (CBD) noted that recent developments in the framework of the CBD were of direct relevance to the work of the Intergovernmental Committee. As a means to achieve the third objective of the Convention — the fair and equitable sharing of the benefits arising out of the utilization of genetic resources — the Conference of the Parties (COP) established an Open-ended Working Group with the mandate to develop guidelines and other approaches on access to genetic resources and benefit-sharing. The Working Group had met in Bonn, Germany, in October 2001, and successfully negotiated a set of draft guidelines on access and benefit-sharing known as the "Bonn Guidelines." The Guidelines, which were voluntary in nature, were intended to provide guidance to Parties in the development of legislative, administrative or policy measures on access and benefit-sharing and to assist in the elaboration of contractual agreements. They included provisions on the institutional framework, the participation of stakeholders, steps to put key concepts into practice such as those of "prior informed consent" and "mutually agreed terms," as well as monitoring. The draft Guidelines would be submitted to the sixth meeting of the COP, in April 2002, for their finalization and eventual adoption. In addition to drafting the Bonn Guidelines and considering capacity-building measures, the Working Group also addressed the question of intellectual property rights in access and benefit-sharing. The Group emphasized the need to ensure that the international instruments dealing with intellectual property rights were mutually supportive with regard to access to genetic resources and benefit-sharing. The Working Group recognized that intellectual property rights might support access to genetic resources and benefit-sharing objectives, and that they might, under certain circumstances, constrain access to and use of genetic resources. It further recognized that the disclosure of the use of genetic resources and traditional knowledge, innovation and practices of indigenous and local communities in applications for intellectual property rights might assist patent examiners in the identification of prior art. The Working Group also noted the importance of the work undertaken by the World Intellectual

Property Organization and recommended, in particular, that WIPO be encouraged "*to make rapid progress in the development of model intellectual property clauses, which may be considered for inclusion in contractual agreements when mutually agreed terms are under negotiation.*" The Working Group was also of the view that further information was needed on a number of key issues relating to intellectual property rights and access to genetic resources and benefit-sharing, such as the feasibility of an internationally recognized certificate of origin system as evidence of prior informed consent and mutually agreed terms; the role of customary laws and practices in relation to the protection of genetic resources and traditional knowledge, innovations and practices, and their relationship with intellectual property rights; the consistency and applicability of requirements of disclosure of country of origin and prior informed consent in the context of international legal obligations; and the efficacy of such disclosures in monitoring compliance with access provisions. In connection with these issues, the Working Group recommended that the assistance of WIPO be sought in order to provide the necessary information. The Working Group noted, in addition, that there was a need for accurate technical information concerning methods for requiring the disclosure within patent applications of such information as: the genetic resources utilized in the development of the claimed inventions; the country of origin of genetic resources utilized in the claimed inventions; associated traditional knowledge, innovations and practices utilized in the development of the claimed inventions; the source of associated traditional knowledge and evidence of prior informed consent. Here again, the Working Group recommended that WIPO be invited to prepare a study on these matters and report its findings to the Conference of the Parties at its seventh meeting. The representative of the CBD stated that the relationship between the work of WIPO and of the Intergovernmental Committee, on the one hand, and that of the Working Group on Access and Benefit-sharing under the CBD, on the other hand, was multifaceted. He noted that WIPO participated actively in the ABS meeting and provided many useful inputs. The CBD Secretariat looked forward to transmitting the results of the work of the Intergovernmental Committee to the sixth meeting of the Conference of the Parties, in April 2002, and to the continued support of WIPO for the achievement of the objectives of the Convention with regard to access and benefit-sharing.

15. The representative of the Food and Agriculture Organization of the United Nations (FAO) said that the International Treaty on Genetic Resources for Food and Agriculture had been adopted by the FAO Conference on November 3, 2001. It would enter into force 90 days after the 40th instrument of ratification was deposited. The Treaty was open for signature until November 4, 2002. By November 15, 2001, nine countries had already signed it. The objectives of the Treaty were the conservation and the sustainable use of genetic resources and the fair and equitable sharing of the benefits deriving from their utilization in harmony with the Convention on Biological Diversity. The Treaty included an article on farmers' rights, which were recognized in acknowledgement of the enormous contributions of local and indigenous communities to the conservation and the development of genetic resources for food and agriculture. Farmers' rights were not intellectual property rights. The responsibility for realizing farmers' rights rested with national governments. They included the protection of traditional knowledge; rights to sharing equitably the benefits deriving from the utilization of plant genetic resources for food and agriculture; and, most importantly, rights to participate in the decision-making, at the national level, on matters relating to the conservation and the utilization of plant genetic resources. Subject to national law, nothing should limit farmers' rights to conserve, use, and exchange or sell saved seeds. The Treaty had moreover established a multilateral system of access and benefit-sharing. That system would apply to crops listed in Annex I to the Treaty, and might be expanded in the future. A funding strategy would be established to implement the Treaty, taking into account the Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic

Resources for Food and Agriculture, adopted at Leipzig in 1996. An appropriate mechanism, such as a trust fund, would be established to collect and use the financial resources, which included the mandatory payments arising out from commercialization. For the first time the Treaty would provide a legal framework for the *ex situ* collections of the Consultative Group on International Agricultural Research (CGIAR), by means of agreements to be established between its Research Centers and the Governing Body. The representative of the FAO emphasized the importance of the Treaty for the international community because it would promote synergy between agriculture, trade and the environment. For plant breeders, the Treaty was important because it facilitated access to plant genetic resources. For farmers, particularly those in developing countries, the Treaty provided a framework for the facilitated exchange of genetic resources necessary for food security. For the CGIAR, the Treaty would facilitate their long term activities and contacts with donors. Finally, for the private sector the Treaty would create, after its entry into force, an agreed and recognized legal system of access, which would permit the industry to invest for the future. The representative of the FAO stated that its organization looked forward to continued cooperation with WIPO in the implementation of the Treaty.

16. The Chair noted that the Ministerial Declaration adopted at the fourth session of the WTO Ministerial Conference, in Doha, made a special reference to the work to be undertaken by the TRIPS Council concerning the relation between the TRIPS Agreement and the CBD, in particular having in view the protection of traditional knowledge. The Chair also referred to the concluding remarks of the co-chair at the first session of the Intergovernmental Committee as well as to the documents circulated by the Secretariat after the meeting.

17. The Delegation of Algeria, on behalf of the African Group, reiterated its paramount interest to deepening, in the course of the second session, the examination of the agenda items as well as the establishment of a working method so that a consensus could be reached on fair and equitable solutions. The African Group recalled the adoption at the last Summit of Heads of States and Governments of the Member States of the Organization of African Unity (OAU) of a Decision that the decade 2001-2010 would be that of Traditional Medicine, which reflected an interest at the highest level of African governments for the agenda topics. The Delegation noted that the time had arrived for Committee Members to envisage the idea of establishing the Committee as a norm setting body in parallel to its mandate to carry out deliberations. His Group would favor the establishment of a Standing Committee with a status similar to the Standing Committees already existing within WIPO. Such a decision would add a new dynamic to the Committee' work. The African Group appreciated the importance of developing a binding legal system in the field of genetic resources, traditional knowledge and folklore. Therefore, negotiations and exchanges of views should lead to the implementation of an international system for the protection of genetic resources, traditional knowledge and folklore. It would be convenient to develop the framework of any future agreement based on directives that should preside over the three areas, and which might be supplemented by additional protocols relating to the specific areas of traditional knowledge, genetic resources and folklore. The undertaking of discussions on genetic resources, traditional knowledge and genetic resources within the framework of WIPO would contribute to further integrate developing countries into a global system of intellectual property. The Delegation noted that WIPO should assist developing and least-developed countries to implement the appropriate systems for ensuring adequate protection of intellectual property relating to traditional knowledge, genetic resources and folklore. On the agenda items, there was some imbalance to the detriment of traditional knowledge and folklore, for it seemed that the activities on genetic resources were rapidly progressing towards the elaboration of guidelines, while the work on traditional knowledge and folklore were still in the phase of

definitions and surveys on national experiences. The African Group was deeply convinced that WIPO was the competent body to handle intellectual property issues which were inherent to genetic resources. The Delegation stressed the sovereign rights of States and communities over genetic resources. It favored access to genetic resources and to benefit-sharing in a reciprocally advantageous framework under effective legal rules. In spite of the importance of innovation in the area of genetic resources and its role in food security through the development of new plant varieties, the Delegation feared the erosion of genetic material. In this context, intellectual property might constitute an effective means for the preservation of the quality of genetic resources and for the prevention of genetic material erosion. The Delegation recommended that WIPO continued its work in close coordination with other intergovernmental organizations competent in the area of genetic resources, namely FAO, UNESCO, CBD and WTO. It was proposed that the WIPO Secretariat prepare a systematic study on intellectual property-related clauses contained in existing contractual arrangements on access to genetic resources. WIPO should also continue its work on integrating traditional knowledge into searchable databases for patent examination purposes, particularly in the context of the PCT. In addition, WIPO should determine which categories of traditional knowledge could be protected under existing legislation. For the other categories, WIPO should develop new *sui generis* mechanisms in order to ensure adequate protection. The Delegation noted the delay in developing a system for the protection of folklore as a product susceptible of commercialization without prejudice to the preservation of its integrity. Recent technological advancements had made the unauthorized reproduction of folklore easier. In this context, the model provisions on the protection of folklore, if updated, could provide the necessary protection, provided a biding international system was put in place, so as to avoid that some Member States failed to implement those provisions at the national level. WIPO should, therefore, continue contributing to the implementation of the model provisions as a way of moving forward the protection of folklore at the sub-regional, regional and international levels. Additionally, WIPO could assist regional coordination efforts so as to identify expressions of folklore that were present in several countries of the same region.

18. The Delegation of Venezuela, on behalf of the Group of Latin American and Caribbean Countries, stressed the importance of the debates in the Intergovernmental Committee for all the countries in the region. It was very important that the Committee reached clear, consensual conclusions. The main task of the Committee was to identify intellectual property rights adequate for the protection of traditional knowledge of indigenous and local communities. The Committee, in its work, should contemplate the fundamental principles of the CBD, namely sovereignty, prior informed consent and equitable benefit-sharing. The transfer of technology required for the sustainable use of biodiversity was another fundamental element for the work of the Committee. The only entities that had competence to regulate access to genetic resources were the States, which dramatically emphasized the importance of securing prior informed consent. In this context, the work of WIPO should be developed so as to complement the activities of the CBD, the FAO, the UNCTAD and the UPOV. Although very relevant, the documents prepared by the Secretariat for the second session of the Committee focused mainly on patents, but there were other areas of intellectual property likewise worth being explored. The Delegation stressed the importance of permitting indigenous communities to participate and give their inputs in the appropriate fora. Finally, the Delegation reminded the need for having all documents timely translated into all official languages.

19. The Delegation of Venezuela, speaking for its country, remarked that, although all the agenda items were equally important, the task B.2, on the consideration of a possible *sui generis* system of protection, had not been taken into account. The Delegation requested that,

in the end of the second session of the Committee, clear conclusions should be drawn from the discussions.

20. The Delegation of India, on behalf of the Asian Group and China, said that the position of the Members States on behalf of which she spoke was the product of meetings and interactions at the national and regional level in their region. Specifically, they had taken into account the WIPO-UNESCO Regional Consultation on the protection of Expressions of Folklore for Countries of Asia and the Pacific, convened in Hanoi, Vietnam in April 1999, the Interregional Meeting on Intellectual Property and Traditional Knowledge, convened in Chiang Rai, Thailand in November 2000; and most recently the WIPO Asia Pacific Regional Symposium on Intellectual Property Rights, Traditional Knowledge and Related Issues held in Yogyakarta, Indonesia, from October 17 to 19, 2001. The Delegation also informed the meeting of the forthcoming WIPO International Forum on "Intellectual Property and Traditional Knowledge: Our Identity, Our Future" to be held in Muscat, Oman in January 2002. The Delegation saw those meetings as landmarks on the road forward towards a consensus for intellectual property protection in those areas. The Delegation added that the case for protecting genetic resources, traditional knowledge and folklore was well-known and acknowledged. Traditional knowledge was a rich and diverse source of creativity and innovation and could result in commercial benefits for local communities and therefore was an important economic asset for those communities' future. Bio-diversity and the traditional knowledge associated with using it in a sustained manner were a comparative advantage for the countries of that region. Existing intellectual property regimes were oriented around the concept of private ownership and individual inventions. What characterized traditional knowledge was that it might not be produced systematically, it was generally held collectively within the community that had nurtured it, and the knowledge remained, for the most part, undocumented. In its deliberations, the Intergovernmental Committee would need to be innovative with regard to the intellectual property system and consider an approach that not only facilitated the advancement of knowledge but also provided for adequate intellectual property protection with equitable benefit sharing in view of increasing commercialization of genetic resources. WIPO was the most appropriate forum to develop internationally acceptable and equitable solutions to the intellectual property issues related to genetic resources, traditional knowledge and folklore. The Delegation said that the Asian Group and China were convinced that it was important for the Intergovernmental Committee to exchange views on the feasibility of a comprehensive international instrument on the protection of genetic resources, traditional knowledge and folklore. The Delegation had seen the success of the WIPO Arbitration and Mediation Center for the resolution of international commercial disputes between private parties. It would like to have WIPO study possibilities of offering alternative dispute resolution services, including but not limited to arbitration and mediation, which were particularly appropriate for the problems involving intellectual property issues related to traditional knowledge and folklore. The Delegation highlighted the need for WIPO's assistance in capacity building within national systems. This assistance could be in the form of legal and technical assistance, training and the provision of necessary equipment and other resources to strengthen intellectual property systems particularly in dealing with issues relating to genetic resources, traditional knowledge and folklore. In view of the importance of these issues in the national context, the national Governments of the Asian Group and China were conducting consultations with all relevant stakeholders at the national level. But it was equally crucial that these issues were looked at in the international context from the point of view of the intellectual property-related provisions of the CBD, the importance of access to and transfer of technology which made use of those resources, including technology protected by patents and other intellectual property rights. At the fourth session of the WTO Ministerial Conference, in Doha, trade ministers had mandated the

Council for TRIPS to examine the inter-relationship between the TRIPS Agreement and the CBD, the protection of traditional knowledge and folklore.

21. The Delegation of India, speaking for its country, emphasized the crucial importance of the issues covered by the Intergovernmental Committee. WIPO was the competent forum in which Member States would be best able in develop a road-map leading to an equitable and acceptable resolution of the Delegation's concerns. For a country like India, rich in biodiversity, traditional forms of medicine, handicrafts, folklore and other knowledge that had been nurtured by the community for centuries, the work of the Committee was crucial. Many countries had begun address addressing some of the issues at the national level and the Delegation could build on those initiatives through the work of the Committee. In India work had begun on setting up a Traditional Knowledge Digital Library, an electronic database on medicinal plants. India had also taken the initiative to work on a Traditional Knowledge Resource Classification. The Delegation mentioned this only to illustrate that it is possible to move forward through concrete steps to find ways to address legitimate concerns for intellectual property protection in those areas. WIPO had earlier responded to the demand for addressing new issues, the most recent being the protection of databases. The Delegation expected that the same could occur in the area of genetic resources and traditional knowledge. Particular importance should also be given to the development of digital libraries and other forms of documentation of traditional knowledge for patent examination purposes. The Delegation was confident that the Committee and WIPO was the forum for taking this process forward.

22. The Delegation of Ecuador said that, in a world of vast human, cultural and biological diversity, the protection of human rights, the sustainable use of genetic resources, as well as the protection of intellectual property rights, constituted a constitutional commitment of the State of Ecuador, so as to obtain mutual support and harmony between those values. On the other hand, it was also a constitutional principle of Ecuador that the State was the only entity that had sovereign rights over any sorts of genetic material and had the capacity to regulate its access by means of national legislation, in conformity with its international obligations. Nonetheless, the delegation recognized the importance of intellectual property in its vast dimension and which constituted one of the aspects of access to genetic and biological resources and benefit-sharing. Therefore, it acknowledged that products derived from genetic resources could benefit the development of research, science, food, agriculture, as well as the fields of medicine, industry and trade. The Delegation stressed the importance of preserving biodiversity and the biological and genetic heritage of the country, as well as of ensuring the rights of indigenous peoples and of local communities to collective intellectual property in their traditional knowledge, to their preservation, utilization and development. In this context, it was a legal and moral obligation of the government of Ecuador to support, promote and preserve principles such as the prior informed consent, the fair and equitable benefit-sharing, as well as the disclosure of the origin of the biological material and the knowledge utilized. It was thus necessary to protect collective rights of communities against abuses and unauthorized exploitation, which in many cases were difficult to assert under the existing intellectual property systems. This led to the need for the development of a system for the protection of traditional knowledge, innovations and practices that were of a collective or communal nature and which had a unique and specific content. The Delegation, for these reasons, wished to reiterate the necessity to develop a systematic study on the elaboration of a *sui generis* system for the adequate protection of biological and genetic resources and the associated traditional knowledge. Without an international and comprehensive agreement, consistent with the CBD, the Convention 169 of the ILO and the TRIPS Agreement, all efforts for the protection of genetic resources and traditional knowledge, at the national, sub-

regional or regional level, would be doomed to fail. A clear mandate in this sense should be accorded to the Intergovernmental Committee.

23. The Delegation of China was pleased to see that since the first session of the Committee, Member States, in particular developing countries, had actively carried out researches, and made many useful recommendations and comments on the issues in question. The Delegation considered WIPO as the most suitable forum for a reasonable resolution of the problems relating to genetic resources, traditional knowledge and folklore. The Committee should define the relevant terms in a most inclusive possible way so that all policies, programs and measures of the related issues could be covered. The Delegation then moved to present its position on the different topics of the agenda, which was in line with those of all other delegations. On genetic resources, the Delegation believed that the source of protection and benefit-sharing of genetic resources at the international level lied, above all, in the Convention on Biological Diversity (CBD), of which China was one of the first signatory States, which had demonstrated the high importance that its country attached to the issue. It was recommended that WIPO and CBD should cooperate closely with one another in their joint pursuit of the established objectives as set out in Article 1 of the Convention. On traditional knowledge, apart from a clear definition of traditional knowledge which was of first priority, deliberation was also needed on (i) the possibilities of providing intellectual property protection to holders of traditional knowledge; and (ii) benefit-sharing of entities other than holders of traditional knowledge who had acquired intellectual property rights from their inventions and creations based on traditional knowledge. It was the view of the Delegation that among the objectives of the protection of traditional knowledge were respect and protection of traditional knowledge, fair and equitable sharing of the benefits arising out of its utilization, and promotion of the development of traditional knowledge. In this respect, all efforts should be made to create and establish legal and economic systems for traditional knowledge holders and their groups, and attention paid to a consistent protection of traditional knowledge and biological diversity. In particular, the delegation appealed to the Committee for its attention to the issue of documentation of traditional knowledge. The differences in different countries in defining prior art led to the practice that in the process of patent examination, the non-documented publicly known technologies in some countries were not considered as prior art that affected the novelty of patent. In their search for traditional-knowledge related prior art, examiners had to face the challenges of lack of databases for non patent documented prior art, lack of classification tools for traditional knowledge, and lack of detailed key word lists of journals and articles in the field of traditional knowledge as required in the PCT for minimum documentation. The delegation supported India's proposal concerning documentation of publicly known traditional knowledge as well as efforts in creating databases for traditional knowledge. As a rich body of works of the mind, accumulated over thousands of years in China, traditional Chinese medicine had its unique theoretical systems, treatment methods and clinic curative effects. China had made active efforts to encourage scientific researchers in this field to seek patent protection for those valuable diagnostic methods and proved recipes in traditional Chinese medicine in accordance with their characteristics. Preliminary achievements had been made in the preparation of searchable documentation of traditional knowledge embodied in traditional Chinese medicine and herbal medicines, which until now were unsearchable. It was its belief that the resolution of this problem was not only conducive to our exploration of the relationship between protection of genetic resources and benefit-sharing on the one hand, and intellectual property protection on the other, but would also be a contribution on its part to the pursuit of the objectives of diversity and sustainable development in the spirit of the CBD. In this respect, the delegation looked forward to cooperating with all countries in jointly advancing this work. It recommended that a symposium on this issue be held sometime next year by the relevant

WIPO Working Groups, as a step to advance the work in this regard. On folklore, the delegation emphasized that its protection was regarded as crucial to China, a nation with 56 ethnic groups. For some of these ethnic groups, folklore occupied a dominant position in their culture, and thus called for an adequate protection. To a certain extent, folklore could be protected under the existing laws. For example, copyright laws could provide protection for works adapted from folklore; and performances of a performer would also be protected by law, even if their content were already in the public domain. Copyright protection, however, was limited and far from a sufficient and effective protection of folklore. In this respect, it was required in China's Copyright Law that separate regulations be formulated for folklore protection. In this respect, the National Copyright Administration and other relevant authorities had conducted an extensive exploration, with investigations carried out and proposals put forward. It hoped that inspiration could be drawn from the international discussions so as to expedite the legislative process in China on this issue. The Delegation hoped to see continuous cooperation between WIPO and UNESCO in the promotion of the legislation work in this area. In particular, in-depth exploration should be carried out on existing national legal protection regimes, in attempt to sum up experiences therefrom and make recommendations for future work. It was also advisable to hold more regional meetings to discuss the relevant issues in a more specific manner. The Delegation noted that a reasonable resolution at the international level of the problems in relation to genetic resources, traditional knowledge and folklore was closely related to the dissemination of relevant knowledge and to building of the awareness of the public and relevant communities to participate in the work. It was thus recommended that the WIPO Secretariat should carry out the following work: (i) to educate the public to pay due attention to the potential value of biological resources, including at schools, in textbooks and through distance learning courses; (ii) to enhance the involvement of national intellectual property authorities and intellectual property communities in the policy making and legal development in relation to the protection of biological diversity, environment and resources; and (iii) to use, in the context of the development of legal and institutional frameworks for acquisition of genetic resources and for benefit sharing, the existing intellectual property systems to promote and give incentives to the improvements and creations based on biological resources. The Delegation would make all efforts necessary to cooperate with all delegations to realize the above objectives.

24. The Delegation of the Russian Federation informed that the Russian State Patent Office (ROSPATENT) had examined the possibility of using the intellectual property system for the legal protection of genetic resources, traditional knowledge and folklore. Several topics had been selected for the studies: 1. genetic resources; 2. traditional knowledge; 3. folklore ((a) (material expressions, folk art crafts); (b) (non-material expressions)); 4. rights and protection of the cultural heritage of indigenous peoples in the Russian Federation. Taking into account the results of the study, the ROSPATENT analyzed the relevant national and international standard-setting documents and drawn the following conclusions. As to the legal protection of genetic resources, it was obvious that genetic resources themselves (and natural resources in general) were not patentable subject matter, since they did not result from human intellectual activities. Patents might be granted for different methods of extraction, processing, purification and other processes relating to the use of genetic and natural resources. Several national statutes could applied to protect such resources. The Delegation described the provisions of the Constitution of the Russian Federation as well as of some national statutes from which it could be concluded that a decision to grant protection in one form or another to natural and, in particular, to genetic resources should not be taken without the consent of the unity of the Russian Federation, on whose territory they are located. Each State should itself decide whether to establish a competent body authorized to take a decision concerning the use of natural (genetic) resources. The

delegation cited as an example a decision taken on the territory of the former USSR, which established the right to use the name of the mineral water "Borzhomi," granted by the Ministry for the Protection of the Environment and Natural Resources of Georgia. The Delegation provided information on the protection of national genetic resources such as plant varieties and animal breeds and noted that under Article 32 of Law No. 5605-1 of August 6, 1993 on Selection Achievements it was needed to indicate the place of origin of seeds and pedigree material. The same indication was also provided for in paragraph 4 of Resolution No. 120 of the government of the Russian Federation, of February 16,2001, containing Regulations on State registration of genetically modified organisms (GMO), which determined the procedure for registration of GMO. An application for State registration was therefore filed with the Ministry of Industry, Science and Technology of the Russian Federation and, in so doing the applicant filing such an application should provide information on the place of origin of an organism - recipient. Methods of treatment, including those based on traditional medicine, were considered patentable, and the following objects based on the use of traditional knowledge were also recognized as patentable: medicinal preparations (herbal medicines, potions, decoctions, infusions, biologically active additives for pharmacological purposes, biocorrectors, compositions, cosmetic preparations with medicinal effects, homeopathic medicines, etc.) based on herbs, minerals. metals, bee and various products of animal activities, algae, hydrobionts, toxins, urine and activated water (melted, living or dead etc.), as well as means and methods for influencing the human organism and environment (facilities and methods of reflexotherapy, biocorrectors, applicators, neutralizers, means and equipment for recording wave characteristics of medicines on a carrier). This applied equally to traditional knowledge in the area of food that was used by creators in developing new formulae and technical methods. As a result of the studies carried out, it was considered necessary to compile and systematize separate non-patent data on genetic resources and traditional knowledge in the area of food, agriculture, biological diversity and environment, and traditional medicine which could form a common information base and could be included in prior art when examining patent applications. It was useful for this purpose to create databases (with the help of the bodies concerned such as the Ministries of Agriculture, Culture, Health and so on) on different aspects of traditional knowledge and genetic resources. In doing this work, the positive example set by India in establishing a digital library of traditional knowledge relating to medicine could be followed. The legal protection and utilization of such objects of folk art as material expressions of folklore (or according to a term used in the Russian Federation "folk-artcrafts") as intellectual property subject matter were governed by the Patent Law of the Russian Federation and by the Law of the Russian Federation on Trademarks, Service Marks and Appellations of Origin. The list of crafts and groups of articles that related to folk-art crafts was adopted in Order No. 555 of the Ministry of Economy of the Russian Federation of December 28, 1999, in accordance with Russian Federation Law No.7 on Folk Art Crafts, of January 6, 1999. Protection should be granted under the Patent Law of the Russian Federation to articles of folk-art crafts as inventions and industrial designs based on traditional knowledge (or using such knowledge) but not to traditional knowledge itself. Legal protection might be granted to some of the objects considered to be trademarks or appellations of origin of goods (for example, to material expressions of folklore). The Law of the Russian Federation on Trademarks, Service Marks and Appellations of Origin established a legal mechanism required to protect the rights of participants in economic activities where goods are produced with specific characteristics, and was intended to offer State support and encouragement to the development of traditional crafts. Most appellations of origin were connected with goods, the emergence and manufacture of which reflected the history and culture of peoples and nationalities of the Russian Federation. This legal regime promoted the conservation of traditional industries and crafts, and hence the fruitful development of the

original and unique multinational culture of Russia. The designation of articles of a number of ancient crafts connected with geographic appellations could be protected as appellations of origin. They include *niello* articles from Velikiy Ustyug, Gorodets painting, Rostov enamel, Kargopol clay toys, Krasnoye Selo filigree (or *skan*), Filimonov toys and many others. The failure to protect non-material expressions of folklore by copyright was explained by the fact, that works are created over a long period and improved by several generations, and it was therefore impossible to determine exactly who the author of a work of folk art was. Most works of poetic folk art were transmitted orally. The authors of a work of folk art were all the people who had contributed to the creation of the work. This could be the people or nation residing permanently on a particular territory. In addition, copyright should have effect throughout the lifetime of the author and for 50 years (in certain countries 70 years) after his death, while it was impossible to fix any period of protection for works of folklore. In the Russian Federation, works of folklore, in particular non-material expressions of folklore, were not protected by copyright, in accordance with national legislation, which provides further that works that had never enjoyed protection on the territory of the Russian Federation should be deemed to have entered the public domain. It is also provided for payment to the State of special royalties for the use on the territory of the Russian Federation of such works. Those royalties would represent a kind of a "cultural tax" and could be imposed in relation to all or only certain categories of works. Such royalties were not currently imposed. In the Delegation's view, the most realistic approach to solving this problem would be the elaboration of national regulations providing specific legal protection for expressions of folklore, based on the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (UNESCO- WIPO, 1985). The problems of indigenous peoples' rights were largely covered by Russian Legislation, which provided for definitions of the concepts of "indigenous minorities of the Russian Federation," "indigenous minorities of the North, Siberia and the Far East," "minority communities," "indigenous environment," "authorized representatives of minorities," and the "traditional way of life of minorities." In particular, this definition covered indigenous minorities of the Russian Federation, including peoples living on the territories of traditional settlement of their ancestors, preserving their traditional way of life, economy and crafts, who were fewer than 50,000 people in the Russian Federation, and who considered themselves to be an independent ethnic community. The Delegation added that a common list of indigenous minorities of the Russian Federation was adopted by the Government of the Russian Federation. In accordance with the Constitution of the Russian Federation and the provisions of international law, the above-mentioned legislation established the legal foundations to guarantee the unique social, economic and cultural development of indigenous minorities, and to protect their indigenous environment, traditional way of life, economy and crafts. Nevertheless, the rights granted by those laws related to the preservation of national culture rather than to the protection of their cultural property and heritage as intellectual property subjects.

25. The Delegation of Egypt had three remarks. Firstly, the work of the Committee could only succeed if it had a clear mandate to find a system that avoided abuses in connection with genetic resources, traditional knowledge and folklore; this matter should be given priority by Committee Members. Secondly, given that it appeared to be a connection between the topics of genetic resources, traditional knowledge and folklore, the Committee should establish three working groups, one for each item, following the schedule recently adopted by the SCIT. And thirdly, the delegation would appreciate to be kept informed about the work of other Intergovernmental Organizations with respect to the topics covered by the Committee. The Delegation welcomed the developments occurred in the CBD and the FAO and stated that all topics and proposals had the same importance, and thus no priorities should be established to

deal with them. The document prepared by the Secretariat on contractual arrangements involving access to genetic resources was much appreciated, but nonetheless special attention should be given to already existing rules, namely those developed under the frameworks of the CBD and the FAO. The two surveys distributed by the Secretariat would help the Delegation to assess the experiences of other countries. It nonetheless welcomed the postponement of the deadlines for providing responses to the questionnaires. Finally, the Delegation agreed with the views of other Delegations that the documents for the second session of the Committee were excessively focused on patents, because other intellectual property areas were equally important for the protection of traditional knowledge. Illegal exploitation of genetic resources, folklore and traditional knowledge could only be prevented by means of a new, *sui generis* mechanism, the development of which should be within the mandate of the Committee.

26. The Delegation of Pakistan noted that several Intergovernmental Organizations, such as FAO, UNEP, IPGRI, WIPO and WTO, were addressing access to genetic resources. It was convenient therefore, that one organization only should deal with genetic resources, traditional knowledge and folklore. Furthermore, valuable genetic resources had been collected by developed countries from developing countries during the pre-CBD era. Where those genetic resources were slightly modified, developing countries might be required to pay for their own material, in one or another form. It was therefore urged that the origin of the genetic or genetically modified material for which a patent claim had been filed were investigated thoroughly for benefit sharing. The Delegation also emphasized the need for technical assistance from WIPO, particularly in view of the fact that intellectual property had recently received high priority in the country.

27. The Delegation of the United States of America stated that, since the convening of the first session of the Intergovernmental Committee, it had made increasing efforts to review its national practices with respect to genetic resources, traditional knowledge and folklore. As part of this work, the Delegation had learned much from, and was pleased to welcome one of its members, who, in his capacity of Chief of the Natural Products Branch of the National Institutes of Health's National Cancer Institute, had developed vast experience in searching for anti-cancer and anti-HIV natural agents and who, in this context, had worked with approximately 30 countries over the past dozen years to develop legal contractual tools on benefit-sharing. He nevertheless cautioned that only one out of 10,000 natural agents screened (including patents and marine life) actually demonstrated activity worth pursuing at an advanced level. The Delegation was particularly encouraged by the on-going work in the Committee of Experts of the Union of the International Patent Classification (IPC)'s task force on traditional knowledge. This task force had been discussing ways of incorporating traditional knowledge documentation with the IPC format and had already made some recommendations. These included training of developing countries in standard classification systems to ensure the usefulness of the databases created, as well as to expand the IPC in certain areas to accommodate naturally derived medicines. As for activities in the area of expressions of folklore, in the past several months, a new initiative had been established at the U.S. Patent and Trademark Office to address tribal concerns. On August 31, 2001 the USPTO began accepting requests for registration in the Database of Official Insignia of Native American Tribes. The Database would be included, for informational purposes, within the USPTO's database of material that was not registered but was searched to make determinations regarding the registrability of trademarks. To date, the USPTO had received only one request for inclusion in the Database of the official insignia of the Redding Rancheria Wintu Yana Pit River tribe in Redding, California. Notwithstanding this new Database, all trademark applications containing tribal names, recognizable likenesses of

Native Americans, symbols perceived as being Native American in origin, and any other application that the USPTO believed suggested an association with Native Americans, were examined by one attorney who had developed expertise and familiarity with this area. Of course, this new Database of Official Insignia did not supersede or otherwise affect the Indian Arts and Crafts Act, of 1935, administered by the Department of the Interior's Bureau of Indian Affairs. In brief, the Indian Arts and Crafts Board promoted the economic welfare of American Indians and Alaska Natives through the development of Indian-produced arts and crafts. It was intended to protect Indian cultural heritage and to assist the efforts of Indian tribes and their members to achieve self-reliance. To achieve these goals, the top priority of the Board was the enforcement and implementation of the Indian Arts and Crafts Act of 1990 which expanded the powers of the Board to respond to growing sales of arts and crafts products misrepresented as being made by Indians. The Act also provided for severe civil and criminal remedies. The Delegation was actively engaged in improving standards with respect to the issue of genetic resources, traditional knowledge and folklore domestically and internationally.

28. The Delegation of South Africa advised that Member States should be cautious in tackling the issues before the Committee, since there were different schools of thought on how to address them. It further cautioned that the Member States should not expect quick solutions since the issues were complex. The Delegation suggested that the regime which was likely to result from the Committee's work should provide for effective protection, full appreciation of the relevant issues, and recognition of all relevant stakeholders. The Delegation recalled that while the TRIPS Agreement established obligations to make patents rights available in all fields of technology, WTO Members had recently appreciated that health issues might take precedent over trade issues. The Delegation thought it possible that similar considerations might apply in other areas. The Delegation advised that Member States should beware of sectorial interests which might impede progress on a comprehensive treaty on all the issues before the Committee. The Delegation emphasized that sharing of benefits among all stakeholders was imperative and that, at the same time, the sovereignty of states over their genetic resources should in no way be threatened. In this respect, the Delegation was of the view that the acquisition of relevant resources without consent should constitute a criminal offense. The Delegation urged WIPO to develop an international treaty or convention, while at the national level implementing legislation should be established. The Delegation indicated a few features of such a system, which included that the term of rights should be perpetual, all stakeholders should enjoy benefits, such as rights and royalties, and the mechanism should provide a legal framework for compensation. The Delegation advised that individual rights at the expense of collective rights should be avoided, that farmers' rights did not currently constitute an appropriate regime, and that the international trading systems was not necessarily the best system for the establishment of such rights. The Delegation stated that it would be advisable to negotiate such rights outside the WTO and considered it dangerous to subject issues in these three areas to a TRIPS framework. The Delegation added, however, that other international conventions should be examined with circumspection and that all national and international regimes should be scrutinized so that they might be integrated in a harmonized and common international system.

29. The Delegation of the Islamic Republic of Iran emphasized that Asian countries were rich in genetic resources, traditional knowledge and folklore and were the custodians of valuable cultural heritage. It noted that recent technological advances in the field of telecommunications had provided traders with means of unfair exploitation of cultural heritage and therefore the illicit exploitation of genetic resources, traditional knowledge and folklore had increased dramatically in recent years. The Delegation warned that the lack of

adequate protection for traditional knowledge and folklore would lead to the extinction of certain forms of traditional knowledge, if current trends continued. The Delegation emphasized that, in light of these developments, it was imperative to develop and adopt effective measures for the protection of these resources at the national and international levels. It considered WIPO the most suitable organization for this exercise, while continuing the cooperation between WIPO and other concerned international organizations, such as UNESCO, FAO and WHO. The Delegation suggested that the Member States could play a decisive role by conducting necessary national and regional consultations, establishing centers for the protection of cultural heritage, providing for national protection of traditional knowledge and folklore, and by documenting them on the basis of international standards. It proposed that the Member States should convey the results of these efforts and experiences to WIPO, so that WIPO could build upon the detailed information received from them. The Delegation reported that the Islamic Republic of Iran had recently established a national committee of high officials from all concerned Ministries and organizations, in order to centralize relevant information and facilitate access to scattered resources available in the country. It informed that the working groups of the committee had conducted studies on the relevant issues and thereby increased the public knowledge of intellectual property rights. The Delegation suggested that WIPO should create more opportunities and capacity for developing countries in the form of technical and legal assistance, training and the provision of equipment and other resources. The Delegation concluded by proposing that WIPO should conduct studies to thoroughly examine the matters before the Committee and should allow the Member States to access up-to-date data resulting from such studies more easily. This could be done, the Delegation suggested, by setting up a system for classifying, filing, storing, exchanging and documenting such studies and research results.

30. The Delegation of Thailand reported that protection related to genetic resources was provided in Thailand under the plant variety protection act of Thailand, which also covered traditional and wild varieties and the sharing of benefits related to genetic resources. It added that Thailand had a law on traditional Thai medicine which protected traditional medical practices and that Thailand had several laws protecting expressions of folklore. The Delegation agreed with the observation made by South Africa that existing forms of intellectual property rights might not be appropriate for the protection of traditional knowledge and folklore. The Delegation proposed the use of particular terms to distinguish between different uses of intellectual property rights. It suggested that the term "contemporary intellectual property rights" be used to refer to those intellectual property rights which were based on individual rights and were currently available, such as trademarks, copyright, patents and so on. Secondly, it suggested that the term "conventional intellectual property rights" be used to refer to intellectual property rights for traditional knowledge, traditional medical practices, genetic resources and so on.

31. The Delegation of Singapore noted that the additional documents related to the work of the CBD and FAO would be helpful to the discussions of the Committee and suggested that in light of the discussions proceeding in other fora, such as the CBD and FAO, it would be important to ensure consistency between the respective processes. Concerning the nature of the regime which should result from the work of the Committee, the Delegation supported the suggestion of South Africa on developing a balanced regime. The Delegation informed that the ASEAN Working Group on Intellectual Property, of which Singapore was currently the Chair, was working on the issues before the Committee and that the Working Group had initiated a project, led by Singapore, in which it tried to develop a common classification of products which were common and unique to the region. Where the Working Group came

across traditional knowledge-related products, it intended to first harmonize the classification within the region, and then bring it to WIPO.

32. The Delegation of Malaysia considered WIPO the most pertinent forum to discuss the linkages between intellectual property and genetic resources, traditional knowledge and folklore and added that it would like to see WIPO playing a more proactive role. It noted that WIPO's work on exploring these linkages was becoming increasingly important in the current era of economic globalization. The Delegation welcomed the work undertaken by WIPO during the fact-finding missions on intellectual property and traditional knowledge and endorsed the outcome of the Asia-Pacific Regional Symposium on Intellectual Property Rights, Traditional Knowledge and Related Issues, held in Yogyakarta, Indonesia. Noting that intellectual property issues related to genetic resources, traditional knowledge and folklore had been discussed in areas such as agriculture, environment, biological diversity, culture and trade, the Delegation considered it imperative to ensure that WIPO's work did not duplicate that of other international organizations and that it remained complementary to the work done by the CBD and FAO. The Delegation suggested that governments should facilitate dialogues and awareness raising about intellectual property at the national level among traditional knowledge holders and other stakeholders. Furthermore, it suggested, traditional knowledge should be properly documented and WIPO should take an active role in assisting governments to establish traditional knowledge databases. The Delegation defined WIPO's role as conducting studies to identify alternatives through which Governments could make use of intellectual property rights as a policy tool to achieve certain objectives. It furthermore suggested that Member States should ascertain how expressions of folklore, including handicrafts, should best be protected. It requested that WIPO should contribute in this area by exploring options for the protection of tangible expressions of folklore. The Delegation observed that only 32 countries had submitted completed questionnaires on national experiences with the legal protection of expressions of folklore and felt that this was not encouraging, considering the usefulness of this information gathering exercise. The Delegation ended by urging WIPO to increase its capacity building for developing and least developed countries to strengthen their intellectual property systems for the protection of genetic resources, traditional knowledge and folklore.

33. The Delegation of the Republic of Korea stated that it was quite appropriate to deal with access to genetic resources and benefit-sharing by extracting possible variables and providing principles. It considered that the specific suggestions to construct databases for searching public domain traditional knowledge as prior art were a meaningful first step for the implementation of the Committee's task. It stated its intention of participating in an exchange of information with other delegations and of benchmarking their best practices through bilateral and multilateral discussions. The Delegation stated that WIPO was the most appropriate forum for international discussions on these issues.

34. The Delegation of Oman stated that its country attached particular importance to intellectual property issues related to genetic resources, traditional knowledge and folklore. It reported that Oman was working with WIPO to host an international forum, entitled "Intellectual Property and Traditional Knowledge: Our Identity, Our Future," which was scheduled to be held from January 21 to 23, 2002. The Delegation informed that Oman had a special Ministry for Cultural Heritage. It added that Oman had established a Center to work in this field, but that there was limited management experience and the Center needed technical support in order to better organize its work. The Delegation supported the proposals made by other delegations to enlarge the scope of the Committee. The Delegation concluded by emphasizing that WIPO should support Member States in establishing intellectual property

systems and in training their staff to protect and manage their intellectual property rights related to genetic resources, traditional knowledge and folklore.

35. The Delegation of Brazil expressed its concern with the definition of an effective model for the protection of genetic resources, traditional knowledge and folklore and for the equitable distribution of benefits among traditional communities and other actors involved. It reported that since the last Committee session, Brazil had reedited a federal law which regulated the access to and use of genetic resources. Recently, this Law had been regulated and a committee for the management of genetic resources had been established. The Delegation explained that this committee had, *inter alia*, the responsibility of examining the approval of all contracts regulating access to the genetic resources. It added that the committee would also discuss the possibility of creating a database for the registration of traditional knowledge. It informed that the National Institute of Industrial Property of Brazil, together with the European Commission, had convened an International Seminar on Intellectual Property, Traditional Knowledge and Genetic Resources, in Manaus, in September 2001. On this occasion, the Delegation added, the indigenous communities had suggested a meeting of shamans, which took place in the week preceding the second session of the Intergovernmental Committee. It reported that at this meeting the shamans discussed the protection of their knowledge and suggested a model of benefit-sharing. The Delegation concluded by foreshadowing the submission of a letter, which had been prepared by the shamans, to the Committee and informing the Committee that a second meeting of the shamans had been scheduled for May, 2002.

36. The Delegation of Kenya stated that the great value which Kenya attached to its genetic resources and the culture of its people was reflected in an increasing number of laws and policies it had put into place to protect genetic resources, traditional knowledge and folklore. It reported that a recent reform of laws relevant to conservation had culminated in the enactment of the Environmental Management Coordination Act 2000 and the establishment of a National Environmental Management Authority to oversee coordination in the implementation of conservation policies. It added that a consortium had been formed to formulate national strategy and action plans for the conservation and sustainable utilization of medicinal and aromatic plants. The Delegation stated that there was a need to hasten the process of preparation of a more binding instrument in the area of traditional knowledge. It considered WIPO to be the appropriate forum for negotiations on such an instrument at the earliest possible date.

37. The Delegation of Morocco noted that among the tasks set out in document WIPO/GRTKF/IC/1/3 the three themes of genetic resources, traditional knowledge and folklore had received similar interest, which showed the interdependence of these issues. It observed that with the advent of new information technologies, biotechnologies, and the liberalization of trade, there had been an abusive exploitation of these resources due to the lack of a legal framework. The Delegation stated that Morocco supported WIPO's work to establish a framework for the protection of these precious resources. It informed that Morocco had renewed its legal framework in such a way as to ensure the protection of all of traditional knowledge and referred to the law on copyright, the law on plant varieties and the law on industrial property. The Delegation emphasized that it highly appreciated the activities presented in document WIPO/GRTKF/IC/2/6 to carry out task B.3 of the Committee, in particular the integration of traditional knowledge into the minimum documentation of the PCT. Furthermore, it requested WIPO to assist developing countries in establishing centers for the documentation of traditional knowledge. Concerning expressions of folklore, the Delegation pointed out that expressions of folklore were mentioned under the

new copyright law of Morocco, in particular under Articles 1 and 7 of the law. It considered that handicrafts were of great interest to Morocco and noted that the artisanal sector employs more than two million people and contributes a relevant part of the national GDP. It added that the Government of Morocco, conscious of the importance of handicrafts, had carried out awareness raising activities for the legal protection of handicrafts and established a Steering Committee for the protection of handicrafts. The Delegation considered that the documents WIPO/GRTKF/IC/2/5 and WIPO/GRTKF/IC/2/7 would constitute platforms for the development of an international system of traditional knowledge protection. The Delegation proposed that as the Intergovernmental Committee of WIPO developed such a system, there should be close coordination with other WIPO Committees, such as the Standing Committee on Copyright and Related Rights (SCCR), the Standing Committee on Trademarks (SCT) and the Standing Committee on Information Technologies (SCIT). In closing, the Delegation welcomed the efforts in international bodies, particularly in WIPO, and requested that the three themes before the Committee should be given equal treatment in future sessions of the Committee.

38. The Delegation of the Philippines offered two indicators which it considered helpful in the establishment of a comprehensive international instrument. First, it stated, the individual demographics of Member States posed a primary consideration for the formulation of an international instrument. In its view, differences in population growth, biological materials, economic capacities and legal systems would need to be recognized to institute cooperation, benefit-sharing and equitable solutions to the intellectual property issues in the three themes of the Committee. The second indicator which the Delegation identified were technological considerations, such as the suggestion that Governments should compile traditional knowledge databases for prior art searches and that WIPO should offer capacity building through technical assistance. The Delegation endorsed WIPO as the appropriate forum to develop intellectual property rights related to genetic resources, traditional knowledge and folklore and recommended that WIPO should lead the concerted effort of the Governments of Member States, with the involvement of all stakeholders. The Delegation suggested that consultations should start at regional level before progressing nationwide, so that representatives from the regions could represent the regions at national consultations. It concluded by recommending that WIPO should avoid duplication of work with other institutions through the alignment of policies, rules and regulations among Member States.

39. The Delegation of Kyrgyzstan emphasized the importance of the questions before the Committee for Kyrgyzstan. It recalled that Kyrgyzstan had a long history and it had developed a considerable amount of traditional knowledge and folklore in the course of that history. It added that Kyrgyzstan also held many genetic resources. The Delegation noted that Kyrgyzstan had discussed the issues before the Committee and could recommend standards that might be applied in international legislation.

40. The Delegation of Panama said that the surveys distributed by the Secretariat had been very useful because they permitted it to share valuable information concerning the law that established a special regime of intellectual property in collective rights of indigenous peoples for the protection and defense of their cultural identity as well as of their traditional knowledge. Both the law and its regulations had been subject to formal and informal comments by the Secretariat of WIPO, many of which had been incorporated into the legal texts. Additionally, a bill had been recently submitted to Parliament, which sought to put national law in conformity with international treaties dealing with the recognition of the Traditional Medicine System as well as the protection, conservation and promotion of biodiversity and traditional medicinal knowledge. The objective of the bill was to regulate in

an effective way the participation of the Congress of Indigenous Traditional Authorities in the processes of studying, conserving, disclosing, protecting and promoting traditional indigenous knowledge. Furthermore, the bill aimed at establishing a special legal regime for the protection of indigenous peoples rights in their collective knowledge that was susceptible of application in the field of health.

41. The Representative of the Pacific Islands Forum Secretariat informed the Committee that the Pacific Island Forum included sixteen Member Governments, most of which were small developing country islands. He noted that the Pacific Islands Forum had been working with the Secretariat of the Pacific Community on the questions before the Committee and recalled that in June 1999 the Forum Trade Ministers Meeting had decided that the Forum Secretariat should assist members in developing regional guidelines and legal mechanisms for protection of indigenous intellectual property rights. He explained that the Ministers' decision had been based on the realization that genetic resources, such as plants, which were known in the region for their medicinal properties, had been taken from the region and patented overseas without due compensation to the region. Traditional arts, crafts, designs and cultural expressions were exposed to similar exploitation, according to his experience. He pointed out that current intellectual property rights could not protect traditional knowledge for three reasons. The first reason, in his view, was that intellectual property rights sought to privatize ownership and were designed to be held by individuals, whereas traditional knowledge was the object of collective ownership. As a second reason he mentioned that intellectual property rights were timebound whereas traditional knowledge was held in perpetuity from generation to generation. The final reason identified by the representative was that traditional knowledge innovation was incremental and informal, and did not satisfy a restricted interpretation of invention, based on novelty, inventive step and industrial application. The representative explained that for these reasons the Pacific island countries had identified that a *sui generis* law was necessary to protect their traditional knowledge and traditional culture. He reported that the Pacific *sui generis* model law was developed at a regional workshop on traditional knowledge and cultural expressions in February 2001. The outcome of the Workshop had been submitted to the Forum Trade Ministers Meeting and the Forum Economic Ministers Meeting in June 2001. The Ministers requested the Forum Secretariat to continue the development of the draft regional Framework with the cooperation of UNESCO and WIPO, taking into account the wider international context. The representative noted that the Forum had benefited from the comments of WIPO on the draft model and would revise the model law accordingly. He noted that while the Forum island countries had proceeded with the drafting of national legislation for the protection of traditional knowledge and cultural expressions, there was still a strong need for international treaties to allow Pacific island countries to take legal action in other jurisdictions. He furthermore noted that a regional framework on the protection of traditional ecological knowledge was being developed and would be presented to the next Forum Economic Ministers Meeting. The representative stated that the Forum supported the initiation of discussion in WIPO on an international treaty. He concluded by stating that the South Pacific Community and the Forum Secretariat had developed a Regionally Focused Action Plan, the activities of which include legislative reforms, capacity building, and education and awareness raising.

42. The Representative of the Secretariat of the Pacific Community said that her organization, jointly with the Pacific Islands Forum Secretariat and UNESCO had developed a Pacific Regional Model Framework on the Protection of Traditional Knowledge and Expressions of Culture. The framework comprised regional guidelines and a *sui generis* Model Law. On document WIPO/GRTKF/IC/2/3, the Delegation noted that the local

community members were the major stakeholders and, therefore, the Pacific Regional Model Law prioritized local communities and provided for the development of an infrastructure in each enacting Pacific Island country, with a national body to negotiate on behalf of the indigenous community. On document WIPO/GRTKF/IC/2/6, the Delegation said that the Pacific Islands communities were capable of administering a scheme to control unauthorized exploitation within the framework of their own traditional and cultural authorities. In this vein, the Pacific Regional Model Law provided for an Administrative Structure to be established at the national level under the Minister responsible for culture. The Structure comprised the following bodies and competences: the Traditional Knowledge and Expressions of Culture Board; and the Cultural and Intellectual Property Organization which comprised three divisions, namely the Resource Center, the Clearing House and the Dispute Resolution Tribunal. Her organization had begun assisting Pacific Island countries who had expressed interest in enacting appropriate legislation and it was currently looking at how to develop a harmonized infrastructure while maintaining and further developing the existing institutions in the region.

43. The Representative of United Nations Commission on Trade and Development (UNCTAD) said that the work of her organization on the protection of traditional knowledge had begun in February 2000, at UNCTAD's tenth conference, as part of UNCTAD's work in the area of trade and environment. Since UNCTAD X, a number of activities had been further developed. In October 2000, UNCTAD Member States had convened an Expert Meeting on Systems and National Experiences for the Protection of Traditional Knowledge, Innovations and Practices. Over 250 experts from 80 countries participated, including representatives of governments, indigenous groups, NGOs, IGOs, academia, private companies and international agencies. In February 2001, upon a recommendation of its Commission on Trade in Goods and Services and Commodities, UNCTAD was called upon to undertake a number of activities, including to: conduct analytical work and organize regional workshops to exchange national experiences and examine issues on traditional knowledge-related issues; assist Member States and local and indigenous communities in exploring policies to harness traditional knowledge for trade and development; assist interested developing countries in exploring ways to protect traditional knowledge. In addition, traditional knowledge was a main topic considered by the UNCTAD/ICTSD capacity building project on TRIPS and Development. This project which started in July 2001, aimed to improve understanding of the development implications of the TRIPS Agreement and to strengthen the analytical and negotiating capacity of developing countries so that they were able to participate in intellectual property rights-related negotiations in an informed fashion in furtherance of their sustainable development objectives. In this context, it was important to note the special attention given by WTO Trade Ministers at the fourth session of the Ministerial Conference, in Doha, to the protection of traditional knowledge and folklore.

44. The Representative of the United Nations Economic Commission for Africa (ECA) emphasized the importance of integrating the discussions on the protection of traditional knowledge into a framework of reduction of poverty and a program to promote the acquisition of information as tool for development. Of utmost importance was the possibility of transforming traditional knowledge into the content of digital databases, for that would enable traditional knowledge to have uses never imagined before.

45. The Representative of the Organization for Economic Cooperation and Development (OECD) detected several areas where WIPO deliberations would help the OECD in its work related to genetic resources and intellectual property. Firstly, the Biological Resource Centers

Network aimed at identifying biological resources across the OECD. The Network aimed at facilitating the transfer of biological materials, ensure the quality of the materials and rationalize and reduce costs, thus ensuring stronger institutional support for biological genetic resources. Secondly, OECD was developing studies of the economic impact of patenting and licensing practices for genetic inventions. In this context, the OECD was very interested in documenting both public and private initiatives for assuring legitimate access to genetic inventions and relevant information. Another area was the analysis of economic rationales for benefit sharing for non-rival, non-excluding goods. Lastly, the initiative to promote better research and development management in public organizations also could count on informative inputs from the Committee's work.

46. The Representative of the African Delegation Regional Intellectual Property Organization (ARIPO) said that over the past decade, biotechnology, pharmaceutical and human care industries had increased their interest in natural products as sources of new biochemical compounds for drugs, chemicals and agro-product development. These activities had increased the interest in traditional knowledge and related issues. Therefore, there was a need for an effective legal system for the protection of traditional knowledge, genetic resources and folklore. In October of 2001, ARIPO, together with the European Patent Office, held a Conference on Emerging Global Intellectual Property Issues for its Member States, in which it had become clear that ARIPO should seek a broader mandate to play a leading role in finding answers to the issues before the Committee. While the issues on the protection of traditional knowledge were being considered at the international level, ARIPO considered it equally important for discussions to be undertaken at the regional level, due to the fact that traditional knowledge and biodiversity were multicultural in nature and cut across national boundaries. ARIPO welcomed the inclusion of the issue of the documentation of traditional knowledge as searchable prior art on the agenda of the Committee. ARIPO had participated actively in the revision of the African Model Law for the protection of the rights of local communities, farmers and breeders and for the regulation of access to biological resources. ARIPO's input had been significant in the amendment of the Draft Law to be consistent with international obligations under the TRIPS Agreement. At the last OAU Summit, held in Lusaka, Zambia, the Heads of States adopted the Law and requested Member States to use it as a basis for their national legislations, yet respecting each national context, while maintaining as much as possible, the principle of uniformity of national laws in the integration of the African economy. Efforts at the international level in putting in place an internationally accepted legal framework should be vigorously pursued. In this regard, ARIPO supported fully the establishment of the Committee to determine the road map on these issues.

47. The Representative of the Indian Movement "Tupaj Amaru" emphasized that the traditional knowledge and the culture of indigenous communities had been subject to misappropriation for many years. He provided some examples of indigenous communities' cultural heritage misappropiation, including cases in Australia, Mexico and Bolivia.

48. The Representative of the Saami Council, an organization of the indigenous Saami people in Finland, Norway, Russia and Sweden, stated that the Committee should recognize the differences between intellectual property rights, on the one hand, and genetic resources, traditional knowledge and folklore, on the other. The indigenous peoples generally regarded their knowledge and natural resources not as a commodity, but as common good that vested in the people collectively. In contrast, intellectual property rights were private rights intended to be sold on the market. For that reason among others, intellectual property rights would not be appropriate for protecting indigenous knowledge and resources. In this context, it should be

pointed out that international law already recognized the collective rights of indigenous peoples, such as Article 13.1 of the ILO Convention No. 169. Given that indigenous peoples regarded their knowledge and natural resources as springing out from a spiritual, cultural and sometimes religious connection between the people and its land, and whereas this spiritual link was unique to indigenous peoples, the Committee should give indigenous peoples an effective opportunity to participate in its work. To deprive indigenous peoples of their genetic resources, traditional knowledge and folklore constituted a violation of those peoples' fundamental rights to self-determination, which was acknowledged by, for example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The same emphasis on indigenous peoples' rights to self-determination had been emphasized by the United Nations Human Rights Committee. He reiterated that it was of paramount importance that the Intergovernmental Committee address the rights to genetic resources, traditional knowledge and folklore, not solely from an intellectual property rights perspective, but also in a manner so as to allow human rights and environmental aspects to influence its work.

49. The Chair underlined the urgency and the importance of finding solutions for the many issues addressed. In his view, there was a consensus that WIPO was indeed the most appropriate forum to deal with intellectual property and genetic resources, traditional knowledge and folklore. He noted the new developments in the CBD, FAO and the WTO, notably in Doha. Many interventions had stressed the need for close cooperation of the Intergovernmental Committee with other Organizations. Some Members had underlined that the three topics covered by the Committee had the same importance and that they were closely interconnected. Some Members had also underlined the need for the Committee to produce clear conclusions as well as for a clear mandate for the future. References had been made to discussions on capacity building, dispute settlement, the work of the Standing Committee on Patents and the integration of traditional knowledge into the standards of the International Patent Classification.

50. The Delegation of Egypt reminded the Committee that at the first session it had already noted the absence of translations of documents into the Arabic language. The Delegation noted that, since Arabic was an official language of WIPO, there was no reason, as a matter of principle, for the translations not being available.

51. Mr. Gurry, on behalf of the Secretariat informed the Delegation of Egypt that the matter would be brought to the attention of the Director General.

Operational Principles for Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing

52. The Chair stated that Agenda items to follow dealt with substance and technical matters and stressed the following few points: (i) that the matters to be discussed touched on new areas; (ii) that it should be understood that the issues were legally and technically complex and that inter-relationships existed with other intergovernmental organizations, and that they were important politically, economically and culturally; (iii) that it was important to create systems that were widely accepted; (iv) that all three elements should be treated in the same way; and finally (v) that the discussions at the session were only the first stage, which could possibly lead to norm setting or legal instruments. In terms of the structure for discussions, the Chair proposed that they should first center on Item 5 of the Agenda concerning operational principles for intellectual property clauses of contractual agreements concerning access to genetic resources and benefit-sharing, followed by Item 6 on traditional knowledge,

including its sub-areas: operational definitions; review of existing intellectual property protection; and the progress report on traditional knowledge as Prior Art. In relation to the Progress Report on traditional knowledge as prior art, the Chair stated that six specific activities were proposed and that members of the Committee were invited to note, elaborate and prioritize them. The Chair invited general comments on the Preliminary Reports prepared by the International Bureau and for Members to agree on an extended deadline for responding to the Survey and Questionnaire in order to have a substantive final Report. The Chair then invited the Secretariat to introduce document WIPO/GRTKF/IC/2/3, "Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-sharing."

53. On the basis of document WIPO/GRTKF/IC/2/3, the Secretariat provided a brief overview and referred to Task A.1 of the Committee which consisted of developing model intellectual property clauses and guide contractual practices for contractual agreements on access and benefit-sharing for genetic resources. The Secretariat stated that the document which had been developed to facilitate the implementation of Task A.1, provided background information for the Committee Members and solicited further guidance and decisions from Members States on what they wished to achieve with the development of the model clauses. The background information was divided into three parts. Notably the first part (Section II), provided the "Institutional background" of previous work on access and benefit-sharing contracts undertaken by WIPO and other relevant fora. Indeed the entire document took into account comments provided by the Secretariats of the CBD, FAO and CGIAR. The second part contextualized contractual agreements within different frameworks for access and benefit -sharing; and finally, Section IV, illustrated existing contractual practices through a random sampling of intellectual property clauses used in existing contracts. In seeking further guidance from the Committee Members, the Secretariat referred to Section V.C of the document which suggests a two-stage approach to the development of the model clauses. At the first stage, based on the decisions of the Member States at the Session, a systematic survey could be undertaken of actual contractual agreements used in the priority areas identified by the committee. This could lead to a compilation of existing clauses and practices which could serve as a basis for the systematic and balanced development of guide contractual practices and model clauses. The Secretariat highlighted that the document also solicited guidance from the Committee Members on two issues. The first issue was the type and scenarios of access and benefit-sharing which the Member States wish to address as their priority. This was important as there were limitless variations of contractual agreements. The Secretariat stated that Section V.A suggests that the priorities could be set in terms of different material, actors and uses. The second issue related to possible operational principles which could be embodied in the model clauses. The Secretariat invited Committee Members to identify principles that could be reflected in the model clauses.

54. The Chair referred to paragraph 129 of the working document and stated that the purpose of developing guide contractual practices and model clauses was to provide useful non-binding guidance for contractual negotiations. The Chair stressed that only intellectual property aspects of access to genetic resources would be treated. There was a need to work closely with other organizations and stakeholders in the area. The Chair stated that the Committee was invited to take certain decisions and give advice to the Secretariat based on paragraphs 113, 118, 122 and 130. These concerned the various variables and scenarios relating to "material," "actors" and "users"; furthermore the Chair directed the Committee to the proposed four operational principles concerning the recognition of formal and informal innovations, sectorial characteristics and full and effective participation of all relevant stakeholders. In addition, the Chair stated that the distinction between the various kinds of

uses of genetic resources, for example the commercial, non-commercial, and customary uses should be considered. The Chair invited the Committee to note, provide observations and indicate priorities to the Secretariat and not to go into detailed discussions on the different variables at this stage. With the resulting work undertaken by the Secretariat, as prioritized by the Committee, the Secretariat would work closely with the Secretariat of the CBD and FAO in developing model clauses and guide contractual practices.

55. The Delegation of Ecuador referred to for document WIPO/GRTKF/IC/2/3, and reiterated the premise on which the guiding criteria of its statement were based, namely, for Ecuador, the only entity in a position to control access to genetic resources, by virtue of its sovereignty over all kinds of genetic material and resources, was the State, acting through its national laws and ultimately its bilateral, regional and international undertakings. The Delegation of Ecuador was not dismissing the value of intellectual property, which was one among many other elements that made up the subject of access to genetic resources and benefit sharing. The Delegation acknowledged for instance that, when an innovative process or product derived from a genetic resource, whether animal, vegetable or microbial, was defined, there was reason to apply for the grant of intellectual property rights, after which its industrial production, distribution and marketing might take place. This meant that intellectual property could take various forms, which were regulated by the appropriate legislation. This recognition of rights could take place by virtue of one of the various intellectual property regimes, which might in turn manifest themselves in various different ways, one of those being contractual instruments. These agreements might well be generally concerned with access to genetic resources, but there might also be clauses written into them to guarantee intellectual property rights arising from the use of those genetic resources. Alternatively, they might be agreements relating exclusively to aspects of the recognition of intellectual property rights. These clauses or agreements relating to the recognition of intellectual property rights might themselves embody questions pertaining to benefit-sharing as a result of the use of genetic resources, in which it would be necessary to guarantee the rights accruing to the provider from that use, as well as those of the recipient and of all parties involved, in such a way that no prejudice was suffered by individuals or local communities in the country of origin of the resources. The Delegation stated that agreements must state the general principles that govern intellectual property, among them the principle that a mere discovery, including the case of an invention being made using natural biological materials, did not qualify for the recognition of intellectual property rights because, for instance in the case of patents, the grant of protection was subject to strict conditions of novelty, non-obviousness and industrial applicability. Any agreement must be predicated on the principle that neither the natural existence of the genetic resources as manifested in nature nor the related traditional knowledge could constitute patentable subject matter in themselves, as they did not conform to the basic criteria of patentability, especially novelty and non-obviousness. One aspect of fundamental importance to the validity of agreements was the condition of prior informed consent on the part of the competent national authorities and the provider directly involved. The Delegation stated that this condition was being elevated to the rank of a constitutional provision in Ecuador. In these instruments the Delegation stressed the importance to fully identify ways in which benefit-sharing could occur as a consequence of intellectual property development and as an incentive. The Delegation of Ecuador further stated that there should be the clearest possible identification of the role of intellectual property rights as an inducement to benefit-sharing. With this in mind, the Delegation was of the view that any negotiation of agreements on benefit-sharing and the intellectual property itself must embody specific ways of ensuring that the providers were involved in the work resulting from agreement to access to genetic resources, notably in the research and development field; specific, realistic arrangements for technology transfer and/or technical

assistance and/or scientific cooperation should also be settled. Agreements of this kind should also provide for a mention to be made of the place of origin of the biological material or related traditional knowledge where an application for the grant of intellectual property rights was filed, which in turn could be useful for the purposes of benefit-sharing. On these assumptions, the Delegation regarded the statement in paragraph 3 of document WIPO/GRTKF/IC/2/3, submitted by the Secretariat, to be satisfactory in that it mentioned the need to take into account other processes and agencies concerned with genetic resources, different access and benefit-sharing frameworks, different sectors involved and different types of genetic material. The Delegation referred to paragraph 113. In this connection and with regard to the Secretariat's request for a pronouncement on the types of genetic resources to which the model intellectual property agreements and clauses should apply, the Delegation of Ecuador considered that due regard should be given to the relevant multilateral organizations operating in accordance with the international undertakings that were mutually binding, especially the CBD and FAO. The Delegation also emphasized the need for reviewing the work being conducted in these international settings, with a view to ensuring that the exercise of intellectual property rights be conducted without any discrimination as to technological scope. The Delegation stated that the materials referred to in paragraph 110 had no reference other than to what was written into the definitions of the Convention on Biological Diversity as genetic material or resources, namely real or potential genetic material of plant, animal, microbial or other origin containing functional units of heredity. In this connection the Delegation felt that the study should begin, without prejudice to or exclusion of other elements, with the drafting of guide contractual practices relating to real genetic material of plant origin, followed by those of potential character but also relating to the plant world; thereafter genetic material of animal origin could be dealt with; and finally, material of microbial origin. As for the degree of innovativeness or improvement, the Delegation made reference to Text Boxes 2, 3 and 5 of the document. Text Box 2, like the others, claimed to be a "sample intellectual property clause," whereas in truth, like many of the Text Boxes, it contained definitions which, in the specific case of this Text Box, were definitions of material and derivative material that included "recombinant DNA clones" from the American Type of Culture Collection (ATTC). More significant in this context was what was said in Secretariat document WIPO/GRTKF/IC/1/3, submitted to the first session of this Committee, which, referring to progeny and derivative material, said "of particular importance is the scope of subject matter covered by an MTA, on which the genetic resource provider seeks to protect his rights," and that "such protection extends to the derivatives of the genetic resource," not overlooking the fact that "an important problem in this respect is to determine what constitutes 'a derivative' and what does not." The Delegation stated that the same mention of this difficulty was found in paragraph 64 of the document submitted to this session of the Committee, and in both it was recognized that one way of determining a derivative was to "agree upon a definition." In view of the foregoing, the Delegation considered that the first aspect to be studied, on the basis of various examples, should be what was understood by the term "derivative" qualifying for intellectual property protection, while various clauses with different options or alternatives could be suggested. Text Box 3 likewise gave a definition of material, which contained a reference to the "source country" in which the material had been obtained, and it spoke of "derivatives prepared from biological organisms," which led to the same conclusion as was mentioned in the previous instance. Text Box 5 set out first when an invention could occur, and dealt with its ownership. For instance, as far as inventions were concerned, it referred to inventions exclusive to the recipient, joint inventions and inventions that could be attributed both to the provider of the genetic material and to "consenting local communities," which introduced a "consenting local communities" category among the parties to the agreement. And it added another element, "traditional uses or processes [which] … may be regarded … as inventions for which inventorship rests solely with said

communities." Consequently, as mentioned in paragraph 67 of the more recent document, the Delegation of Ecuador agreed that "protection measures for traditional knowledge, innovations and practices must be further explored to guarantee the rights of traditional knowledge holders" by virtue of contracts for access to genetic resources in so far as they had a bearing on intellectual property. On the sectoral differences or the genetic resources sector concerned, the Delegation referred to Text Boxes 1 and 4, which had to do with genetic resources for food and agriculture. Both boxes referred to the International Agricultural Research Centers and the FAO, and also to the limitations that had been imposed in intellectual property terms, it being specified that the recipient agrees neither to apply for nor to obtain intellectual property rights in germplasm or related information, which meant that the parties to the agreement undertake to make use of the resource solely for research purposes; that could mean, as mentioned in document WIPO/GRTKF/IC/1/3 issued for the previous session (paragraph 38(i)), that "the germplasm provider wants to permit scientific uses of the material, but wants to reserve all commercial rights that may arise from the research." The Delegation noted that a similar clause was written into Text Box 15, the commentary on which, in paragraph 90, said that "such a possibility could also be prevented through the destruction of novelty of the transferred material." The Delegation of Ecuador considered that it would be advisable to establish clauses in which the operation of international law restricted or limited the options for securing intellectual property rights, irrespective of whether the material involved was *in situ* or *ex situ*. In paragraph 118, "the Intergovernmental Committee was invited to take note of the different types of stakeholders in genetic resources and is invited to indicate whether the interests, needs and roles of any particular types should be addressed as a matter of priority in the development of guide contractual practices and model IP clauses." In contract law, the parties obviously constituted an essential element of an agreement, and, as paragraph 114 of the document said, "users and other stakeholders differ," depending on the place and their interests. However, the Delegation stated that one could not be allowed to overlook the importance of the resource providers, where the fundamental actor, as already mentioned in this account, is the State, acting through its governmental institutions or private-sector research bodies. This paragraph referred to a number of the Text Boxes analyzed and also to Text Box 16, which said that "inventorship will be determined under patent law," presumably meaning that of the country in which the contract was signed. And yet it was also provided that the parties would seek appropriate protection abroad, including in the source country if appropriate. This question led the Delegation of Ecuador to suggest that it was important to determine the law to which the agreement would be subject, and also the possibilities for resorting to a place different from the place of signature for the registration of the purported invention, in such a way that the various options for contractual clauses on the intellectual property aspects of the subject might be known. By the same token, as far as Text Box 23 was concerned, there were various options for the possible termination of an agreement, notably failure to abide by the provisions of the national laws of the country providing the resources. Notwithstanding the foregoing, the model intellectual property clauses or guide contractual practices, the Delegation of Ecuador felt that one must first take due account of the role of the State, with its sovereignty over the genetic resources which made it the main stakeholder, and in accordance with that principle, should reflect its possible contractual relations with the national and/or foreign private sector. The Delegation referred to paragraph 122. Faced with the invitation in the Secretariat document to decide on which of the uses, whether commercial or non-commercial, should be addressed as a matter of priority when model IP clauses were developed, the Delegation of Ecuador considered that it would be appropriate to first clearly establish the distinction between them, in order to avoid confusion as to what constituted transfer of material for commercial use and for non-commercial use. That clarification would also be relevant to the fact that many access contracts were made for research or conservation

purposes but subsequently gave rise to a commercial use; the Delegation of Ecuador stated that it was important to study this question, obviously with reference to the type of resources, although plant genetic resources for food and agriculture would be particularly relevant in that connection. Thereafter one could usefully work on those with a direct bearing on trade, in preparation for subsequent analysis within the Committee. With regard to paragraph 130, and with regard to the Secretariat's invitation to propose principles and specify objectives for the development of contractual practices, the Delegation mentioned in its various statements to the present Committee that the principles underlying Ecuadorian policy on genetic resources, which were enshrined in various chapters of its Constitution, were also those relating to intellectual property. Without prejudice to the foregoing, the Delegation viewed the principles proposed by the document under consideration as follows: as far as Principle 1 was concerned, the concept of innovation and creation was in effect a fundamental pillar of intellectual property, and should be the overriding consideration in the drafting of model clauses, but without prejudice to the protection that in this case had to be given to the providers of the genetic resources, the State and its communities. The distinction between formal and informal was of particular importance here, bearing in mind that "informal innovators" had been defined as "countries, communities and individuals, generally working at the local level, that have through generations developed and conserved local technologies and products including plant genetic resources without having obtained formal recognition of their innovative labor or right related to it," that being the definition quoted in document WIPO/GRTKF/IC/1/3, paragraph 9, footnote 6. As to the proposed Principle 2, the Delegation of Ecuador mentioned their commitments under international treaties associated with biological and plant genetic material. The Delegation considered it essential that the intellectual property clauses of access and benefit-sharing contracts should apply the general principles, guidelines and concepts devised in the CBD and FAO forums mentioned, and that the parties should act, not only with their own particular interests, but keeping in mind those of the international community. With regard to Principle 3, the Delegation of Ecuador attached particular importance to the full and effective participation of indigenous and local communities, prior informed consent and benefit-sharing. For the contractual clauses to be accessible to those interest groups, many of which were the holders of traditional knowledge, it was of the utmost importance that they should be drafted in simple and clear terms in such a way that the rights were readily identifiable, and that they should be accompanied by detailed comments, likewise expressed in everyday language; this was essential in order to promote observance of the Principle. As far as Principle 4 was concerned, the Delegation agreed with the proposal submitted in the document. Consequently there should be a distinction between clauses that referred to uses, especially traditional uses, without exclusion of any of them at the outset, so that the continuity of use of the genetic resources by the communities possessing them might be ensured.

56. The Delegation of Venezuela, speaking on behalf of Cuba, the Dominican Republic, Panama, Nicaragua and four Andean States, notably Ecuador, Peru, Bolivia and Venezuela, thanked the Secretariat for the important work contained in the documents and its guiding comments. The Delegation stated that it was possible to develop model clauses and guide contractual practices for all types of material, actors and uses without *a priori* exclusions. The Delegation considered it necessary to clearly establish what constituted the transfer of material for commercial and non-commercial purposes. The Delegation reiterated the first principle highlighted during the first session of the Committee according to which that the model clauses should not be of a binding nature and that they include the sovereignty of States over their genetic resources, prior informed consent and fair and equitable benefit-sharing. The Delegation expressed its interest to include clauses to guarantee access to and transfer of adequate technologies in the terms established in the CBD Convention.

With regard to the proposed Principle 1, the Delegation felt the need for clarification on the use of the terms "innovation" and "creativity," and "formal and informal innovations," informal being used to refer to the innovations of the traditional, indigenous and local communities. As for Principle 2, the Delegation stated that the use of the term "political framework" was not clear and might lead to error. The Delegation proposed to replace the aforementioned term with the term "legal framework" which was a standard. With regard to Principle 4, the Delegation expressed the need for it to be eliminated as it claimed to raise to the category of principle the distinction between commercial and non-commercial use, when in reality, the separation was difficult to establish as indicated by the Secretariat in the document. Alternatively one should include the distinction between the different types of material transferred and the actors. The Delegation stated that, when the Secretariat initiated their systematic study of existing contractual practices, examples should be included other than those found in document WIPO/GRTKF/IC/2/3. The Delegation expressed its doubts as to the relevance of the Glossary contained in the document as other legal instruments, such as the CBD, already provide such definitions. The Delegation noted that one should not ignore the relationship between this Committee and other Committees, namely the Standing Committee on Patents, where discussions had been initiated on exceptions to patentibility and the need to mention the place of origin of genetic resources and traditional knowledge used as a base for the inventions, thus ensuring prior informed consent and benefit sharing. The Delegation further elaborated that it would be useful to have the contractual model clauses drafted in such a way to guarantee balanced and fair participation. The Delegation considered it of utmost importance to provide legal assistance to traditional, local and indigenous communities. Furthermore the Delegation noted that the Principles outlined in the document were just one of the steps towards the creation of a *sui generis* system to protect the rights of intellectual property whether associated or not to access to genetic resources and to traditional knowledge. The Delegation stated that it was essential to be cautious and prudent so that the model clauses did not overreach to trigger a process that would contribute to access to genetic resources without going through a fair and equitable benefit-sharing process.

57. The Delegation of Venezuela, speaking for its country, thanked the Secretariat for the extensive documents. Regarding the work on operational principles which should inform and set standards, the Delegation proposed that the principles should include the disclosure of origin of the genetic material especially when it was related to the use of this material and when using systems of protection of intellectual property in order to facilitate a just distribution and benefit-sharing. Secondly, the Delegation stated that the guide contractual practices and model clauses should include the principle of access to and transfer of technology in accordance with that of the CBD. With regard to priority activities for the Secretariat to initiate the elaboration of guide contractual practices and model clauses on intellectual property matters, the Delegation of Venezuela considered it positive to have activities for all types of material, actors and uses without any *a priori* exclusions. The Delegation of Venezuela stated that it was not ready to carry out detailed prioritization of the activities. Therefore the observations made were solely for the purpose of orientation. With regard to the type of material to be transferred and with respect to the "degree of improvement in innovations" the Delegation felt that there was a need to begin with material where no innovations had been made. With regard to sectorial distinctions the Delegation considered it necessary to first take note of those materials transferred to be used in the pharmaceutical and cosmetic industries and include those that were going to be the object of research. With regard to plant genetic resources for food and agriculture which were covered under the International Treaty on Plant Genetic Resources for Food and Agriculture, a priority should be given to the taxonomic origin where a distinction was made between genetic material of plant, animal, microbial or other types. Without excluding other categories, the Delegation

stated that one should, in the first instance consider *in situ* access. The model clauses should refer to the use of the existing intellectual property system, such as patents in connection with the disclosure of the origin of the utilized genetic resources. As to actors, the Delegation stated that the model clauses or guide contractual practices should take into account the role of the State in their elaboration of contracts given that the sovereignty over genetic resources belonged to it. In the second instance, the Delegation stated that it was important to take into account the role of local and indigenous communities. The Delegation of Venezuela referred to the importance of avoiding confusion over the transfer of material for commercial and non-commercial use, and that one should be aware of the need to introduce clauses which would develop the principle that any other use which might be given to the transferred genetic material which had not been planned by the parties in the access contract should be the object of revision or subject to certain pre-determined or established rules. The Delegation insisted on the introduction of terms which would envisage changing circumstances. Finally the Delegation concluded stating that the Glossary found at the end of document was not necessary given the existing definitions in other legal instruments such as the CBD.

58. The Delegation of Colombia stated that in preparing operational principles and model contractual clauses, the following principles, by way of example, should be taken into account: (i) the recipient of a genetic resource should not be entitled to intellectual property rights unless the genetic material had been the subject of a technical innovation; (ii) there should be recognition of the intellectual property rights of the country of origin from which the genetic resources were obtained; (iii) there should be recognition of the principle of the prior informed consent of traditional communities; (iv) in cases of access to genetic resources for research, and where subsequently intellectual property rights were obtained, the rightsholder should share benefits arising from the intellectual property rights with the country of origin and the traditional communities. The Delegation stated that it could support international guidelines for access and benefit-sharing in genetic resources provided that they were voluntary and not legally binding, were sufficiently broad in scope, and were confined to the intellectual property aspects. Finally, the Delegation noted that Colombia and the other countries of the Andean Community already had guidelines on these issues in the form of Decision 486 (Common Intellectual Property Regime) and decision 391 (Common Regime on Access to Genetic Resources) , which should be taken into account in future work of the Intergovernmental Committee. The Delegation ended by recommending that account should be taken of the work on access to genetic resources and benefit-sharing done by the Working Group on Access and Benefit-sharing of the CBD, which met in Bonn, Germany, from October 22 to 26, 2001.

59. The Delegation of Brazil welcomed the fact that the Committee was initiating discussions on Task A.1 regarding contractual arrangements on access to genetic resources. However, the Delegation stated that, while it was of the view that discussions on this task could be useful, it also believed that contracts were intrinsically limited, as the parties involved might not be in the same negotiating position. Contracts might also have a limited scope and, without regulatory supervision, might not necessarily fulfill the requirements of benefit-sharing and prior informed consent. In addition, there might also be limitations as to the enforcement of contracts. In this context, the Delegation stated that its discussion on this task was without prejudice to the need to carry out other tasks which were supported by a great number of Members at the first session of the Intergovernmental Committee. Referring to experiences in implementing Brazilian legislation on access to genetic resources, the Delegation stated that the establishment of international contractual arrangements in Brazil should comply with national legislation and regulations. Compliance in such cases did not establish the contractual provisions as binding, but rather ensured that such provisions met

minimum requirements. Concerning the "Variables and Scenarios to be Addressed," in part V.A of document WIPO/GRTKF/IC/2/3, the Delegation noted that the element of transfer of technology was scarcely mentioned in the document. The Delegation stated that transfer of technology was closely associated with the issue of intellectual property rights and access to genetic resources, and made references to transfer of technology in the CBD and the TRIPS Agreement, as well as in Brazilian legislation on access to genetic resources and the protection of traditional knowledge. The Delegation believed that the Intergovernmental Committee should provide further elaboration of technical elements related to transfer of technology in contractual agreements related to access to genetic resources, as well as in tasks related to the development of national and international legal frameworks. Regarding the issue of stakeholders, the Delegation stated that the document by the Secretariat failed to identify Governments as important stakeholders. The Delegation stated that Governments might play a crucial role, for instance, in balancing interests in contracts between traditional communities and private sector companies, and that, under Brazilian legislation, the prior approval of all contractual arrangements on access to genetic resources of the Council on the Management of Genetic Resources was required. Regarding "Operational Principles for the Development of Guide Contractual Clauses," the Delegation stated that Principle 1 provided an interesting basis for future work. The Delegation stated that Principle 2 was also relevant, and might also provide adequate guidance for the fulfillment of requirements to disclose the source of genetic material used in patented inventions. Regarding Principle 3, the Delegation agreed that the full and effective participation of all relevant stakeholders was an important element in the elaboration of contractual arrangements, and referred to a "Meeting of Shamans," recently organized by the National Institute of Industrial Property of Brazil (INPI). Referring to the principle of "prior informed consent," the Delegation referred to a training program on intellectual property and traditional knowledge being prepared by the INPI for indigenous stakeholders, including indigenous lawyers. The training program would focus on existing mechanisms of protection, including bilateral contracts and *sui generis* models of protection. The Delegation stated that it would welcome the support of WIPO in this initiative and would encourage WIPO to develop a further similar activities at the regional and international levels. The Delegation expressed support for Principle IV. Finally, the Delegation agreed with those other Delegations that called for increased coordination between WIPO and other international organizations, particularly the CBD and the FAO.

60. The Delegation of India, speaking on behalf of the Asian Group, stated that it considered it important that WIPO continue to address issues related to genetic resources and traditional knowledge in conjunction with the Secretariat of the CBD and the Commission on Genetic Resources for Food and Agriculture of the FAO. The Asian Group also noted that, as stated in document WIPO/GRTKF/IC/2/3, model contractual agreements were not in themselves intellectual property rights instruments, and that the aim of this work was to identify and provide a factual and technical account of the intellectual property issues arising in the context of contractual agreements for access and benefit-sharing. It would be useful, the Delegation added, for Governments to conduct consultations at the national level regarding access to genetic resources and benefit-sharing which involved all relevant stakeholders, and provide the results from these processes and other relevant national experiences to the Intergovernmental Committee in the form of country reports, case studies and other information. The Asian Group stated that individual delegations in the Group would react to the variables, options and principles set out in document WIPO/GRTKF/IC/2/3.

61. The Delegation of India, speaking for its country, stated that any decision in the area of operational principles for the formulation of guide contractual practices and model intellectual

property clauses should have a direct bearing with the principles adopted in the CBD and in the FAO's International Treaty on Plant Genetic Resources for Food and Agriculture. The Delegation stated that all plant genetic resources for food and agriculture which were currently maintained under the FAO, the CGIAR centers and other international agriculture research centers (IARC) held in trust under FAO-CGIAR Agreements, as well as those part of the multilateral system established under the International Treaty on Plant Genetic Resources for Food and Agriculture, should be covered in the contractual agreements. Referring to paragraph 113 of document WIPO/GRTKF/IC/2/3, which invited Members to indicate whether any particular types of genetic resources should be addressed as a matter of priority, the Delegation of India stated that, from the point of view of food and nutritional security and global interdependence on this issue, the interests of the farming community, which included village and indigenous communities, should get priority. Similarly, the issue of health security should be emphasized. With regard to paragraph 118 of document WIPO/GRTKF/IC/2/3, and as stated by certain other delegations, the Indian Delegation supported the view that recipients of genetic resources should not claim any intellectual property or other rights that limit the facilitated access to the resources or their genetic parts. The facilitated access to be provided should be pursuant to a standard material transfer agreement (MTA). The MTA should not only include the concept of repeat access, but also include provisions on user obligations, and the rights of providers, including any kind of commercial arrangement, which could be anticipated at the outset. Regarding stakeholders, the Delegation highlighted the requirements of traditional farming communities as well as of local and indigenous people. The Delegation stated that the benefits arising from the use, including commercial use, of genetic resources should be shared fairly and equitably through mechanisms such as exchange of information, access to and transfer of technology, capacity building, and the sharing of benefits arising from commercialization. In addition, the "prior informed consent" of the holder of the resource material and knowledge was important. The Delegation informed the Intergovernmental Committee that the Indian *sui generis* law on Protection of Plant Varieties and Farmers' Rights recognized the role and contribution of the farming community in conserving, evolving and providing the plant genetic resources for breeding new plant varieties. The legislation provided for a system of benefit-sharing arrangements through mandatory disclosure of the geographical location of the genetic resource. In respect of paragraph 122, the Delegation considered both options – "the bio-prospecting scenario" and the public sector conservation and breeding programs – of equal importance in the context of the requirements and concerns of a developing country such as India. The Delegation agreed in general with the operational principles set out in the document, adding that the scope of benefit-sharing should be broadened to include not only monetary sharing, but also sharing of benefits through joint intellectual property rights, research and development and capacity building. Finally, the Delegation agreed with the proposals contained in paragraph 133 of the document. The survey should specifically bring out contractual terms on intellectual property entered into by private/public institutions with local and indigenous communities.

62. The Delegation of Thailand expressed support for the previous statements under this agenda item made by the Delegations of Brazil and India. Referring generally to the use of contract in respect of genetic resources, traditional knowledge and folklore, the Delegation noted that contractual arrangements were binding only upon the parties to them, and had no effect on third parties. Thus, a contractual approach should be based upon national legislation which was, in turn, based upon an international framework such as the Multilateral System under the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO. However, the implications of that system still required consideration. Such a system could also be considered in relation to the protection of traditional knowledge and folklore.

63. The Delegation of Indonesia said that its country still depended heavily on the activities of its rural community in the agricultural sector as the backbone of its economic development. Since the way of life of the Indonesian people was very much influenced by the land and their local environment, Indonesia's natural resources and diverse cultures were valued by its people as important national assets. Consequently, the Government of Indonesia always followed with great interest international efforts undertaken to protect those assets, on the understanding that it was necessary to strike the right balance between the interests of local or indigenous communities and the provisions of intellectual property rights for inventions deriving from traditional knowledge owned or genetic resources customarily used by those communities. On document WIPO/GRFTK/IC/2/3, the Delegation supported the proposal to conduct further studies on the legal status of genetic resources, as well as the roles and the rights of the government and local or indigenous communities of the country of origin in the event of the transfer and commercial use of genetic resources as well as their derivatives by the private sector and research institutions. The Delegation noted that, at the first session of the Committee, Members had indicated that the future guidelines on international contractual practices and model intellectual property clauses concerning genetic resources should be non-binding in nature. However, bearing in mind the interests of various stakeholders and notwithstanding the principle of contractual freedom, the Delegation was convinced that those guidelines would provide a valuable reference for the communities involved as well as for governments, so that they could fully understand the legal consequences of drawing such contracts. In conclusion, the delegation was of the view that the combination of Principles 2, 3 and 4, as proposed on pages 51 and 52 of the aforementioned document, constituted an appropriate basis for the definition of the scope of the intellectual property-related rights and obligations which would be reflected in the model contractual clauses.

64. The Delegation of Zambia stated that, when addressing the issue of access to genetic resources and benefit sharing, Committee Members should not lose track of who the custodians of those resources were, how they benefited or not from the utilization of those resources in the past, and who the major beneficiaries of the use of those resources were. It was gratifying that the Committee was discussing access to genetic resources and benefit sharing in the same breath. It was common knowledge that there had always been access to genetic resources, but the same could not be said about fair and equitable sharing of the benefits arising from the use of genetic resources. Moreover, benefit sharing should not be restricted to monetary benefits, but it should be considered in the broadest sense possible and available. An area which should and must benefit from the use of genetic resources was the strengthening of traditional knowledge systems. Furthermore, benefit sharing should encompass access to technology as well as transfer of technology. The Delegation believed, however, that there was a great need to look closely at the receiving environment of technology and the conditions for that transfer. It was necessary indeed to identify ways and means of enhancing the transfer of technology, including capacity building. The Delegation supported the setting of minimum standards for material transfer agreements (MTAs), a model of which should be developed by the Secretariat of WIPO, following a comprehensive survey of MTAs that were available. Committee Members interested would then be at liberty to adopt the MTA model to respond to specific situations in their countries, taking into account the type of material to be transferred, the actors involved and the use of genetic resources.

65. The Delegation of Jamaica said that, concerning paragraph 113 of document WIPO/GRTKF/IC/2/3, it believed priority should be given to two areas: agreements for different taxonomic origin; and development of contractual practices and model clauses that

depended on the legal status of the genetic resources under international law. Specialized MTAs for the transfer of genetic resources (microbial or plant or animal) were most often used in its country. Guide contractual practices and model clauses on intellectual property would be very useful in this area. It should also be noted that many agreements provided for access to more than one type of material, including marine organisms and endemic and indigenous plant and animal species, without distinction and thus guidance would be very welcome. As to paragraph 118 of the aforementioned document, the role of the State was very important in this arena. In its country access and benefit sharing was being developed and it was being considered in that context to include terms that would require the State to review contracts and establish minimum standards for such agreements. The role of the civil society was then a second priority as there were needs more important and contractual practices and model clauses on access to traditional knowledge needed to be developed first. The issues of confidentiality and confidentially agreements should be stressed in this area and work should be done on the use of those clauses as part of guide contractual practices. Finally, on paragraph 122, the delegation believed that priority should be given to understanding the bioprospecting scenario or commercial use, because often MTAs were generic agreements and the intellectual property and ownership provisions were the most difficult to negotiate. Reference to model clauses on the transfer of technology was also very important for they would allow to track the process of development of commercial research including clauses on patent applications and licensing. On paragraph 130, the delegation agreed with the operational principles outlined in the Secretariat's document. Nonetheless, it wished to call the attention for principles contained in the Draft Bonn Guidelines, under which the guidelines were non-binding in nature, they were easy to use, they might accommodate different types of application and, most importantly, they were intended to promote transparency in the negotiation and implementation of access and benefit sharing agreements. The Delegation agreed that WIPO should conduct a survey on current contractual practices, including agreements on access to genetic resources and traditional knowledge, as well as their impact on contractual negotiations and conditions on payment of royalties. The Delegation concluded that a very important issue was the negotiating capacity, which depended very much on the bargaining power of the parties to the agreements.

66. The Delegation of Singapore said that the work of the Secretariat on operational principles concerning contractual arrangements should prioritize the activities that could bring benefits as wide as possible. On materials to be covered, the Delegation understood that no area should be given preference, because to leave types of genetic materials uncovered might be troublesome. In that regard, Article 12.3 of the FAO Treaty could provide useful guidelines and principles in the sense that WIPO should concentrate its work on genetic resources not covered by the work of the FAO. On actors, the Delegation again stressed that the work should lead to benefits as wide as possible, thus including the public sectors and research institutions. As far as the prospective users of the guidelines were concerned, the Delegation stressed that academic research institutions should receive a particular attention.

67. The Delegation of Turkey noted that, because of its geographical location, Turkey was one of the most peculiar areas in the world where biological diversity was concerned, especially for plant genetic resources. On the other hand, Turkey was a mosaic of ancient civilizations and different cultures, with an enormous cultural heritage. Since about half of the population of Turkey lived in rural areas, genetic resources and their uses were still preserved by rural communities. The Delegation informed that *in situ* conservation of genetic resources was realized by protected areas with different status. *Ex situ* conservation was carried out by seed collections and several gene banks. Accession to plant and animal genetic resources was regulated by the Ministry of Agriculture and Rural Affairs. Material accession

and transfer were also managed by that Ministry. The general principle on access was to give the highest priority to the recipients willing to carry out scientific and similar projects in collaboration with local authorities and scientists. However, illegal access and transfer of genetic material outside the country were still a very serious issue. On the other hand, Turkey was examining the possibility of identifying and registering any material derived from genetic resources and make it available for users under contractual arrangements and on a case by case approach. This was also seen as a starting point for protecting genetic resources under the intellectual property rights regime. With regard to the different types of genetic resources covered by contractual agreements as described in paragraphs 110 to 113 of document WIPO/GRTKF/IC/2/3, the Delegation stated that all types should be acknowledged, so no special priority should be set for any of the five criteria suggested under the basic category named as "materials." Since different types of genetic resources required different types of agreements, all types of criteria should be addressed as equally important. The Delegation added that under the category named as the degree of human improvement and innovation, the extent of the limits of the human improvement should clearly be described and standardized in the guide contractual practices and model intellectual property clauses. Moroever the Delegation wished to propose that sectorial aspects should be covered as a fourth variable, just as material, actors and uses. This additional variable, the Delegation suggested, should be taken seperately. As to the stakeholders that participated in contractual arrangements, the delegation found that the interests, needs and roles of any of the particular types were equally important. A mechanism of financial support was needed for the development, implementation and monitoring of national policies for access and benefit sharing which must involve all stakeholders fully and equally in the decision-making process. Public awareness and capacity building were utmost important to ensure full participation of stakeholders. On "uses," the Delegation emphasized its priority on the first and second options, namely the "classical bioprospecting scenario" and "the intellectual property-related issues arising in the context of public sector conservation and breeding programs for plant genetic resources for food and agriculture." The Delegation fully supported all the four operational principles proposed in the document, but it wished to emphasize that, on principle 1, since there was no system for the protection of informal innovations, some problems could arise during its operation. The Committee, therefore, might consider providing technical assistance to countries for establishing effective means for the protection of such innovations. Furthermore, model intellectual property clauses and contractual guidelines should also cover the following points: sovereignty of countries over their genetic resources and traditional knowledge; prior informed consent; access to and transfer of technology to the donor country; and disclosure of the origin of genetic resources in related intellectual property applications. Furthermore, the guiding contractual provisions should not lead to uncontrolled access to genetic resources and ought to cover uses by third parties. The Delegation supported the development of a survey on existing practices, including the establishment of a mechanism for exchanging of experiences among Committee Members, in line with the CBD's clearing-house mechanism. The delegation proposed that the WIPO Secretariat should work in cooperation not only with the CBD and the FAO, but also with other international agreements, such as the CITES and the WTO, in particular in the context of the TRIPS Agreement.

68. The Delegation of Australia observed that the document under consideration showed how difficult it would be to quickly develop model intellectual property clauses covering the range of issues and scenarios reflected in the document. However, the Delegation considered it important that the Committee demonstrated visible progress quickly. It proposed to build on the suggestion contained in paragraph 133 of the document to undertake a survey of existing contractual agreements. Referring to its proposal in document

WIPO/GRTKF/IC/2/12 it expressed its belief that this work should aim at developing a database of intellectual property contractual terms for access to genetic resources and benefit-sharing. It further suggested that the database should display information about the legal context in which the intellectual property contractual terms had operated. It specified that this additional information could include information on general contract law in the relevant jurisdiction, information on any relevant CBD implementation legislation and information on any relevant legislative provisions relating to indigenous peoples. The Delegation specified that the principal focus of the database would be to show how such intellectual property clauses had operated in their national context. It suggested that Member States, non-governmental organizations and private sector companies could contribute to the database. It further proposed that the database could be linked with the CBD's clearing house mechanism in order to maximize the usefulness and accessibility of this tool, which might also have capacity building benefits. The Delegation informed that Australia had prepared a draft matrix for the data collection, in order to illustrate how such a collection could be compiled.

69. The Delegation of Peru suggested that several factors should be taken into account when undertaking the prioritization requested by the document. Regarding the different types of materials for which the Committee was invited to indicate particular types that should be addressed as a priority, the Delegation suggested that the guide contractual practices and model intellectual property clauses should cover all types of material. However, concerning plant genetic resources for food and agriculture, the Delegation reminded the Committee that these resources were covered by the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO. Regarding actors whose role or interests should be addressed as a priority, the Delegation highlighted the role of the State as the sole sovereign over genetic resources. It also noted the importance of considering indigenous and local communities who are often the guardians of genetic resources and have conserved them throughout history. It suggested that WIPO should ensure the effective participation of indigenous and local communities, which was often only possible by financing their participation. Concerning uses of genetic resources which should be considered as a priority, the Delegation suggested that uses should not only rely on the simple distinction between commercial and non-commercial use, but should take into account industrial application and whether the resource is used for research or for conservation purposes. It noted that material which is initially used for research could later on be used for commercial purposes. It also suggested that even though the model intellectual property clauses would be non-binding, WIPO might still promote their use by providers and recipients of genetic resources, so as to achieve a better balance in the negotiations of these contracts. The Delegation concluded by stating that there should be a close connection between the model intellectual property clauses and the principles of the CBD.

70. The Delegation of Egypt noted that the need for coordination and contracts among stakeholders made it necessary to develop a binding legal instrument and to establish national legislation on what kinds of clauses should apply. The Delegation emphasized that practices in this area of access to genetic resources should be in line with full respect for the State's sovereignty over genetic resources. Furthermore, the Delegation perceived a need for clarity and transparency as regards the source of the genetic resources. The Delegation advised that the provisions of the CBD and FAO should be respected in the agreements. It suggested that *sui generis* rules should be enforced which would have to be in harmony with the standards set out in the TRIPS Agreement, in particular under Article 27.3(b). The Delegation emphasized that benefits could not only be financial or monetary, but that there should be participation in all the benefits derived from use of genetic resources, for example through the

transfer of technology and the training of human resources. The Delegation recalled the provisions of Article 7 of the TRIPS Agreement on technology transfer which the CBD reflected as well. In conclusion the Delegation reiterated that the drafting of a binding international instrument was imperative, which should take into account the interests of developing countries.

71. The Delegation of the Russian Federation considered it important to take into account in contractual agreements all types of genetic resources, and stressed the primary importance of such resources for food and agriculture. Moreover, it was important to take into consideration the interests of all the parties to contractual agreements mentioned in document WIPO/GRTKF/IC/2/3. The contractual agreements should also cover all types of use of genetic resources, including scientific and/or commercial purposes of common use. The Delegation agreed with the four possible principles set out in section V.B of document WIPO/GRTKF/IC/2/3. It supported the proposal of the Delegation of Australia for the establishment of a database on existing contractual agreements.

72. The Delegation of Norway began by recalling the importance of genetic resources for present and future generations. It noted that effective use of these resources would generally benefit from open and facilitated access. It provided the example of genetic resource underpinning food production, where all regions of the world depended heavily on plant genetic resources that had their origin in other regions. It acknowledged that the use of genetic resources should be in harmony with the CBD, including its provisions on fair and equitable benefit-sharing. It noted that the role of intellectual property rights in this context was important and that intellectual property rights provided important incentives for innovation. It also noted, however, that concerns had been raised about how such rights impact on the sharing of benefits arising from the use of genetic resources. Consequently, the Delegation stated, one was now faced with a situation where intellectual property rights were central to discussions on access and benefit-sharing regimes. It recalled that this had also been the case during the final negotiations for the International Treaty on Plant Genetic Resources for Food and Agriculture, which had recently been finalized under the auspices of the FAO. In the view of the Delegation, the negotiating history of the Treaty illustrated the usefulness of possible principle 2, as identified in paragraph 125 of document WIPO/GRTKF/IC/2/3, which suggested that sectorial characteristics of genetic resources should be taken into account when formulating model intellectual property clauses. The Delegation agreed with the importance of this principle, since different sectors might need terms of access and intellectual property clauses which suited the particular needs of those sectors. The Delegation recalled that in the FAO Treaty access to genetic resources was generally open and facilitated. It explained the conditions set out by the Treaty for recipients benefiting from facilitated access under the Treaty, namely that they should not claim any intellectual property rights or other rights that limited the facilitated access to the genetic resources, their parts or components in the form received from the multilateral system. The Delegation also agreed with the other three suggested operational principles contained in the document. As regards the different variables that could be addressed when developing model intellectual property clauses, the Delegation identified actors and uses as the important variables. It preferred that the work focused on those scenarios which involved actors with differing interests and bargaining powers, which would often imply actors who were respectively inside and outside the commercial sectors, such as public sector institutions. The Delegation considered the classical bioprospecting scenario, as described in paragraph 121 of the document, to be the right priority for the future work under Task A.1 of the Committee. It added that this work should take into account the role of the State and be undertaken with the active participation of indigenous and local communities. The Delegation recalled that there

was now an International Treaty to deal with plant genetic resources for food and agriculture and it followed that whether the Committee should in the future undertake any work on plant genetic resources for food and agriculture falling under the scope of the Treaty would depend on whether the Interim Committee, established by the Treaty, would consider WIPO's input useful in its work. The Delegation supported the statement of the Delegation of Singapore in this respect. It emphasized that it looked forward to the future cooperation between WIPO, CBD and FAO which would promote increased understanding and mutual supportiveness between intellectual property rights regimes and the CBD. In conclusion, the Delegation emphasized that it strongly believed in the process of the Committee, it supported the four operational principles proposed in the document, it supported the two-stage approach for the organization of work and it believed that a scenario where commercial actors seek access to genetic resources from indigenous and local communities should be given priority.

73. The Delegation of New Zealand informed that it supported the proposal made by the Delegation of Australia, since it suggested a practical course forward and would produce a useful resource. It suggested that the Committee might consider at a later date whether a compilation of existing contractual agreements might sufficiently address Task A.1, or whether it was necessary to develop model intellectual property clauses. In response to the invitation contained in paragraph 113 of the document regarding priority materials, the Delegation stated that it had no preference in this respect. Concerning the identification of actors which should receive priority attention, the Delegation indicated that priority should be given to the interests of the public research community and indigenous and local communities. Concerning priority uses of genetic resources the Delegation suggested that priority should be given to the classical bioprospecting scenario and to certain domestic scenarios, such as agreements between public research institutions and indigenous and local communities for the screening of medicinal plants. The principles suggested in the document were endorsed by the Delegation without objections, as long as they were simply matters to be taken into account in the development of the model intellectual property clauses. The Delegation closed by reiterating that all model intellectual property clauses should be non-binding.

74. The Delegation of the United States of America supported the development of guide contractual practices if it were understood that they were for guidance only and not binding. It recalled that the United States had encouraged laws and practices related to access contracts for some time now. It saw as the goals of guide contractual practices that they would evolve into a concrete and useful document and that it reflected real-life scenarios. To this end the Delegation had made available the Memoranda of Understanding and the Letters of Collection of the National Cancer Institute (NCI) of the United States as examples of useful agreements. The goal of such a document to be issued by the Secretariat should be to make it accessible to researchers, source country organizations and indigenous groups. The Delegation supported the proposal made by the Delegation of Australia on creating a matrix of intellectual property clauses which, the Delegation suggested, could also be coupled with a "Lessons Learned"-section, in which Governments and researchers might share their experiences in using particular clauses. Addressing the document under consideration, the Delegation did not see the usefulness of prioritizing among particular materials or stakeholders. It considered it more useful to work on a flexible approach that would be adaptable to a variety of needs found in research. However, the Delegation did see a benefit in ensuring that scientific, non-commercial activities involving the collection of genetic resources not to be impeded. It believed that access to genetic resources for these types of activities, which were not intended to lead to the establishment of intellectual property rights, should have a minimum of impediments. The Delegation concurred with the concept of

recognizing, promoting and protecting creativity and innovation connected with genetic resources, as outlined in possible principle 1. It could support a suggestion made by other Delegations that access and benefit-sharing guidelines include a limitation that collectors of genetic resources could only obtain intellectual property rights with respect to innovations and not with respect to genetic resources in the form in which they existed in nature. The Delegation suggested that existing agreements, such as the TRIPS Agreement, be used as guidance for defining the limits of intellectual property systems. With regard to possible principle 2, it suggested that the Australian matrix concept take into account a sectorial approach. The Delegation stated its belief that WIPO was the right organization for discussing intellectual property issues in all areas and that other organizations should not be responsible for drafting intellectual property clauses. Regarding possible principle 3, the Delegation supported the proposal of the Asian Group to survey all stakeholders. On possible principle 4 it emphasized the importance of focusing on basic research, which typically has no intention for commercialization at the time when the transfer is made, and noted that the bulk of research is such basic research. Concerning commercial research, it referred to already existing contract provisions which had requirements that the researcher go back to the provider for further consent, such as those of the NCI, the United States Department of Agriculture and the Walter Reed Army Research Institute.

75. The Delegation of Belgium, speaking on behalf of the European Community and its Member States, expressed its support for the general approach which had been outlined in the working document under consideration by the Committee. It stated its wish to indicate a number of elements which it considered to be of importance with regard to the principles that featured in the document, which included the following: (a) concerning the principles identified in paragraph 6 of the document, it would be pertinent that the principles reflected in the model intellectual property clauses should ensure coherence and mutual supportiveness with other bodies dealing with genetic resources; (b) with regard to paragraph 7 of the working document, the Delegation agreed that the work of the Committee should be limited solely to intellectual property aspects, so that other aspects of genetic resources could be dealt with by other fora which dealt with genetic resources; (c) concerning paragraph 9 of the document, the Delegation concurred with the need to coordinate the work of the Committee with other intergovernmental organizations, including UPOV; (d) regarding paragraph 123 of the document, it appeared necessary to the Delegation that the guide practices and model intellectual property clauses should be of a non-binding character. Concerning the prioritization which was requested in the document among different materials, actors and uses, as reflected in paragraphs 113, 118 and 122, the Delegation expressed its wish to first hear the views and suggestions of other countries, in particular developing countries, and stakeholders, including indigenous and local communities. Nevertheless, the Delegation wished to indicate a few points, which included the following: (a) Regarding the question of stakeholders which was raised in paragraph 118, it appeared to the Delegation that indigenous and local communities should be closely associated with the drawing up of the guide practices and model clauses; (b) concerning the prioritization of different uses of genetic resources, as envisaged in paragraph 121, the Delegation was inclined to prioritize the classical bioprospecting scenario, while not excluding other scenarios from possible consideration in the future; (c) regarding the possible principles which were identified in paragraphs 123 to 130 of the document, the Delegation, referring to paragraph 126, noted that the Committee should ensure coherence and mutual supportiveness of its work with the work of the CBD, FAO and WTO. In this regard, it added that the European Community and its Member States recognized the importance of the work undertaken in the context of the CBD, in particular its Working Group on Access and Benefit-sharing, which had met in Bonn, Germany; (d) it also stated that the guide practices and model intellectual property clauses were not binding in

nature, as reflected in paragraph 129 of the document; (e) the Delegation supported the proposal for a two-stage process for the development of the clauses, as contained in paragraphs 131 to 134, and emphasized the need to make rapid progress and to achieve concrete results in a short period of time. With reference to paragraph 133, it noted that there was a need to include the private sector and industry in the consultations; (f) finally, concerning paragraph 134, the Delegation considered that the inventory of intellectual property clauses of access and benefit-sharing contracts proposed by the Delegation of Australia could provide useful assistance, in parallel to the work of the Committee.

76. The Delegation of Japan supported the proposal made by the Australian Delegation because it considered that the pratical viewpoints were most important in this exercise. It anticipated that the proposed database and matrix would be very useful as a basis for stakeholders. The Delegation suggested that a geographical balance should be maintained in the contracts contained in the database and found it a good approach, that after the database would have been completed, the Committee could decide at that time whether it was indeed necessary to develop model intellectual property clauses. The Delegation stated two principles which should be applied, namely, first, the non-binding nature of the model clauses and, second, the promotion of innovative activities of the various stakeholders. The Delegation considered these two principles the most important ones and suggested that they be taken into account, as far as they did not conflict with CBD or TRIPS contexts. The Delegation closed by proposing that the Committee should study the feasibility of a supporting system for stakeholders in genetic resources.

77. The Delegation of Canada expressed its agreement that there was an urgency to move forward rapidly with the work of the Committee. It repeated that Canada favored a contracting approach to access and benefit-sharing for genetic resources because of its flexibility vis-à-vis legislative approaches. With regard to Part V.A of the document under consideration, concerning scenarios which should be prioritized, the Delegation suggested that one of the scenarios that should be prioritized was the bioprospecting scenario. It furthermore supported the compilation of contractual clauses relevant to indigenous and local communities. The Delegation stated its general agreement with the principles set out in the document and concurred with the Chairman and the Delegation of Venezuela that the model intellectual property clauses would be used as a voluntary guide. Referring to paragraph 6 of the document, it suggested that any product of the Committee's work should be flexible, consistent with intellectual property standards and the work of other genetic resource fora, and simple, so that the clauses and guide practices would be accessible to all stakeholders. It agreed with the Delegation from Ecuador regarding the need for precise language and gave the example of the word "informal" in the phrase "informal creativity and innovation" of possible principle 1, which was unclear and required reformulation. In relation to possible principle 3, the Delegation noted that this raised the issue of capacity building among some stakeholders and that this was a particularly important issue for holders of traditional knowledge. The Delegation commented that it found the proposal made by the Delegation of Australia constructive and saw it as a useful initiative for this Committee. It recorded its understanding that this course of action would be complementary to the work program proposed in document WIPO/GRTKF/IC/2/3 and would be conducted simultaneously with work on model intellectual property clauses to guide contractual practices. It considered it useful if there were a visible concrete result from the work of the Committee in the short term. The Delegation considered it desirable that the compilation of contractual terms support ongoing work of the CBD's Working Group on Access and Benefit-sharing. In particular, it suggested that there should be close cooperation between the CBD and WIPO Secretariats to avoid the duplication of efforts and to ensure the compatibility of databases. Finally, it

proposed that the compilation should be linked to the CBD Clearing House Mechanism in order to facilitate wide access, including access by indigenous and local communities.

78. The Delegation of Algeria, speaking on behalf of the African Group, supported the development of a *sui generis* system for the protection of intellectual property rights related to genetic resources. Within this framework it wished to see contractual arrangements with a binding nature. The Delegation supported the principle of access to technology, which should be included in the model contractual clauses and agreements. It pointed out that at the present time the African Delegation could not establish a list of priorities. It explained that benefit-sharing should include the material and immaterial aspects of protection. It expressed its pleasure with any future cooperation between WIPO and the CBD and FAO, while remaining focused on WIPO's competence in the field of intellectual property. With regard to the priority actors that should be considered, the Delegation emphasized the importance of the State as the primary actor in determining access to genetic resources and benefit-sharing. It noted that in the food security context, there was an important role for the development of new plant varieties and agricultural varieties.

79. The Delegation of Morocco considered genetic resources to be important in sustainable development. In the Delegation's view, the elaboration of the clauses should take into account the work done in other bodies such as FAO, CBD and UPOV. It noted that contractual policies should not go against food security. In regard of possible principle 1 it requested WIPO to define the innovation brought about by humans means with regards to genetic resources. The Delegation recommended that the Committee should take into account sectorial differences of genetic resources. It added that the Committee should determine who stakeholders were, over and above those already mentioned in paragraph 114 of the document. Regarding participation, possible principle 3 should extend the negotiation of contracts on intellectual property, including on traditional knowledge holders. It considered it important to make a distinction between different types of utilization of genetic resources. Finally, it emphasized that WIPO was competent to draw up a model which would be adaptable to different systems.

80. The Delegation of South Africa stated that it fully supported the approach reflected in document WIPO/GRTKF/IC/2/3. While agreeing with the statement in paragraph 6(c) of the document, it added a qualification that the work of the Intergovernmental Committee should also take into account possible *sui generis* systems in respect of genetic resources, traditional knowledge and folklore. Non-binding regulations, the Delegation stated, would disadvantage developing countries, which should propose national strategies and initiatives. Particular attention should be paid to cases in which the same genetic resources are found in more than one country. The Delegation referred to the protection of databases, and stated that a link should be drawn between the protection of databases and genetic resources. Finally, the Delegation stated that an international treaty should not be imposed, but rather guidelines should be established for incorporation into national laws. Such guidelines should not be a barrier to trade, the Delegation added.

81. The Delegation of Kenya expressed support for the statement made earlier on behalf of the African Group. The Delegation stated that it found it difficult to prioritize the types of genetic resources referred to in document WIPO/GRTKF/IC/2/3. The Delegation stated that it considered nutrition and health as among the priority areas. Regarding the issue of stakeholders, the Delegation found that there were a multiplicity of players having variable capacities, needs and roles. However, the Delegation added, indigenous communities who had been marginalized by the developmental process, required special attention. The

Delegation stated that it supported the principles laid down in document WIPO/GRTKF/IC/2/3, but that the list was not exhaustive and that it should take into consideration other principles as laid down in the CBD, particularly those relating to benefit-sharing and technology transfer. Finally, the Delegation stated that benefit-sharing should not only include monetary aspects but also technology transfer.

82. The Delegation of China stated that it agreed with many of the opinions expressed in the statements of other Delegations, including the following: the terms used in drafting MTA model clauses and the scope of their application needed to be further clarified, and the forms of benefit-sharing should not be limited to financial rewards. The Delegation responded to the requests of the Chair to make the following comments: firstly, it thought that a non-binding MTA model contract might be necessary for providing guidance to all Member States. Secondly, the Delegation supported the idea of citing some priorities for the Committee's future work. It considered priorities necessary because there were many issues involved and it was better and more practical on the operational level to begin by working on just some issues. The Delegation believed that future work would have to take into account the three CBD principles of national sovereignty, prior informed consent and the fair and equitable sharing of benefits. Regarding the principles proposed in document WIPO/GRTKF/IC/2/3, the Delegation supported these, but wished more detailed explanations. For example, the Delegation queried the distinction drawn in paragraph 125 between "formal" and "informal" human creativity and innovation. Regarding Principle 3, there was a need to define terms such as "relevant stakeholders" and "traditional knowledge holders," the Delegation concluded.

83. The Delegation of Switzerland considered that the development of guide contractual practices and model intellectual property clauses should follow a process-based approach. It explained that such an approach would distinguish all steps involved in access to genetic resources and benefit-sharing, which would include all steps ranging from the permission to collect genetic resources to the commercial and other use of the results of any innovative activity involving these resources. It pointed out that according to this approach one would ask who provided what material to whom for what purpose. It specified that all the steps distinguished would be analyzed from an intellectual property point of view. It suggested that the proposed process-based approach had the following advantages: (a) The approach would allow an analysis of the intellectual property needs of all of the three basic categories outlined in paragraph 109 of document WIPO/GRTKF/IC/2/3, namely materials, actors and uses. Furthermore, it would not limit the analysis to a specific material, actor or use. Instead, the Delegation explained, it would guarantee that all steps involved in access to genetic resources and benefit-sharing were addressed in a logical and practical manner. (b) Where possible, this approach would allow the application of the same solutions to different materials, actors and uses. The Delegation pointed out that this might prevent that an intricate number of guide contractual practices and model intellectual property clauses would need to be developed. (c) At the same time, the Delegation added, this approach would allow to address the specific needs of different materials, actors and uses involved in access to genetic resources and benefit-sharing, where necessary. Thus, it suggested, solutions could be specifically tailored according to the different needs of the different materials, actors and uses. The Delegation summarized its proposal by indicating that the proposed process-based approach would analyze the intellectual property needs of different materials provided and accessed by different actors and used for different purposes. It suggested that, where feasible, the same solution would apply, and, where necessary, different solutions would be developed. It expressed its view that any other approach would be too limited in its scope and would pose the risk that too many different contractual configurations would have to be developed in the

end. The Delegation then commented on the operational principles for the development of guide contractual clauses. With regard to possible principle 1, as identified in the document under consideration, the Delegation felt that the wording was too general and ambigous, which left it open what exactly the content and aims of this principle were. In the view of the Delegation the recognition, promotion and protection of all forms of formal and informal human creativity and innovation should be the aim of the Committee's efforts, rather than a principle guiding its work. The Delegation added that it considered contractual flexibility to be of great importance when developing guide contractual clauses and therefore any guide contractual clauses resulting from the Committee's work should allow its potential users enough flexibility to take into account their specific interests and needs. Furthermore, it added, any such guide contractual practices should be of voluntary nature. The Delegation then stated its support for the proposal that the Secretariat should undertake a systemic survey of actual contractual agreements used in the process-based approach which it had just outlined. It noted that the information gathered could be assembled into a database, as had been proposed by the Delegation of Australia. In closing, it recalled a recommendation made by the Working Group on Access and Benefit-sharing of the CBD, which had met in Bonn. The Delegation emphasized that the CBD Working Group had recommended that the Conference of the Parties of the CBD should encourage WIPO to make rapid progress in the development of model intellectual property clauses which might be considered for inclusion in contractual agreements when mutually agreed terms are under negotiation. The Delegation ended by stating that it fully supported principles 2, 3 and 4, as outlined in document WIPO/GRTKF/IC/2/3.

84. The Republic of Korea stated that questions concerning access to genetic resources were important for biotechnology. The Delegation stated that more time was needed to consult on these issues at the national level. The Delegation supported the principles proposed in document WIPO/GRTKF/IC/2/3 in principle, and hoped that the model intellectual property clauses would not be developed in such a way as to weaken traditional creativity.

85. The Delegation of Pakistan expressed support for the views that had been expressed by the Delegations of New Zealand and Japan. The Delegation referred to legislation drafted in Pakistan on access to biological resources and community rights. Access to genetic resources should be in line with the International Treaty adopted by the FAO, the Delegation stated. In addition to adhering to intellectual property rights, references to the source of origin of genetic resources was necessary to avoid any future conflict among States. Regarding intellectual property rights and the documentation of traditional knowledge and folklore, the Delegation urged that special attention be given to the development of human resources in developing countries. Finally, the Delegation expressed support for the principles proposed in document WIPO/GRTKF/IC/2/3, and urged further collaboration between WIPO, FAO and the CBD.

86. The Representative of the FAO informed the Committee of the ongoing processes within the Commission on Genetic Resources for Food and Agriculture (CGRFA) of the FAO. He commended document WIPO/GRTKF/IC/2/3 for recognizing the specificity of the multilateral system on access and benefit-sharing of the FAO and pointed out that document WIPO/GRTKF/IC/2/Inf.2 made available to the Committee the International Treaty on Plant Genetic Resources for Food and Agriculture, but not the Resolution accompanying the Treaty, which made interim arrangements pending entry into force. He emphasized that possible principle 2 was particularly important in that it recognized that in the case of contracts concluded in the context of the Multilateral System of Access and Benefit-sharing the parties were not acting only in their private interest, but in that of the international community. He

suggested that this concept, in so far as it relates to intellectual property, could be taken into account in the development of the model clauses. He explained that the Multilateral System by its nature involved a pooling of resources, and avoided the need to track individual genetic materials. He recalled that in the negotiations for the Treaty one recurrent question had been the transaction costs of any system of registration, contract and tracking, which had been studied by the CGRFA. He noted that Article 13.d(ii) of the Treaty contained a description of the multilateral system being implemented through a standard material transfer agreement. Under Article 15 there was a description of how international institutions, such as the CGIAR, which brought their materials into the Multilateral System, would also use material transfer agreements to be established by the Governing Body of the new Treaty. He pointed out that the Treaty itself contained tasks that would be completed by the Governing Body. The Resolution established an Interim Committee which would look in detail at the establishment of the material transfer agreement which would apply to the multilateral system. These, he indicated, were guidelines already adopted by governments which would provide a framework for the agricultural sector. In closing, he thanked the Secretariat for the support FAO had received from WIPO during the negotiations of the Treaty and anticipated that governments might in the future require the assistance of WIPO in the process of implementing the Treaty, both in the interim process and thereafter.

87. The Representative of the United Nations Educational, Scientific and Cultural Organization (UNESCO) described the activities of UNESCO in respect of genetic resources and, in particular, the ethical dimensions of the social utilization of the human genome in relation to biotechnological and biomedical advances. The Delegation described *inter alia* the work being undertaken within the context of the International Committee on Bioethics, as well as the outcomes of the 31st General Conference of UNESCO which took place in October and November 2001. Further activities of UNESCO in this area, the Representative stated, would include the promotion of the Universal Declaration on the Human Genome and Human Rights and the elaboration of a new international standard-setting instrument to cover the ethical aspects of the processing, storage and social exploitation of human genetic information. Particular attention, the Representative stated, should be paid to the legitimate interests of Indigenous Peoples and local communities. In so far as the principles proposed in Document 3 were concerned, the Representative stated that they were appropriate, provided they were governed by the ethical considerations being considered in the UNESCO activities he had described. The Representative added that contractual clauses could be challenged and that, therefore, it would be convenient to develop model provisions for national laws and, thereafter, international rules as soon as possible.

88. The Representative of the Institute for African Development (INADEV) sounded a note of caution on the uncritical and unexamined use of contractual agreements for access to genetic resources and benefit-sharing. The Representative stated that, which such arrangements might be recommended for improving the negotiating capacity of provider countries, a contractual approach would at best be a poor substitute for what provider countries needed, namely a *sui generis* international treaty that would binding, flexible, adaptable to local needs and devoid of constraints that were imposed under the rigidities of intellectual property criteria. The Representative urged that the Committee should therefore not loose sight of working towards this important goal of adopting an effective international treaty. He stated six reasons why the dependence by African countries on contractual agreements as a method for protecting traditional knowledge was problematic. The first problem, he explained, was that most African countries lacked the technological and scientific capacity to capitalize on commercial collaborations and opportunities that could be created under contractual arrangements. He added that most African countries lacked the relevant

expertise to negotiate and ensure a fair deal, a constraint which was further heightened by the absence of legislation in most African countries to regulate access to genetic resources and benefit-sharing. He therefore saw a danger that biotechnology companies might try to take advantage of the traditional communities' lack of knowledge of the commercial value of plants to set basement prices. The second reason which the Representative indicated was that because very few discoveries resulting from bioprospecting actually translated into profits, the benefit-sharing provisions were rarely implemented with a concomitant economic loss to traditional communities. Thirdly, he added, the contributions of indigenous communities could be ignored by manipulating the rules of the game and provided two examples. One example concerned recipient parties to contracts who claimed that no compensation was payable because they had made use of *ex situ* collections rather than the resources of the provider country. The other example illustrated that biotechnology companies could make improvements on chemical compounds so that they were considered distinct from the originals and would thereby enable them to claim ownership over the improved versions. A fourth problem in the use of contractual arrangements, he added, concerned disclosure. He stated that experience had shown that such arrangements were rarely made public, with companies expecting communities to simply to trust that the companies would honor their side of the bargain. The fifth problem with contractual arrangements, he explained, was that such arrangements could be used to weaken the bargaining power of developing countries, especially where a particular resource could be found in several countries. He was of the view that such arrangements allowed biotechnology companies to shop around and play communities against each other in the companies' bid to attract the lowest possible prices to the detriment of the communities. A sixth and final limitation in the use of contracts was that they applied only to the parties to the contract and had no value as a precedent in relation to third parties. The Representative urged that if contractual agreements were to be used at all despite these misgivings, the following five principles should be kept in mind: (1) negotiated contracts would have to be subject to review by a competent national body to ensure that the arrangements were fair for the traditional communities concerned; (2) the details of the contracts should be disclosed to the public as soon as the arrangements were approved by the relevant national agency; (3) all stakeholders should be involved in the negotiations and approval process of such contracts; (4) regarding the enforcement of such contractual agreements, he suggested that a special tribunal should be established to adjucate issues surrounding genetic resource transfer contracts. The tribunal should be empowered to impose civil remedies, and criminal remedies should be available in cases of serious violations of the terms of the agreements. (5) contrary to the suggestion in paragraph 6(c) of the document he pointed out that such contracts needed not be consistent with intellectual property criteria. He exemplified that, contrary to well-established principles of international intellectual property law, a contract could provide that: (a) rights to a transferred resource were owned collectively by the members of a community; (b) notwithstanding the terms of the contract, the traditional community might retain rights over the use of the transferred resource in accordance with the traditional practices, whether these were in written form or not; (c) the recipient might be prohibited from applying for intellectual property protection in relation to the transferred resource or any improvements to it; (d) the traditional community might have a right to all products developed from the transferred resource whether such products have been described as original and intellectual property rights subsequently obtained over them in other countries. The Representative concluded by emphasizing that if these matters were not carefully considered in the drafting of any contracts on access to genetic resources and benefit-sharing, the contractual arrangements would end up being convenient and unsuspecting state-supported mechanisms pressed into service for further exploitation of traditional communities while benefiting disproportionately the biotechnology companies.

89. The Representative of the Inuit Circumpolar Conference (ICC) expressed its gratitude to the Government of Canada for funding its participation in this session. The Representative requested that WIPO undertake a study of contractual arrangements that indigenous peoples had entered into with respect to traditional knowledge and benefit-sharing in order to establish whether or not contractual arrangements were useful tools for indigenous peoples.

90. The Representative of the Indian Movement "Tupaj Amaru" said that in the indigenous peoples' concept view, the notions of genetic resources and traditional knowledge were integrated into a historic process of social and economic development of their common heritage which aimed at the fair and equitable sharing of benefits derived from the commercialization of those resources. He expressed the concern that document WIPO/GRTKF/IC/2/3 might not reflect entirely the values and interests of indigenous peoples, who were not mentioned as main actors. Moreover the document emphasized the commercial application of genetic resources, without taking into account their spiritual dimension and cultural traditions, based upon customary law. He noted that on many occasions the interests and rights of indigenous peoples on their resources and knowledge had been misappropriated, and that the solution would never be found in voluntary contractual arrangements, but on a binding international legal framework, applicable to providers and recipients, Member States and transnational corporations.

91. The Representative of the Saami Council stated that, although that was not an issued addressed by the Committee, any reference to indigenous communities should be replaced by "indigenous peoples," for it could otherwise be seen as derogatory and discriminatory. He emphasized that frequently genetic resources had been referred to as being subject to the rights of States, in disregard of the fact that the rightful holders of the world's genetic resources were not always the States, but rather indigenous peoples or communities. Therefore, indigenous peoples in their capacity of right holders should be taken as a priority by the Committee in the development of contract guidelines. Moreover, should the relevant holders of genetic resources decide to enter into an agreement concerning access to those resources and/or benefit-sharing, such agreement ought to be entered into with their full prior and informed consent. In this context, he referred to Article 15.5 in conjunction with Article 8(j) of the CBD. The Representative understood the concern of an eventual duplication of work of the Committee and other international organizations, but he did believe it essential that the Committee address other relevant issues, such as environmental and human rights issues. He also believed it essential that the Committee co-ordinate its work with other bodies dealing with such issues. The Representative supported possible principle 3 of the document in question, underscoring that relevant stakeholders should be given full and effective participation in process issues related to contractual negotiations and the development of intellectual property-related clauses for access and benefit-sharing. He recommended that the Committee and other bodies developing intellectual property-related clauses for access and benefit-sharing consult with the newly established Permanent Forum on Indigenous Issues.

92. The Representative of the Biotechnological Industry Organization (BIO) expressed his support for the development of transparent contractual practices concerning access to genetic resources and traditional knowledge. He believed in the usefulness of maintaining a closely cooperative working relationship with all stakeholders involved. As a matter of course, the legal environment to be taken into account included intellectual property rights. The Representative said that the work proposed under document WIPO/GRTKF/IC/2/3 was consistent with those views. An important aspect was that any contract guidelines to be developed should be non-binding. He supported the proposal of the Delegation of Singapore

that future work should comprise research institutions. He urged the Committee to continue its work in a creative and positive fashion so as to encourage the participation of all stakeholders involved.

93. The Representative of the International Plant Genetic Resources Institute (IPGRI) provided the Committee with an overview about the role that the IARCs were envisaging to assume in the context of the new FAO Treaty, namely by adhering to its provisions by means of agreements to be established with the future multilateral system's Governing Body. He called the attention for the different provisions of the FAO Treaty that restrained collectors of genetic resources, genes and seed from seeking intellectual property rights in the materials received.

94. The Representative of the World Conservation Union (IUCN) pointed out a number of issues, the consideration of which IUCN found to be of fundamental importance, regardless of the principles that would guide the establishment of contracts on the access to genetic resources and associated traditional knowledge might. These issues included: (1) that genetic resources were only a small part of the goods and services provided by ecosystems and biological diversity; (2) that the existence and availability of genetic resources was closely tied to the conservation of biological diversity and the supporting ecosystems; (3) that the conservation, maintenance and production of biological diversity and of genetic resources depended predominantly on indigenous peoples and local communities, which used, maintained and recreated these resources; (4) that indigenous peoples and local communities were not only the custodians of the resources mentioned and holders of the associated traditional knowledge, but especially and foremost, holders of rights contained in international instruments, such as ILO Convention 169 and in national constitutions and other legal frameworks; and (5) that existing patent systems and the recognition of intellectual property rights did not necessarily guarantee the conservation of biological diversity or the protection of the rights of indigenous peoples and local communities. Consequently, the Representative recommended to the Committee that: (1) model clauses and/or normative frameworks on the access to and the use of genetic resources and traditional knowledge should consider the costs, policies and strategies for the conservation of biological diversity and its ecosystems; (2) model clauses and/or normative frameworks should recognise and respect the rights of indigenous peoples and local communities; (3) model clauses and/or normative frameworks should take into consideration the customary law and practices of indigenous peoples and local communities; (4) it should prepare studies that allowed to identify principles from the customary law and practices of indigenous peoples and local communities that might be applicable to the discussion of the Committee; (5) it should take into consideration the practice and models of contracts for access and licenses on traditional knowledge which were used at the regional, national and local levels, especially by those countries and societies that were rich in biodiversity; and (6) it should support and foster technically and financially the active and informed participation in these debates of all stakeholders, in particular, indigenous peoples and local communities.

95. The Representative of the International Chamber of Commerce (ICC) supported the view that contract guidelines should have a voluntary nature because the works of the Committee were in a too early stage for the development of compulsory guidelines.

96. The Chair drew five general conclusions: (1) the work on the establishment of model clauses for contractual agreements in the field of genetic resources should continue, taking a prudent and considered approach; (2) there was a general agreement that draft guiding principles or model provisions should be established for various sectors of access to and use

of genetic resources, dealing purely with intellectual property aspects of contracts, this being without prejudice to the possible development of international standards on *sui generis* protection in this field, as stressed by some delegations; (3) it was understood that what was being elaborated should be non-binding and only serving as a guide in contract negotiations; the final form of such a guide (principles, model provisions, minimum standards for contracts, etc.) should be decided at a later stage; this should be without prejudice to e.g. the application of national provisions relating to contracts; (4) it had been underlined that the work undertaken by WIPO should be without prejudice to, and consistent with, the work undertaken in other organizations, especially the CBD, FAO and UPOV; and (5) it had also been underlined that the work on the establishment of guidance in the field of contracts should be undertaken with full and effective participation of indigenous and local peoples and communities. The Chair stated that the principles mentioned by the Secretariat in paragraphs 123 to 130 of document WIPO/GRTKF/IC/2/3 found broad support, even if it was questioned if Principle 4 on the distinction between various kinds of use had any independent importance as compared with the variables and scenarios. Additionally it was mentioned that Principle 1 might be too wide. Additional principles, such as those included in the CBD and flexibility and simplicity, should be taken into consideration, the Chair stated. As regards the priorities to be given, it was found difficult to prioritize between the various factors mentioned under the headlines "materials," "actors" and "uses." As regards materials, however, the Chair noted that it had been mentioned that attention should, where and when appropriate, be given to all sectors that were relevant to the economic and social development of countries as well as to the importance of informal inventiveness. Interest was also expressed to the effect that different taxonomic materials should be dealt with. As regards actors, the areas where government institutions were involved should be given special attention, the Chair concluded. Also, the interests of farming communities and of civil society should be taken into account. Particular attention should be given to situations where the parties had different bargaining power, e.g. when commercial actors were involved in relation to indigenous communities. As regards different uses, the Chair stated that both the bioprospecting scenario and the public sector conservation and breeding scenario should be included. Also, confidentiality clauses should be addressed.

97. The Chair identified certain additional specific points which had been mentioned in the discussions: (a) the question of disclosure of origin, prior informed consent, and appropriate benefit-sharing schemes; (b) the issue of transfer of technology associated to genetic resources; (c) attention should be given to the issue of applicable law, including the situation when genetic resources were common to several countries; (d) attention should be given to the situation when genetic material had been made available for research or conservation but had later been commercially used; at the same time it was found important to safeguard basic scientific research in field concerned; (e) the issue of education and training of as well as the issue of legal assistance to indigenous and local communities should be considered in the field concerned; (f) the work in the patent classification area should be taken into account; (g) questions relating to the legal status of different genetic resources under international law should also be studied; (h) the terms to be used in this context had to be clearly defined; (i) a process-based or step-by-step approach should also be considered in undertaking this work; and (l) a proposal concerning a database on contracts and associated issues found support and would be further studied.

98. Mr. Gurry, on behalf of the Secretariat of WIPO, took the floor and provided the following provisional comments on the Chair's statements. First, it appeared that the first concrete task that the Secretariat would undertake would be the survey referred to in paragraph 133 of document WIPO/GRTKF/IC/23. He wished to remind Members, however,

that the success of this exercise would depend exclusively upon Members' responses to the survey. Second, the database as proposed by the Delegation of Australia would be a natural expression of the survey exercise, and would be conducted in parallel with other activities. The Secretariat would need to analyze the functionality of the database, and address certain other questions, such as warranties that provisions submitted did not constitute copyright infringements or confidentiality breaches.

99. The Chair concluded by stating that it appeared that the Committee had agreed with the two-step approach proposed for the further work by the Secretariat as included in paragraphs 131 to 134 of document WIPO/GRTKF/IC/2/3.

100. The Delegation of Algeria supported the Chair's conclusions which, in its view, permitted the continuation of the work at a dynamic pace. However, any future work should not prejudice the development of a future, binding *sui generis* regime on the protection of traditional knowledge, regime which the African group supported. The Delegation recommended that the work on contract guidelines should take regional and national experiences into account, as well as the principles of sovereignty, prior informed consent and benefit-sharing. Moreover, attention should be paid to dispute settlement in the event of misappropriation of genetic resources and traditional knowledge. Finally, customary law and practices of traditional knowledge holders should be additional road marks for the Committee.

101. The Delegation of Venezuela supported the Delegation of Algeria's view that the work on contract guidelines should not prejudice the future development of a *sui generis* system. The Delegation reiterated that any contract guidelines should take other principles into account, such as those of the CBD. Actually, access to genetic resources implied two different legal regimes. One was covered by the FAO multilateral system and applied to plant genetic resources for food and agriculture which were listed in an annex to the International Treaty on Plant Genetic Resources. All other genetic resources should be subject to a different legal regime, yet to be developed under existing principles.

102. Mr. Gurry, on behalf of the Secretariat, in responding to a question posed by the Delegation of Mexico on the nature of the work to be initiated according to the Australian proposal, clarified that the Secretariat would prepare first the structure under which the proposed electronic database could be developed and submit it to the next session of the Committee for discussion. Only after that structure was approved, the Secretariat would begin to collect and organize the relevant data.

103. The Delegation of Pakistan recommended that in future work the importance of geographical indications and the need for human capacity building should be considered.

104. The Delegation of India expressed its support for the Chair's conclusions, but noted that although sectors of nutrition, food and agriculture were extremely important, other sectors, such as public health, were no less important for developing countries.

105. The Delegation of Brazil did not challenge the conclusion that future contract guidelines should not be binding. Nonetheless, it recalled that all contractual arrangements should comply with national and international law on access to genetic resources and traditional knowledge.

106. The Delegation of Egypt reminded that it had expressed its view that contract guidelines should be mandatory and binding. It agreed with the reference to the principles of the CBD, including those of prior informed consent and technology transfer.

107. The Chair observed that his conclusions reflected the views expressed by a large number of Committee Members. But all points made by delegations, including those not reflected in his conclusions, would be stated in the final Report.

108. The Delegation of Kenya observed that the possible principles identified in the document were lacking an interface with customary laws and wished to complement the existing principles with the additional principle of respect for customary laws.

109. The Delegation of Thailand supported the conclusions of the Chairman and added its concern that the International Agricultural Research Centers (IARCs), such as the International Rice Research Institute, should be invited to use the material transfer agreement that would be developed. It was of the opinion that the IARCs should be urged to take into account that they were holding important genetic resources of many countries and therefore they had to be careful that the benefits from such use were shared in an equitable manner and that no intellectual property rights would be taken out on direct derivatives and modifications.

110. The Chairman thanked the Committee Members for their remarks and said he would include their comments in the Report. He confirmed that the conclusions would be reflected in the Report and repeated that the conclusions were at his responsibility. In conclusion, the Chairman noted that the Committee had decided to adopt the two-step approach outlined in document WIPO/GRTKF/IC/2/3 for the implementation of Task A.1.

Traditional Knowledge

111. The Chairman explained that the working documents relevant to this agenda item were documents WIPO/GRTKF/IC/2/4, WIPO/GRTKF/IC/2/5, WIPO/GRTKF/IC/2/6 and WIPO/GRTKF/IC/2/9. He invited the Secretariat to make some comments on operational definitions.

Operational definitions

112. Mr. Gurry, on behalf of the secretariat, drew the attention of the Committee to document WIPO/GRTKF/IC/2/Inf.3, which contained, *inter alia*, a table of responses received for the survey for intellectual property protection of traditional knowledge. He noted that, for example, only 23 responses to the Survey on existing forms of intellectual property protection for traditional knowledge had been received and encouraged the Committee Members to respond to the Survey, since information received from Members was essential for the Secretariat in advancing its work on definitions and terms. He also observed that the general approach which the Secretariat had adopted so far in relation to this work was that it had considered that terms and definitions differed according to the purpose for which they came into existence. He provided the example that very different definitions of the term "traditional knowledge" were conceivable for sociological, historical or legal purposes. He added that perhaps this was one reason why no international instrument defined the term "invention," but only the term "patentable invention." The approach of the Secretariat had therefore been, and would continue to be unless it heard from the Committee Members to the contrary, to regard the relevant terms and definitions within the context of legal protection, in particular of intellectual property protection.

113. The Delegation of Egypt expressed its agreement with the observation of the Secretariat that definitions of the term "traditional knowledge" differed according to the purpose for which they were developed and added that they also differed according to the cultures in which they were developed.

Review of Existing Intellectual Property Protection

114. Upon invitation by the Chair, the Secretariat introduced documents WIPO/GRTKF/IC/2/5 and WIPO/GRTKF/IC/2/9. After the introduction of those documents by the Secretariat, the Chair invited Delegations to express their views on document WIPO/GRTKF/IC/2/9, but received no comments from Committee Members. He urged those Committee Members that had not provided responses to do so by the new deadline of February 28, 2002, and moved to the discussion of the next topic.

Progress Report on Traditional Knowledge as Prior Art

115. Upon invitation by the Chair, the Secretariat introduced document WIPO/GRTKF/IC/2/6.

116. The Chairman stated that there were three basic purposes of the measures identified in the document, namely (1) to avoid the granting of patents for traditional knowledge-based inventions which did not fulfill the necessary requirements of protection; (2) to avoid problems for traditional knowledge holders to challenge such patents; and (3) to ensure the recognition of traditional knowledge and its technological value. He then invited Committee Members to comment on the document and referred them to the list of possible Activities in Annex 3 of the document.

117. The Delegation of Brazil considered Task B.3 to be an important element, but felt it was not sufficient to prevent the non-authorized appropriation of traditional knowledge through patents. It noted that the task of examining traditional knowledge as prior art covered only one dimension of protection, namely defensive protection, and that it failed to address two other dimensions. It specified that the first of these dimensions was, in light of Article 8(j) of the CBD, to "promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices." It added that the second dimension which had not been recognized was the difficulty of defining the thin line of what was in the public domain and what was still protected by secrecy. The Delegation noted that there had been no unanimous view among traditional communities on the advantages of the development of databases. It considered this a clear indication that the use of databases should not be limited to the gathering of information which might actually facilitate the non-authorized use of traditional knowledge. Rather, it suggested, the use of information in the databases should be driven by the prior informed consent of traditional knowledge holders and the fair and equitable benefit-sharing resulting from the use of the protected information. In this context, the Delegation stressed its position that more comprehensive work would be needed on elaborating national and international *sui generis* systems to protect traditional knowledge. It was of the view that document WIPO/GRTKF/IC/2/6 did not exhaust all the issues that might be considered by the Committee. The Delegation encouraged a close coordination between WIPO and the CBD, bearing in mind Decision V/16 of the COP of the CBD, which encouraged that the Programme of Work on the implementation of Article 8(j) be carried out in collaboration with

WIPO. It also recalled that the WTO Doha Ministerial Declaration instructed the TRIPS Council "to examine, *inter alia*, the relationship between the TRIPS Agreement and the CBD, the protection of traditional knowledge and folklore." It proposed that the Committee should follow closely the developments at the WTO and ensure that its own efforts were complementary to those developments. The Delegation expressed reservations to the use of draft provisions of the draft Substantive Patent Law Treaty (SPLT), since they were subject to negotiations and modifications, but it supported the suggestion to recommend that the Standing Committee on Patents take into account traditional knowledge in its discussions on the SPLT. It also recommended coordination with the IPC Task Force. Finally, the Delegation generally agreed with possible Activities 1, 2, 3, 4, 5 and 6. The Delegation introduced one of his members, Mr. Marcos Terena, General Coordinator of Indigenous Rights, who, on behalf of the indigenous peoples of Brazil, read a message emphasizing the importance of WIPO as a potential ally in the defense of indigenous rights against piracy and illicit trade when their traditional knowledge was being stolen and sold as goods. He explained that he was attending the session of the Committee due to the interest of the National Institute of Industrial Property, which had also sponsored a meeting of shamans. At the meeting, the shamans had said that indigenous peoples had knowledge about the management and sustainable use of biological diversity. They had noted that this knowledge was collective and could not be traded. They considered that their knowledge of biological diversity could not be separated from their identity, laws, institutions, value systems and cosmological visions as peoples. They firmly expressed their right to full participation in national and international decision making forums on traditional knowledge and biological diversity, such as the CBD, WIPO, UNCTAD, WTO and also in this Committee. He expressed the shamans' firm opposition to any type of patenting arising from the use of traditional knowledge and their request that the Committee set up a mechanism to punish the theft of their biodiversity. In addition, the shamans wished to recommend that an indigenous body should be set up in WIPO to follow the discussions of the Intergovernmental Committee, as supported by the government of Brazil. He emphasized that the Committee would not be able to define the term "traditional knowledge" in any meaningful sense unless it listened to the indigenous and local communities who held this knowledge. The shamans proposed adoption of a universal instrument for the protection of traditional knowledge. He clarified that this would constitute an alternative system, since there was presently no *sui generis* system for the protection of traditional knowledge. He underlined their hope that WIPO would be a forum of debate where the indigenous voice would be heard. He urged Governments and WIPO that at forthcoming sessions of the Committee the developed countries should contribute to ensure that more indigenous representatives were present. The shamans' declaration adopted at a meeting held in S. Luís do Maranhão, with the participation of the INPI, was distributed to Committee Members as document WIPO/GRTKF/IC/2/14.

118. The Delegation of India, speaking on behalf of the Asian Group, stated that in order to ensure a comprehensive approach Governments should hold consultations at the national level with holders of traditional knowledge and other stakeholders on the types of knowledge which should be protected by intellectual property and other rights and the scope of rights which should be available for those types of knowledge. It added that Governments should provide the results from these processes and other national experiences with the protection of traditional knowledge to the Committee in the form of country reports and case studies. The Delegation noted that the document under consideration gave concrete suggestions for the integration of traditional knowledge documentation into searchable prior art. Also in order to ensure the protection of traditional knowledge it was important for Member States to document their traditional knowledge to avoid its loss with the passing away of the older generations. When documenting the traditional knowledge, it was important to recognize that

all traditional knowledge was not in the public domain. Based on this distinction, Member States could as appropriate compile databases of traditional knowledge which was in the public domain and make those databases available to patent-granting authorities for the purposes of prior art searches, in order to prevent the grant of any intellectual property rights over such public domain knowledge; establish registers of traditional knowledge elements which were not in the public domain and keep the contents of the registers undisclosed, pending the possible establishment of new protection standards for the traditional knowledge elements contained in the registers. In this connection, document WIPO/GRTKF/IC/2/6 on the status of traditional knowledge as prior art gave concrete suggestions for integrating traditional knowledge documentation into the databases available to patent examiners in developed countries. The delegation felt that WIPO could be of assistance to its Member States, to clarify (i) which traditional knowledge was currently adequately covered by existing intellectual property rights; (ii) which additional subject matter required to be legally protected, but was currently not adequately covered by existing intellectual property rights; and (iii) which rights would need to be made available in order to provide adequate legal protection for this additional subject matter. The Delegation also suggested that WIPO should take a more active role and, on an increased scale and pace, have Traditional Knowledge Digital Libraries as a priority project.

119. The Delegation of India, speaking on its own behalf, stated that it considered the possible Activities identified in the document as relevant suggestions for the effective integration of traditional knowledge documentation into prior art. This task needed effective cooperation of all Member States, with the assistance WIPO, to proceed to develop a system in which the holders of traditional knowledge established databases and made them accessible to the patent offices for use in determining prior art. National measures alone were not adequate. The Delegation expressed its full support for the measures identified in paragraph 8 of the document and welcomed the work undertaken under the IPDL Project, the SCP and the IPC. While examining the issue of searchable prior art data it was also needed to understand that documentation of traditional knowledge was closely related to the question of ownership of traditional knowledge and the legal protection of databases prepared which could not be covered by copyright. This was especially relevant when the database was easily available in digital format. The Member States must, therefore, develop a *sui generis* law for protection of traditional knowledge covering all types including folklore. The Delegation informed the Committee that India had begun to prepare a Traditional Knowledge Digital Library related to the traditional uses of medicinal plants. It also commended the work of the Task Force which had been constituted by the Committee of Experts of the Special Union for the IPC. The Delegation emphasized that Member States would have to develop a *sui generis* law covering all types of traditional knowledge, including folklore. It observed that traditional knowledge disclosures had a close relation to local languages and were not based on the language of modern science. Their terminologies were also different and this needed to be appreciated if prior art were to be meaningful. With regard to possible Activities 1 and 3, the Delegation agreed that there was a need to integrate traditional knowledge gazettes into searchable prior art, but it cautioned that in some cases translation might not be accurate and it might therefore be necessary for the International Search Authorities to consult experts in the countries of origin of the traditional knowledge. The delegation agreed there was need to improve the availability of traditional knowledge-based NPL in the context of international searches by integration of more periodicals, gazettes and newsletters which documented traditional knowledge into the minimum documentation list. Each Member State should be given the opportunity to identify such journals many of which might be in local languages and terminology disclosures might be different from that of patent journals. Also the translations of those might not be accurate and therefore not adequately serve the purpose. Concerning

possible Activity 2, the Delegation supported the integration of traditional knowledge-specific periodicals into the JOPAL Project, but did not feel comfortable with establishing a prioritization of periodicals. Furthermore, the Delegation expressed its support for possible Activity 4. Its only concern was that databases one available in the public domain should be protected in the interest of the holders of traditional knowledge. This issue must be discussed along with documentation and electronic exchange of databases. With reference to possible Activity 6, the Delegation specified that any application for patents and industrial designs should be required to disclose the content of traditional knowledge and to produce the prior informed consent of the holder of the traditional knowledge, based on which the claimed invention or design had been developed. The Delegation suggested that the Traditional Knowledge Digital Library initiative could be extended to other areas of traditional knowledge. In conclusion, the Delegation was of the view that the application of patent standards to determine prior art in traditional knowledge could be detrimental to the interest of Member States, communities and regions rich in traditional knowledge. This was true in India which had for example traditional knowledge in a number of languages, handicraft traditions and followed different traditional medicinal practices like Ayurveda, Unani, Sidha, etc, and medicinal knowledge of tribal communities.

120. The Delegation of Ecuador said that document WIPO/GRTKF/IC/2/6 raised again the issue of the adequate protection of genetic resources, knowledge, innovations and traditional practices and folklore, especially through the establishment of a *sui generis* system, always taking into account the principle that the biological and genetic heritage is subject to the sovereign right of the State. The Delegation reminded that, both under national and regional legislation, its main objective was to seek to put in place a *sui generis* system of intellectual property protection for collective knowledge which was more adequate, effective and consistent with the need for acknowledging the rights of indigenous, afro-american and local communities. The document reflected the serious concern with the feasibility of using intellectual property rights for the adequate protection of knowledge, innovations and practices of indigenous and local communities. The document treated similarly the concepts of "prior art" and "traditional knowledge." But, as the document said, the definitions of "prior art" might vary considerably from one law to another. Although the purpose was to avoid the undue patenting of traditional knowledge, the suggested mechanism might operate the other way around, because it would not be a matter of protecting rights, but of destroying them, for currently there was not a system to protect that knowledge, either conventional or *sui generis*. Among the different proposals tabled by the document, priority had been given to the classification and collection of traditional knowledge by means of databases, organized in a network, as a tool for the examination of patent applications. The document referred to Articles 16 and 17.2 of the CBD in that context. The document noted that, whereas in international searches oral disclosure, use, exhibition or any other mean of disclosure could not be deemed as prior art, unless they had been disseminated in a written form, such legal framework might have consequences as far as the consideration of traditional knowledge as prior art was concerned. Nonetheless, the Delegation requested the Committee the analysis of how an administration in charge of international searches could be more efficient in retrieving traditional knowledge that was prior art for the purposes of barring the patentability of the claimed invention. For that to be operationalized, however, there should be some security that patent applications in violation of traditional knowledge should not be granted. Secondly, administrations in charge of searches should be obliged to retrieve prior traditional knowledge, irrespectively of the place or jurisdiction, and of whether the knowledge was oral or written. Thirdly, the delegation recommended to the Members of the Committee that they should subscribe to agreements of cooperation between countries or intellectual property offices containing provisions for that purpose. On the six Activities proposed in the

document, the Delegation had the following comments: on Activity 1, the fact that there was not a *sui generis* system for the protection of traditional knowledge meant that, under patent law standards, disclosure of traditional knowledge would lead to the elimination of any possibility of acquiring intellectual property rights in that knowledge; on Activity 2, in addition to the above comment, the Delegation did not agree with the proposal of prioritizing some types of publications, because the important matter should not be one of finding priorities, but of seeking the most appropriate mechanism for the protection of traditional knowledge; therefore, it was recommended that the administrations should review the collections of traditional knowledge, without any priority and preserving the necessary adequate protection for that knowledge; Activity 3 was not acceptable because it would mean the recognition that traditional knowledge could be protected by patents and that all traditional knowledge was in the public domain and, therefore, it could not be protected by any mechanism of intellectual property rights, including a *sui generis* one; for the same reasons, Activity 4 could not be undertaken; on Activity 5, it would not be possible to classify and collect expressions and values of culture that had a different nature, without having previously developed a *sui generis* comprehensive and harmonious system of protection that could be used as a guideline for that Activity; finally, under Activity 6, it was important to note that the document itself acknowledged the possibility of developing a *sui generis* system for the protection of traditional knowledge; in this context, technical assistance to indigenous communities focused on developing their understanding of the advantages and the shortcomings of intellectual property, was of the utmost importance. The Delegation concluded that any efforts towards the establishment of databases of traditional knowledge should not prejudice the possibility of the future establishment of a *sui generis* intellectual property mechanism for its protection.

121. The Delegation of New Zealand wished to share with the Committee its recent experience concerning proposed changes to New Zealand's Trade Marks legislation, currently being considered by a Parliamentary Select Committee. These proposed changes were intended to respond to concerns expressed by Maori, the indigenous people of New Zealand, about the inappropriate registration of trade marks based on Maori text and imagery. The Trade Marks Bill, would, if enacted, provide that the Commissioner of Trade Marks should not register a mark where its use or registration would be considered offensive to a significant sector of the community, including Maori. To assist the Commissioner's consideration of whether a mark might be considered offensive to Maori, the Bill provided for the establishment of an advisory committee. The role of the advisory committee would be to advise whether the use or registration of a mark derivative of Maori text or imagery would be or was likely to be offensive to Maori. New Zealand was also considering how aspects of the Patents Act 1953 might (where appropriate) be modified to address Maori concerns and interests. A comprehensive review of the Act was taking place, which would include consideration exceptions to patentability. Public consultation would be undertaken next year which would among other things, seek to ascertain views on issues of interest to Maori, such as how patent examiners might be made aware of traditional knowledge which constituted prior art. The Delegation acknowledged that measures such as those contained in the Trade Marks Bill went only some way to address the concerns of indigenous peoples about the use and protection of their 'cultural and intellectual property'. For this reason the Delegation considered that the examination of sui generis modes for the protection of traditional knowledge was both necessary and important. New Zealand was undertaking scoping work on both legislative and non-legislative mechanisms for domestic protection of traditional knowledge. It was expected that discussion with Maori on these issues would begin in the coming year. New Zealand considered that further and ongoing discussion with the indigenous people of New Zealand was fundamental to the development of domestic models,

and indeed any international scheme of sui generis protection for traditional knowledge. While not strictly an intellectual property protection mechanism, the Delegation drew the Committee's attention to a development of the Maori Arts Board of New Zealand – the Maori Made Mark. The Maori Made Mark was intended to be a mark of authenticity and quality, which would indicate to consumers that the creator of goods was of Maori descent and produced work of a particular quality. It was a response to concerns raised by Maori regarding the protection of cultural and intellectual property rights, the misuse and abuse of Maori concepts, styles and imagery and the lack of commercial benefits accruing back to Maori. The Maori Made Mark was considered by many as an interim means of providing limited protection to Maori cultural property, by decreasing the market for 'rip-offs' of Maori designs by non-Maori.

122. The Delegation of Venezuela, speaking on behalf of Cuba, Ecuador and Venezuela, noted that all the language used in the document presently under consideration was derived from the language of patents and was not necessarily of use to traditional knowledge, in particular traditional knowledge in the "public domain." In the view of the Delegation the term prior art referred only to patents and advised that if the Committee adopted such language, it would confine the work of the Committee to patents. The Delegation noted that, with the aim of increasing the availability of information on traditional knowledge, the language used in document WIPO/GRTKF/IC/2/6 corresponded exclusively to patent law, which was not necessarily helpful for the protection of traditional knowledge. With regard to possible Activity 2, the Delegation pointed out that the SCIT had not yet outlined the JOPAL project so the Delegation considered the use of JOPAL premature and supported the position which the Delegation of India had expressed on behalf of the Asian Group. Under the rationale of patent law, in the absence of novelty there was no protection. However, the notion of "prior art" was unique to the patent system. On Activity 4, it was helpful to recall the crucial importance of technical assistance. Activity 6 stressed the need for a study on the impact that the collection of traditional knowledge, and particularly its classification as prior art, would have on the availability of legal protection for that knowledge. Such collection should ensure that all traditional knowledge in the public domain would be susceptible of protection. However, it was not clear how traditional knowledge in the public domain could be distinguished from traditional knowledge that was not. It appeared that the collection of traditional knowledge, as proposed, assumed that disclosure could amount to loss of protection. Therefore, it should be found a way of developing a *sui generis* system based on different principles, as suggested in paragraph 107 of the document. On the other hand, the Delegation wished to stress that Activities 1 and 4 required technical assistance to developing countries to be implemented. One of the three countries on behalf of which the Delegation was speaking had already acquired experience in developing a database in the context of traditional knowledge. The Delegation wondered how the costs incurred in making it could be recovered. It underlined the importance of having not only a defensive, negative type of protection but also a positive sort of protection which permitted the appropriation and the management of rights in traditional knowledge. But a clear distinction should be drawn between positive protection, in the sense of assertion of rights, and negative protection, in the sense touched by the Secretariat document, or the prevention of acquisition of rights by third parties. In that context, question arose on the means to protect the contents of the database. One again, the Delegation stressed the importance of technical assistance for countries and indigenous communities on the many different aspects of intellectual property relating to the protection of traditional knowledge. The delegation concluded that the only manner to adequately address the concerns of traditional knowledge holders would be to develop a positive protection system by means of a *sui generis* system for the intellectual property protection of the contents of indigenous knowledge databases. The Delegation noted that

there was no reference to benefit-sharing and considered that the present document should have been based on Article 8(j) of the CBD. It supported the statement made by the Delegation of Brazil, especially concerning the definition of prior art and underlined that the Committee and WIPO could not define what traditional knowledge was without the effective participation of indigenous and local communities. In closing, the Delegation expressed its hope that in the future numerous representatives of local and indigenous communities from all countries would be able to participate in the Committee.

123. The Delegation of Peru considered that certain measures identified in the document under consideration were only valid if the Committee adopted the broad definition of prior art as mentioned in paragraph 53 of the document, based on EPO definition, which stated that "[t]he state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the filing of the European patent application." It stated that a restrictive definition of prior art which did not take into account oral disclosure did not provide a solution to avoid the illicit appropriation of traditional knowledge. In view of this, the Delegation considered it essential that the Committee recommended to the SCP that it should retain the proposal contained in the draft Substantive Patent Law Treaty on prior art. The Delegation stressed that while the defensive protection of traditional knowledge was important, this should not distract the Committee from its main work which was to propose a *sui generis* system of protection for traditional knowledge of international scope. It added that this *sui generis* protection system should cover even for those elements of traditional knowledge which were already in the public domain. With regard to possible Activity 1, it suggested the inclusion of the drafting and dissemination of publications other than periodicals and considered that WIPO could assist local communities in this respect. The Delegation emphasized that possible Activity 3 should not be aimed specifically at developing or least developed countries, because it was precisely in developed countries where most illegal patenting of traditional knowledge was to be found. In conclusion, the Delegation stated that possible Activity 6 was the most important one and should be given every support by the Committee.

124. The Delegation of Thailand supported the statement made by the Delegation of Brazil. It suggested that an operational definition of traditional knowledge should be set out at least preliminarily in order to have a working definition for the Committee. It recalled WIPO's working definition of the term "traditional knowledge" as used in the WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge. According to this use, the term "traditional knowledge" referred to "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields." The Delegation stated that at this point the said definition was suitable for the Committee to achieve its objective, namely to develop a *sui generis* system for the protection of traditional knowledge. It urged that all stakeholders should be involved in the process of developing this *sui generis* system and recommended that a consultation with indigenous and local communities should be held to define what constitutes their traditional knowledge. It added that the results of this consultation should be passed on to WIPO to develop the aforementioned *sui generis* system. With reference to document WIPO/GRTKF/IC/2/5, the Delegation stated its understanding that intellectual property protection was meant to cover private property rights. It added, however, that in traditional knowledge discussions all stakeholders shared a broader view of intellectual property rights and extended them to collective rights. The Delegation requested WIPO to consult with the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the CBD so as not to duplicate work

and to support each other in finding the best form of traditional knowledge protection. It further suggested that there should be regional frameworks of traditional knowledge protection, since most countries in a region possessed similar traditional knowledge. It noted that the most important work on traditional knowledge protection was at the national level and that any legislation should begin by protecting the most endangered traditional knowledge. Concerning the status of traditional knowledge as prior art, the Delegation wished to remark on the vulnerability of traditional knowledge. It called for awareness of the Committee about the problems of compiling traditional knowledge into databases. The Delegation provided the example of somebody accessing traditional knowledge via a public database, using it to create an invention or any innovations, not applying for any patents or trademarks but instead keeping it as a trade secret or modifying it into a copyrightable form. In that case, the Delegation pointed out, the traceability of the use of traditional knowledge would be very difficult, since the two latter intellectual property rights were without formalities. It requested WIPO and the Committee to help resolve this dilemma. Finally, it urged WIPO to consult with the TRIPS Council of the WTO and cooperate to deal with traditional knowledge as prior art in a way that would not be detrimental to traditional knowledge holders.

125. The Delegation of the Islamic Republic of Iran stressed the relationship between intellectual property, traditional plant medicine and the exploitation of medicinal plants. It noted that most of these resources were to be found in developing countries and therefore the defensive intellectual property in this area would concern that group of countries and the communities of those countries. It stated that WIPO could play an essential role in relation to traditional knowledge as prior art. It informed that in Iran more than 9,000 ancient manuscripts had been collected and work that remained to be done was enormous. It noted that according to the WHO, 80% of the country's inhabitants used medicinal plants for their health care. In conclusion it requested WIPO to spend more time on expert work in the field in cooperation with the countries concerned. To reach this goal, it recommended to use the science of chorology as a tool for the evaluation of natural resources found in ecological sites and also damages inflicted to them.

126. The Delegation of China stated that traditional knowledge was important for the economy, science and cultural development and was closely related to intellectual property issues. The documentation of traditional knowledge was relevant to patents, but raised other complex questions too. The Delegation agreed, for example, with previous statements concerning the need to define and determine the scope of "traditional knowledge." Traditional knowledge was said to display the characteristics of: (i) transmission from generation to generation; (ii) belonging to a territory or nation; and, (iii) being developed in a constantly changing environment. The Delegation stated that this understanding of traditional knowledge should be clarified. The Delegation referred to the Task Force set up by the WIPO Committee of Experts of the Special Union for the International Patent Classification, of which China was a member. The Delegation advised that China had submitted reports to this Task Force on several topics such as: a traditional knowledge resource classification; a traditional medicine database; an international patent classification table of Chinese traditional medicine and relevant auxiliary tools; and a temporary database, all of which had received positive comments from Member States of WIPO. The Delegation concluded by stating that it would continue with its work regarding the classification and indexing of traditional knowledge as prior art.

127. The Delegation of South Africa stated that document WIPO/GRTKF/IC/2/6 used the term "prior art" as it was understood within the context of the present patent system. However, the Delegation stated, it was not agreed that the patent system was the best method

to protect genetic resources, traditional knowledge and folklore. Documents WIPO/GRTKF/IC/2/3 and WIPO/GRTKF/IC/2/6 should be read together. A decision would still have to be taken, possibly by the WIPO General Assembly, on how best to protect genetic resources, traditional knowledge and folklore. While databases, the Delegation added, might assist in preventing the patenting of traditional knowledge, they would not necessarily be useful for the protection of traditional knowledge systems. The Delegation stated that WIPO should build capacity, particularly among developing countries, in relation to patent searches and examinations, and there was a need to prioritize meager resources. The WIPO Standing Committee on the Law of Patents (the SCP) should take cognizance of discussions taking place within the Intergovernmental Committee, and there might be a need for joint jurisdiction by the SCP and the Intergovernmental Committee. The Delegation concluded by suggesting that questions concerning the current patent system could be referred to the SCP and issues relating to the protection of genetic resources, traditional knowledge and folklore should be dealt with by the Intergovernmental Committee.

128. The Delegation of Côte d'Ivoire advised that its country comprised some 60 ethnic groups, whose genetic resources, traditional and folklore were threatened by illicit appropriation without benefit-sharing. The Delegation stated that indigenous peoples should be represented at sessions of the Intergovernmental Committee. The Intergovernmental Committee should comprise two sub-committees, one dealing with genetic resources, and the other with traditional knowledge and folklore, which should be treated together. The Delegation envisaged the establishment of three binding international protection instruments, one each for genetic resources, traditional knowledge and folklore.

129. The Delegation of Morocco stated that traditional knowledge should not be considered to be in the public domain, in the sense that term was used in a patent law context. Documentation of traditional knowledge might lead to greater access to and commercialization of traditional knowledge. On the other hand, the Delegation agreed that the documentation of traditional knowledge would be a form of protection. However, documentation should be seen as the basis for a new *sui generis* system which should differ from the current patent system. The Delegation referred to the work of UNESCO and other organizations relating to registration, classification and documentation systems, and suggested further coordination between WIPO and these other organizations. In conclusion, the Delegation expressed support for Activities 1, 3 and 6 as set out in document WIPO/GRTKF/IC/2/6.

130. The Delegation of Switzerland stated that the Intergovernmental Committee should coordinate its work with the Committee of Experts of the IPC Union as suggested in paragraph 76 of document WIPO/GRTKF/IC/2/6. The Delegation expressed support for Activities 1 and 2 as proposed in paragraphs 81 and 84 of document WIPO/GRTKF/IC/2/6. However, with regard to the proposed Activity 3, it would require the global harmonization of formal and substantive patent law and therefore this Activity seemed premature. The Delegation suggested that this Activity be reassessed at a later stage. The Delegation strongly supported the proposed Activity 4. Referring to previous submissions it had made before the WTO's TRIPS Council (see IP/C/W/284) and as recounted in paragraph 94 of document WIPO/GRTKF/IC/2/6, the Delegation suggested that the database should: be established at the international level; function primarily as a gateway to existing regional, national and local databases which would be electronically linked to each other; be established and administered by WIPO in close cooperation with other relevant organizations such as the CBD; be voluntary; be classified; and be updated regularly. The Delegation suggested that WIPO prepare a document for discussion at the next session of the Intergovernmental

Committee on the feasibility of such an international database. The Delegation also supported the proposed Activities 5 and 6. Regarding the latter, it emphasized that indigenous and local communities as well as national and regional documentation initiatives be assisted to allow them to manage the intellectual property implications of documentation. However, their needs and expectations would need to be determined. The Delegation suggested that the WIPO Secretariat prepare a questionnaire in this regard to be circulated among those concerned.

131. The Delegation of Canada noted that the general objective of the proposed activities was to ensure that traditional knowledge which was already in the public domain and was identifiable as such was unpatentable. The Delegation stated that prior art in Canada was considered to be any disclosure that became available to the public anywhere in the world. Oral disclosures would also form part of the prior art, but in practice, would only be used by the Canadian Patent Office if the oral disclosures were captured in paper or machine readable form. In addition, the Delegation emphasized that the date and the source of the prior art had to be clearly established and in summary identification of prior art was largely dependent on the availability and accessibility of relevant documents. The Delegation of Canada further stated that traditional knowledge fell in two main categories, namely (i) traditional knowledge which had been codified, i.e., appeared in written form, and was in the public domain; and (ii) traditional knowledge which was not codified and which formed part of the oral traditions of indigenous communities. The Delegation included in the second category traditional knowledge which was kept secret by traditional knowledge holders at the community, group and individual levels. The Delegation noted that the Canadian Aboriginal societies were more concerned about the second category of traditional knowledge, which was not the subject of document WIPO/GRTKF/IC/2/6. With reference to said document the Delegation referred to some initiatives already under way which regarded the classification tools for traditional knowledge, notably the Committee of Experts of the Special Union for the International Classification (IPC). The Delegation stated that it looked forward to receiving the report of the Task Force on Traditional Knowledge of the Committee of Experts of the IPC Union, slated for completion during the first half of 2002. The Delegation suggested that the Committee should focus their attention and efforts on activities which would most likely yield results in a cost effective manner, namely Activities 1 and 5. The Delegation also encouraged the Committee to further explore and discuss Activity 6 in order to better understand the intellectual property implications of documenting traditional knowledge, and whether the intellectual property implications were any different from those relevant to documentation in other fields. The Delegation stated that Activity 2 could be worth undertaking but that it depended on the status of the JOPAL project which was currently being reviewed. As for Activities 3 and 4 the Delegation noted that they could be worth undertaking.

132. The Delegation of Egypt stated that traditional knowledge accumulated over the past years in local communities and transmitted over generations had value for those societies. The Delegation stated that traditional knowledge and its experiences were of paramount importance to many species, particularly to consumers, producers and breeders in general. In addition, the Delegation stressed the importance and potential of traditional knowledge in the field of pharmaceutical production. The Delegation further noted that both users and rights holders should share, in an equitable manner, the benefits of traditional knowledge and should provide access and use only after prior informed consent was authorized. The Delegation recalled that the currently available international intellectual property protection instruments were insufficient and were to be complemented by other instruments that would apply traditional knowledge to serve the objectives of traditional knowledge and genetic resources. The Delegation further stated that the patent system, referred to in document

WIPO/GRTKF/IC/2/6 did not fulfill the requirements for the protection of traditional knowledge as traditional knowledge protection should not be subject to the novelty requirement. Thus, the Delegation of Egypt felt that a *sui generis* system was essential to protect this knowledge. Furthermore, an international instrument had to include the idea of prior art, as referred to in paragraph 107 of said document. This *sui generis* system would be the cumulating point for discussions on proposed activities outlined in Annex 3. Finally, the Delegation of Egypt supported Activities 1, 4 and in particular Activity 6, as they would contribute to the collection and compilation of traditional knowledge and would allow for the development of a *sui generis* system for the protection of TK.

133. The Delegation of Panama stated that the search and creation of a *sui generis* system for the protection of traditional was an initiative begun by the indigenous peoples themselves . The Delegation said that the State of Panama supported the initiative which culminated in the Law no. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001, which represented the adoption of new forms of protection for traditional knowledge. This was a special system on the collective protection and defense of their cultural identity and traditional knowledge. An action plan was being developed to further work of the recently created Collective Rights of Panama office for granting collective exclusive rights in traditional knowledge. The Delegation of Panama stated that it was concerned as regards the classification and the use of this knowledge. The Delegation said that traditional knowledge was not new as it was transmitted from one generation to another. However it could be knew for the purposes of prior art. The Delegation of Panama stated that it had special legislation for the protection of traditional knowledge where no payment of fees was contemplated and rights would not lapse. The definition of prior art comprised disclosure, whether written or oral and indeed, much of this traditional knowledge had been transmitted through oral traditions. The Delegation supported Activity 6 described in paragraph 111 of document WIPO/GRTKF/IC/2/6. The Delegation was interested in the documentation of traditional knowledge especially with regard to the prevention of the loss of traditional knowledge as mentioned in paragraph 112. The Delegation agreed with paragraph 113 where the traditional knowledge holders "… were reluctant to divulge knowledge, because of stories of biopiracy on the one hand and the destruction of novelty on the other hand." This would apply to prior art as much of traditional knowledge is age-old knowledge. The Delegation stated that the register created, as well as the database, had the purpose of not only providing information but also records about registered traditional knowledge rights. The Delegation called on the assistance of WIPO in this regard.

134. The Delegation of the United States of America stated at the outset that they supported all 6 possible Activities contained in document WIPO/GRTKF/IC/2/6. The Delegation felt that they provided positive and constructive ways to meet the expectations of traditional knowledge holders. The Delegation referred to activities of the Task Force of the Committee of Experts of the Special Union for the International Patent Classification (IPC) and noted the proposed sample traditional knowledge databases, namely those of India and China, which would soon be available on the WIPO website. Notwithstanding the IPC activities, the Delegation of the United States of America felt that more could be done by the Committee, particularly in the enhancement of national offices' search files. With regard to the proposed Activity 6, the Delegation understood it to mean that technical assistance would be provided for the documentation of traditional knowledge. Such assistance could include translation, classification and advice on whether certain traditional knowledge would qualify for trade secret or other intellectual property protection. Finally, the Delegation said it looked forward to the final product which would incorporate the activities of the IPC and assist patent offices in ensuring that applications for patents which were novel subject matter were granted.

135. The Delegation of the Republic of Korea placed a high value on WIPO's proposal for integrating public domain traditional knowledge into searchable prior art and welcomed all 6 activities mentioned in document WIPO/GRTKF/IC/2/6 which would improve the availability, search facility and exchange of traditional knowledge. However, since the concept and scope of traditional knowledge were still unclear, it was necessary to reach international consensus on which traditional knowledge among different types should be given priority. With regard to Activity 4, the Delegation suggested that those countries having already established a traditional knowledge database might share their experiences with other Member States. Finally, the Delegation of Korea suggested that WIPO should provide Member States with technical, legal and administrative assistance in building traditional knowledge databases.

136. The Delegation of Japan stated that, generally speaking, it supported possible Activities 1, 4, and 5, accepted Activity 6, and hesitated in supporting Activities 2 and 3. With regard to Activity 1, the Delegation stated that this activity was a first step to the documentation of traditional knowledge. However, the Delegation stated that it was important that this issue be first discussed by PCT Member States as it was their mandate to decide whether periodicals should be integrated into a minimum documentation list of the PCT or not. The Delegation of Japan recognized Activity 2 but stated that it preferred to wait for a progress report on JOPAL which was currently being examined by the Standing Committee on Information Technology (SCIT). The Delegation also hesitated in giving their support for Activity 3, as the Intergovernmental Committee was not the competent body to consider guidelines for the search and examination of patent applications. The Delegation of Japan noted that it was best to wait for progress and comprehensive discussions made in other fora so as to avoid conflict and duplication. The Delegation referred to the Japanese patent law and stated that inventions, which were publicly known or worked in the world prior to the filing date of the application could constitute prior art, and that traditional knowledge which was disseminated orally could also be considered as prior art and would therefore prevent the same invention from getting a patent right. The Delegation noted that many countries already considered traditional knowledge as prior art. As such it did not see the urgency or importance to amend the current guidelines for the search and examination with a view to strengthen traditional knowledge. With regard to Activity 4, the Delegation said that it was acceptable to study the feasibility of the distribution of traditional knowledge under the IPDL project which had been discussed at the SCIT. However, the Delegation was of the point of view that care should be given to budgetary and technical issues. Regarding budgetary implications, the Delegation did not feel it was appropriate to develop all the necessary technology for implementing the TKDL and/or an online database system from paper-based knowledge, but rather, that it would be beneficial to improve the present conditions for accessing the current IPDL database. The Delegation of Japan suggested that a survey be carried out with regard to the interface between the present database with a view to seek a common interface. As for Activity 5, the Delegation considered it reasonable to apply current WIPO standards for the information related to traditional knowledge from the perspective of dissemination and utilization of such information. Since it remained, to some extent, unclear with regard to the applicability of such standards to traditional knowledge, the Delegation felt that it was reasonable to undertake a survey on the basic situation surrounding the information. Finally, the Delegation of Japan said it supported Activity 6 since traditional knowledge was mostly transmitted orally and it was not rare that there would be no written record of the traditional knowledge. Thus, in order to promote the distribution of the traditional knowledge, it was indispensable to promote traditional knowledge documentation initiatives, and during the

documentation process it would be necessary to manage legal issues including the copyright issue related to the traditional knowledge.

137. The Delegation of Norway stated that traditional knowledge provided a valuable source of information and knowledge which was often acquired and preserved through generations. The Delegation acknowledged the important value of traditional knowledge and noted that the Committee provided an opportunity to explore ways and means in which traditional knowledge could be adequately taken into account when striving to strike a balance between the various interests involved. In this respect, the Delegation emphasized the legitimate interests of traditional knowledge holders which must be recognized and respected. The Delegation further welcomed the initial work that had been undertaken so far regarding Task B.3, namely the effective integration of traditional knowledge documentation into searchable prior art. This task was very important, mainly due to the reasons pointed out in paragraph 7 of document WIPO/GRTKF/IC/2/6. In particular, the Delegation stated that it was important that IP offices avoid granting patents to non- traditional knowledge holders for traditional knowledge based inventions which were not novel and non-obvious. The Delegation of Norway strongly supported Activities 1 to 4 which were suggested in Annex 3. The Delegation was also positive towards the possible Activities 5 and 6. Furthermore, in connection with the proposed Activity 3, the Delegation felt it was desirable to work toward a globally recognized definition of the term "prior art." It stated that their preference in such a definition would be the definition of prior art found in the European Patent Convention. The Delegation noted the concerns that this could be a strenuous task for some delegations, however they felt that this should not restrain this Committee from recommending such work to the standing Committee on Patents.

138. The Delegation of New Zealand stated that their response to the activities suggested in document WIPO/GRTKF/IC/2/6 which were essentially practical measures for the establishment of linkages between intellectual property offices and traditional knowledge initiatives, were premised on the basis that New Zealand had little experience concerning traditional knowledge documentation initiatives. The Delegation said that it was particularly interested in the experiences of other Member States in the area. The Delegation supported possible Activities 1 and 2 and with regard to Activity 3, the Delegation stated that it had no objection to the initiation of discussions by the Committee on possible recommendations. However, the Delegation said that further support for Activity 3 would depend on the nature of any possible recommendations. It emphasized that any resulting guidelines should be non-binding in nature. With regard to the possible recommendation that international-type searches be made in national applications, the Delegation noted that the activity should be subject to the capacities of the concerned intellectual property offices, in particular to those of developing and least developed countries. The delegation of New Zealand supported this qualification and asked that the Committee pay close attention to the resource constraints of small intellectual property offices in any consideration of possible recommendations. With regard to Activity 4, the Delegation stated that it had little experience in the area and as such was not in a position to contribute to the discussions. However, the Delegation said it supported the suggested feasibility study, and emphasized the need to take into account the different needs of the various stakeholders and specificity of traditional knowledge in different languages, regions, media and legal contexts. The Delegation held that key issues would be the voluntary recording of any traditional knowledge, and access to it by third parties. The Delegation acknowledged that some Maori (the indigenous peoples of New Zealand) had raised concerns, in the context of a claim against the government of New Zealand concerning intellectual property, flora and fauna and a number of other issues, on the risks of documenting knowledge and it becoming available to those who were not authorized

to use it. As such, the Delegation cautioned that careful consideration should be given to this matter. The Delegation stated that discussions with the Maori were required before the government of New Zealand could comment any further on the issue of documentation of traditional knowledge. The Delegation said that it supported Activity 5 and stressed the need for flexibility where existing standards did not meet the needs of traditional knowledge holders and documentation initiatives. Finally, the Delegation supported Activity 6 and agreed that it was most important that traditional knowledge holders were made aware of the intellectual property implications of documentation. An issue to be considered would be the resources and expertise of national industrial property offices and whether they were able to provided necessary assistance.

139. The Delegation of Pakistan asserted that traditional knowledge was directly linked to intellectual property rights, and held that prior art terminology needed to be re-defined. The term would have to be defined in such a way as to satisfy all stakeholders. The Delegation believed that, in traditional knowledge documentation, prior art would not distinguish the sovereign rights over traditional knowledge held by a particular community or ethnic group politically divided into 2 or 3 countries. Finally, the Delegation of Pakistan contented that the activities listed in Annex 3 of the document needed to be revised given the observations made by various Delegations.

140. The Delegation of the Russian Federation expressed its hope that work would continue in this direction. The Delegation agreed that the process of including traditional knowledge as prior art required many participants, such as intellectual property offices, Ministries, State organs and traditional communities, without which it would be impossible to establish a traditional knowledge database. The Delegation stated that the establishment of a traditional knowledge database required a great deal of effort in its coordination and any information by countries who have already carried out work in this area would be of assistance to those countries without any experience.

141. The Delegation of Singapore stated that the document WIPO/GRTKF/IC/2/6 also referred to work being carried out by other fora and referred specifically to paragraph 36 of the document, which was also being discussed at the TRIPS Council, and that the area was relevant. The Delegation hoped that the work of other international bodies would be kept in mind when considering the connected work. In addition, the Delegation pointed out that the document was confined to the area of patents and should keep in mind the possibility of there being, for example, an adaptation at a later point to an existing intellectual property concept. The Delegation stated that the Committee should concentrate on Activities 1, 4, and 5 as mentioned by the Delegation of Norway. The Delegation also agreed to Activity 6, which they felt was useful to the indigenous peoples.

142. The Delegation of Zambia stated that its country was a vast country bordered by eight neighboring states and that from this geographical arrangement it had benefited with the enrichment of their culture especially those communities that lived along the border. The Delegation further stated that it had a population of ten million, which consisted of 73 ethnic groups, and in addition groups from Europe, Asia and Africa, who each had their own traditions and created a situation of complexity. The Delegation referred to the SADC draft Protocol on Culture, to which they were a signatory, that recognized the importance of copyright laws, contractual arrangements and benefit-sharing. The Delegation proposed that the Secretariat consider existing agreements, protocols and policies at national, bilateral and multilateral levels. The Delegation conveyed their optimism that the continued work of the Secretariat would address the issues of traditional knowledge and prior art. The Delegation

was of the opinion that prior art excluded intangible elements such as traditional value systems, norms, beliefs, traditional healing therapies, and language. The Delegation was in agreement with the observations raised in document WIPO/GRTKF/IC/2/6 which appeared to support the need for a *sui generis* international instrument that was binding, flexible and adaptable to the local needs.

143. The Representative of the European Community welcomed, on behalf of the European Commission, document WIPO/GRTKF/IC/2/6 and considered it to be a useful contribution to the discussion of Task B.3 for the examination of present criteria and the possibility of drafting new ones. The Representative expressed the importance of information on traditional knowledge being available for patent offices through databases or recordings. This would allow examiners to take into account the information as forming part of prior art and reduce the risk of patents that did not meet the basic requirements. The Representative supported possible Activities 1 to 6. He further stated that during the work of these possible activities, it would be appropriate to take into account WIPO's work in other Committees, for example the Standing Committee on Patent Law (SCP) and to establish close consultations with users and other stakeholders.

144. The Representative of the Secretariat of the Convention for Biological Diversity (CBD) referred to the CBD's activities which fell under the items on the agenda. The Representative stated that Article 8(j) was the main provision of the CBD which dealt with traditional knowledge and referred to what was known as the Programme of Work on Article 8(j) and Related Provisions. The Representative stated that pursuant to the Article, parties had maintained, preserved, promoted knowledge, innovation and practices of indigenous and local communities which were relevant to biological diversity, and obtained wider application with the approval of the holders of traditional knowledge. The Representative referred to the establishment of an Ad hoc Open-ended Inter-sessional Working Group which was mandated to review progress in the Programme of Work, and which would meet in February 2002 to consider matters which included the following: (i) the preparation of a report on the status and trends regarding traditional knowledge of relevance to biological diversity; (ii) examination of participatory mechanisms for indigenous and local communities in decision-making in the conservation and sustainable use of biological diversity both at the national level and within the organs of the Convention; (iii) consideration of development of guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on sacred sites and on lands and waters occupied by indigenous communities. The Representative further stated that in relation to the Programme of Work on Article 8(j), the Conference of the Parties had requested at its fifth meeting to support registers of traditional knowledge by means of participatory programs and consultations with indigenous and local communities and also to take into account the strengthening of laws, customary practices and traditional systems of resource management such as the protection of traditional knowledge against unauthorized use. The Representative expressed his wish to draw the attention of the Members to the Report of the Working Group on Access and Benefit-sharing, contained on page 36 of the Annex of document WIPO/GRTKF/IC/2/11, which listed a number of issues and recommendations of the Working Group on the role of intellectual property rights in the implementation of benefit-sharing arrangements. The Representative pointed out Recommendation 2 on page 36 where the Working Group recommended that Parties and governments be invited to encourage the disclosure of relevant traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights where an invention concerns, or made use of, such knowledge in its developments. The Representative referred in addition to paragraphs three and four on pages 36 and 37 in the above-mentioned

document, the Working Group had noted the need for intellectual property information on certain key issues, which include: (i) the role of oral evidence in prior art in the examination, granting, and maintenance of intellectual property rights; (ii) the need for information on the feasibility of requiring the disclosure in patent application of associated traditional knowledge utilized in the development of the claimed invention. The Representative concluded that the work of the Intergovernmental Committee had a direct bearing on the work of the CBD specifically in the issues mentioned and those contained in document WIPO/GRTKF/IC/2/11.

145. The Representative of the United Nations Convention to Combat Desertification (UNCCD) stated that the UNCCD, which came into force in December 1996, consisted of 176 parties and its relevance was to countries that experienced land degradation in arid, semi-arid and dry sub-humid regions. The Representative commented on their attempts to mitigate the effects of drought and how drought impacted every region of the world. The Representative stated that is was a development convention and pointed out the link between poverty and environmental degradation. The Representative referred to Article 18 of the Convention, which spoke of traditional knowledge. The Representative pointed out that due to resource constraints and the lack of capacity, the Parties to the UNCCD were not able to initiate their inventories on traditional knowledge. In the Committee on Science and Technology of the UNCCD two groups of experts were examining aspects of traditional knowledge and how it had been useful in combating land degradation as well as mitigate the effects of drought. The Representative stated the importance to preserve drought tolerant plants for food and agriculture. She recognized the need to promote traditional knowledge by working closely together with other organizations and felt the work of the WIPO's Secretariat to be important in this context.

146. The Representative of the European Patent Organization (EPO) stated that the task of the EPO was to grant European patents for any kind of subject matter, with a few exclusions. The Representative stated that with regard to the criteria concerning novelty and inventive step, any form of tools to access any knowledge which was in the public domain was important. The Representative expressed the readiness of the EPO to collaborate with WIPO in the establishment and development of appropriate documentation on traditional knowledge in the framework of certain projects under its program.

147. The Representative of UNESCO supported in general the approach reflected in document WIPO/GRTKF/IC/2/6. He underlined that the Committee should develop the same type of approach for the other areas of traditional knowledge, so as to identify the possibility of protecting their intellectual property aspects which were most adequate to their nature and social function. The Representative described UNESCO's experience with respect to the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, during which it was determined that traditional knowledge belonged collectively, developed in accordance with developments in social life and was connected to the destiny of the people who were the holders of the knowledge. The Representative stated that any protection system should take these features into account, as well as the interests of the traditional knowledge holders. Referring to paragraphs 32 and 33 of document WIPO/GRTKF/IC/2/6, the Representative provided further information on UNESCO activities concerning the safeguarding and promotion of intangible cultural heritage, which, the Representative stated, complimented the work of WIPO concerning the intellectual property aspects of this heritage. The Representative stressed the importance of traditional knowledge's role as a tool for the conservation of biodiversity and the development of a balanced policy. He informed that, in its work, UNESCO also paid attention: to the revitalization of the mechanisms of transmission of traditional knowledge from one generation to another; to the collection of

data and technical forms of handicraft production; and to the identification, preservation and promotion of traditional knowledge linked to the techniques of expression and production of artistic works. The Representative reported that at the 31st General Conference of UNESCO held in October and November 2001, Member States of UNESCO had approved the preparation of a new international instrument to protect intangible heritage, including literary and artistic expressions. Various capacity building measures, at national and local levels, were envisaged. The new instrument would eventually aim at: (a) providing for rules on the establishment of standard and complementary inventories of the different elements of that heritage; (b) permitting international cooperation concerning national inventories in a way as to facilitate access to those national inventories of heritage; and (c) regulating the fair and legitimate use of this heritage while respecting its integrity and original functions. The Representative concluded by stating that UNESCO had previously cooperated with WIPO in this area, and looked forward to continuing to do so, with each organization contributing effectively in this area within its respective mandate.

148. The Representative of UNCTAD stated that further study was needed in respect of access to databases of traditional knowledge and in determining what traditional knowledge might be regarded as being in the public domain and what may not. The Representative stated too that it appeared that the burden of the costs of such databases would fall more heavily on traditional knowledge holders, and expressed concern for the financial sustainability of the proposed documentation exercises. The Representative proposed that a balance be struck between the measures and obligations to be assumed by users and providers.

149. The Representative of the Center for International Environmental Law (CIEL), stated that the existing system of patents and intellectual property rights were not designed for the conservation of biodiversity, appropriate use of traditional knowledge and the rights of the local communities. The Representative further stated that the Secretariat should include Task B.2 on the agenda and considered the proposal of an alternative means of protection of traditional knowledge. The Representative stated that the drafting of a *sui generis* system should take into account and explore the following points: clear and institutionalized prior informed consent both of States and indigenous peoples, and local communities; formal instances of participation and information to those interested in research and use of traditional knowledge; recognition and protection of moral rights for expressions and innovations and practices of the Indigenous peoples and communities; protection of the traditional knowledge information contained in registers or databases and also the participation by indigenous peoples in their management; the use of protection systems similar to trade secrecy for areas of traditional knowledge not in the public domain; mechanisms for compensation for equitable benefit-sharing regarding knowledge considered as prior art in the public domain; the principles and procedures which formed part of customary law of Indigenous Peoples and local communities; the requirement of certificates of origins, contracts of access, license for traditional knowledge when applying for patents; the equitable enjoyment of benefits should not be limited to compensation payments or royalty but also as transfer of technology, shared enjoyment of intellectual property, training, maintenance costs and the revitalization of biodiversity and traditional knowledge; and the protection of traditional knowledge against misappropriation. The Representative concluded by stating that with regard to the distinction between commercial and non-commercial use of genetic resources and traditional knowledge, his organization recommended the establishment of observational and monitory mechanisms.

150. The Delegation of Spain stated that in its country there was a great deal of traditional knowledge related to the sustainable use of biodiversity and genetic resources which had been acquired through the handling of resources by rural communities, which historically went

back many years and corresponded to very diversified cultures. It stated further that the central government was making efforts to recover this traditional knowledge with the aim of protecting it through specific systems such as, for example, denominations of origin, or the sheepherders' traditions. Local administrations, municipalities and the central Government were working on bringing products derived from traditional knowledge onto the market, to the benefit of right holders. The Delegation further stated its efforts to create market incentives for this knowledge. The Delegation expressed its interest in traditional knowledge in the national sphere and also internationally. It supported the participation of indigenous and local communities in the context of the different international fora, particularly in the context of the CBD. The Delegation stated that it had financed and supported the participation of indigenous peoples in several meetings of the Working Group on Article 8(j). The Delegation proposed that traditional knowledge should be discussed at the international level with the aim of developing an adequate legal framework.

151. The Representative of the Saami Council supported the efforts of registering traditional knowledge as prior art. He believed that this constituted an important step in the prevention of the patenting of traditional knowledge. The Representative recognized that there were many other important issues relating to traditional knowledge to be dealt with, particularly traditional knowledge already in the public domain. The Representative underlined that the recording of traditional knowledge as prior art should aim solely to prevent the patenting of such knowledge by those who were not holders of traditional knowledge. Such registration should be without any prejudice as to the rights traditional knowledge holders had or might have under future legal systems. The Representative agreed with the Delegation of Venezuela that if traditional knowledge was not protected at present then it could be at a future stage, for example, under a *sui generis* system. Traditional knowledge should not be recorded as prior art without the full and prior informed consent of the concerned stakeholders as referred in paragraph 94 of the document WIPO/GRTKF/IC/2/6. It was essential, the Representative concluded, to educate and train indigenous peoples as to what their rights were with regards to traditional knowledge.

152. The Representative of the First Nations Development Institute (FNDI) stated that her organization had spent more than twenty years working with Native American communities and organizations in their quest for culturally appropriate community economic development. Being a rather broad area of concern, one of the first areas upon which her organization focused was the interplay between the "knowledge" industries and those communities, and the community efforts to maintain their rights in those relationships. This interest in intellectual property mechanisms, and their limitations from an Indigenous perspective, brought her organization to this Committee session. Looking specifically at the agenda item on traditional knowledge, she would like to make a few points. Specifically she noted with appreciation the commitment made by Brazil to ensure that an Indigenous voice from their country was fully participating in these deliberations. The representative also thanked the Indigenous representative for sharing his perspectives and wisdom with the Committee. She also thanked those country delegations that had specifically mentioned their ongoing efforts to devise, in collaboration with the Indigenous peoples within their national borders, legislative and operational mechanisms that protected the rights of Indigenous peoples in these interactions. For example, the secretariat of the Pacific Community provided a brief description of a mechanism designed and led by Indigenous peoples, a mechanism that met their needs while providing operational capacity to meet the requests of others seeking to interact with them. The Representative was disappointed that more detailed attention has not been paid to such models, and recommended that the WIPO Secretariat place on its list of future tasks a collation and analysis of such Indigenous-led mechanisms, for they provided a much more

comprehensive model than a discussion of databases, taking into account *inter alia* the safekeeping and maintenance of data, the obligations and rights of both knowledge holders and users, dispute resolution, and potentially, if necessary, punitive measures. More importantly, as Indigenous-designed mechanisms, they were guided by the expertise of the knowledge holders from the beginning. In the Representative's view, it had been made clear internationally and in a variety of forums that a bottom-up approach to development (whether speaking of developing databases or national economies) was more effective in the long run, and more effective for all concerned. Regarding the discussion of placing traditional knowledge in the public domain, she was particularly concerned of general discussions about this without explicit acknowledgement of standard international principles of free and informed prior consent by the knowledge holders. The Representative took the point of Canada that a distinction be made specifically within the work of the Committee regarding traditional knowledge that had already been codified in a publicly accessible format and that which had not. Regarding the latter, it should be emphasized within the work of the Committee that suggestions regarding the use of periodicals and other documented cases of traditional knowledge should not assume that these works had been published under the condition of free and informed prior consent. A great deal of traditional knowledge had already been placed within the public domain without the consent of the knowledge holder by the research community, and the Committee should not compound this breach of rights by then digitizing it and making it available globally for all. Careful attention must be placed that would ensure that any currently documented work be verified by the community for proper consent procedures before it is offered for wider dissemination. Above and beyond achieving consent, any work undertaken in this regard must also ensure that it is in compliance with the customary laws that govern the knowledge. As was mentioned by many of the delegates already, this was not simply about fitting traditional knowledge into the formal patent system, but rather gaining an understanding and respect for other systems already governing this knowledge, working toward a complementarity that could meet the needs of both knowledge holders and users. Delegations had already mentioned initiatives that acknowledge and respected customary laws with regard to traditional knowledge. Again, the representative urged the WIPO secretariat to study these more closely and offer them for analysis and discussion by the Committee. This need for greater understanding of customary law governing traditional knowledge brought the Representative to her next point, which was to urge the Committee to place in its workplan the need for training and technical assistance for non-indigenous peoples with regard to customary laws. Capacity building was a two-way street, and the WIPO secretariat and the Committee would aid this effort tremendously if it could assist in identifying the training needs of non-Indigenous actors with regard to customary laws and traditions governing traditional knowledge. The Representative, however, was not recommending that WIPO took on these training tasks because that was not its field of expertise. Finally, the Representative urged that the necessary resources and logistical support be made available to ensure the full and effective participation of Indigenous expertise throughout these discussions. She emphasized that Indigenous elders, lawyers, and activists had been working for decades to articulate the intellectual property rights needs of Indigenous peoples and provide guidance on how these needs could be met. They knew the formal intellectual property rights system and its limitations. They knew customary law and traditions. Indigenous peoples knew what they wanted, they knew what worked and what did not, and to ignore this expertise would be not only to the detriment of Indigenous peoples, but also to the detriment of the Committee in developing solutions that would work on the ground.

153. The Representative of the Indigenous Peoples Biodiversity Network (IPBN) noted the importance of the Committee continuing its work with transparency and the effectiveness, and

that the participation of the owners of the traditional knowledge be recognized and promoted. The Representative requested that the Committee consider the establishment of a fund to facilitate and allow the presence of indigenous representatives in future discussions of the Committee. The Representative expressed his concern with the proposal of the establishment of a global database on Indigenous knowledge. The best way to preserve knowledge would be to strengthen the political, social, culture and economic structures in the communities. The Representative believed that the protection of traditional knowledge required better handling and requested that the concept of intellectual property *per se* be extended to take into account the indigenous concepts of innovation and discovery. The Representative stated that the discussions were focused only on the economic aspects of a small part of traditional knowledge. The Representative stated that this knowledge was valuable to them because of its holistic function with other elements of the world. The discussions should be extensive and broader and that a *sui generis* system would be a better alternative before looking into more practical issues such as contracts. He concluded that there was a need for governments to consider a link with other processes of the United Nations especially the United Nations High Commissioner for Human Rights because the question of intellectual property was also a question of human rights.

154. The Representative of the American Association for the Advancement of Science (AAAS) informed the Committee of the creation of a database known as the Traditional Ecological Knowledge Prior Art Database (TEKPAD). The Representative stated that the goal of the database was to promote the use of the public domain in order to promote and protect traditional knowledge. The database, he stated, was a searchable electronic text index and archive of information already in the public domain that addressed traditional ecological knowledge in the use of specific plant species. He further stated that the database brought together various forms of public domain data that served to demonstrate prior art for traditional knowledge. In addition to ethnobotanic data, the database included scientific and medical articles, abstracts, as well as patent applications. The Representative said that, had the database been available earlier, several traditional knowledge-related US patent applications would have not succeed. The Representative emphasized the need to create such database to protect traditional knowledge from patent infringement. The Representative concluded by stating that the TEKPAD database could be accessed on the Internet at <ip.aaas.org/tekpad> and expressed his hope that the database would serve as a model for other similar endeavors.

155. The Representative of the Aboriginal and Torres Strait Islander Commission (ATSIC) explained that it consisted of approximately 400 representatives elected by the Aboriginal and Torres Strait Islander people, the Indigenous peoples of Australia. ATSIC's structure incorporated a national Board, consisting of 17 commissioners, and thirty five regional councils, each with between 10 and 12 elected members. In the past six years ATSIC had commissioned two and expert reports on the rights of the Aboriginal and Torres Strait Islander peoples, including their intellectual property rights. His organization did not wish to make any objections to Activities 1 to 6 set out in document WIPO/GRTKF/IC/2/6. He emphasized the right of indigenous peoples to have ownership of intellectual property including traditional knowledge regardless of whether it had been released into the public domain. He added that States, before claiming sovereign rights to their genetic resources, should be aware that those rights are subject to the prior and original rights of indigenous peoples. The Representative reminded the Committee that the indigenous peoples of Australia had a History which dated back to at least 100,000 years back, while the nation-state of Australia was only one hundred years old and the British colonisation had occurred just over two hundred years ago. The Representative referred to two recent events in Australia

which led to the correction of the illegal occupation of the lands and rights of indigenous peoples. The first event, he stated, was the *Mabo* case, in which it had been held that the indigenous peoples' common law ownership of land had to be recognized and that land could be acquired only in a non-discriminatory manner with their prior and informed consent. In the second case, *Yanner v Eaton*, it was decided that the government could not claim property ownership over wild animals but merely propose to 'manage' the existence and use of wild animals. The Representative thus challenged the assertion by States of their unfettered sovereign rights over intellectual property of indigenous peoples. Under each of the six possible Activities laid out in the document, the Committee should provide adequate resources and means for indigenous peoples' participation. The Representative referred to the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, which could be found in Appendix I of the report released in Australia in the previous year, called *Our Culture: Our Future,* and maintained that principles 1 to 9 were all relevant, in particular principles 2 and 7. Activities 3, 4 and 6 should be undertaken with due cognizance of the resource requirements needed to establish and coordinate databases on traditional knowledge as prior art. He agreed with the contents of the Declaration of Shamans on Intellectual Property and the Protection of Traditional Knowledge and Genetic Resources, made available by the Delegation of Brazil, and pointed out that half the recommendations were directed to the international community and the other half to the government of Brazil. He further stated that States had multiplied their expenditures on issues of copyright, patents and design protections over a short period of time. The Representative was pleased on the efforts made by the States such as the Delegations of the United States of America, Brazil, New Zealand and Spain, to increase indigenous peoples' participation in the international debate on traditional knowledge. He requested that the Committee give due regard to his concerns that participation of indigenous peoples, at all levels and in all activities, was necessary if indigenous peoples were going to experience equal treatment and outcomes.

156. The Representative of the Indian Movement "Tupaj Amaru" emphasized that the collection of traditional knowledge was not enough to preserve it, it was indeed necessary to develop a legal, binding framework for its adequate protection. From the document in question, it could be concluded that neither the PCT nor the Draft Substantive Patent Law Treaty was adequate for protecting traditional knowledge. He reiterated that WIPO should establish a working group, open to governments, indigenous peoples, intergovernmental organizations and non-governmental organizations, with the task of examining operational principles, contractual practices and model laws, as well as traditional knowledge and folklore.

157. The Chair drew three general conclusions: (1) the Committee had agreed with and expressed its support for, further work within WIPO on the relations between traditional knowledge and prior art in the patent field as one of the important elements for the better recognition and protection of the technological value of traditional knowledge. Some delegations, however, strongly felt that this work relating to traditional knowledge and prior art should not prejudice any discussions on the legal protection of traditional knowledge, for instance in the form of a *sui generis* system. (2) Most delegations had supported, or did not oppose, any of the activities which were mentioned as possible Activities 1 to 6 in the Secretariat´s document. None of these activities were expressly rejected, even if some Delegations felt that some of the activities might be premature or should be reassessed later. It should be noted that further in-depth considerations are indeed necessary on the nature and consequences of the various activities. (3) It had been underlined that any future work in this field should be closely coordinated with that within the CBD and that synergies should be ensured with the work in WTO on the basis of the Article 19 in the Doha Ministerial

Declaration. The work should also be coordinated with the SCP and IPC within WIPO. As regards the various proposed activities, the Chairman drew the following conclusions: (a) as a general remark it was indeed very difficult and even impossible to establish priorities between the various proposed activities; (b) as regards Activity 1, a number of Delegations had expressed support. It was noted by one Delegation that the work should not be restricted to periodicals only; (c) as regards Activity 2, hesitations had been expressed and Delegations had said that this activity should be carefully examined in the light of the discussions in the SCIT and of the evolution of the JOPAL Project. In fact, this was the activity where there were the most hesitations; (d) as regards Activity 3, there had been sentiments to the effect that this should be reassessed and there were also doubts whether this activity should be dealt with in this Intergovernmental Committee or in the SCP; (e) as regards Activity 4, there had been considerable support for the establishment of a database on traditional knowledge, but also considerable hesitation as to the costs, access and use of the database, and the protection of the contents of it, which issues would have to be further studied by the Secretariat; (f) as regards Activity 5, there had been support from a number of Delegations; (g) as regards Activity 6, there had been considerable support, even if some Delegations said that one should further look into what the assistance should contain and how it should be organized and financed. In summary, the most positive feelings had been for Activities 1 and 5, and also for Activity 6 and for the tentative pursuing of Activity 4. In addition, a number of specific points had been made which should be taken into account in the further work. Those points included, *inter alia*: the concern expressed as to the feasibility of prioritizing between journals, as indicated in Activity 2; careful attention had to be given to the distinction between traditional knowledge in the public domain and such knowledge which was protected on the basis of secrecy or confidentiality; attention should be given to solutions found in national and regional legislation; attention should also be given to the fact that traditional knowledge often exists only in oral form; the concern expressed that the documentation of traditional knowledge or putting it into a database could destroy the protection, since this is vulnerable material and public documentation could threaten it; as regards databases, it was understood that a database would have to be international, under the responsibility of WIPO, and that the Secretariat should study other ongoing activities in this field and experiences from other similar databases; the need for close consultations with holders of traditional knowledge and with other stakeholders; the need for technical assistance, also in relation to the database and documentation issue; the need to study relations between traditional knowledge and other forms of protection than patents; the need for a definition of what was prior art. The Chair concluded that the Intergovernmental Committee had accepted the activities for the implementation of Task B.3, subject to the above observations.

158. The Delegation of Algeria, on behalf of the African Group, stated that all Delegations supported the main thrust of the Chair's Conclusions. However, the Delegation emphasized that several Delegations expressed support for the work on traditional knowledge as prior art but that it should not limit the scope of the discussions on a *sui generis* system for the protection of traditional knowledge. The Delegation further supported the setting up of a database of traditional knowledge, and in this instance, a clear distinction should be drawn between the public and non-public domains of traditional knowledge. In addition, the Delegation said that the provisions of Article 17 of the CBD on the special needs of developing countries should be taken into account. The Delegation stated that most traditional knowledge, particularly traditional medicine, had been put in the public domain without taking into account its commercial value. The Delegation further held that the final objective should be the enrichment of traditional knowledge for the benefit of all humanity. and that developing countries should benefit from the exploitation of traditional knowledge when putting their traditional knowledge in the public domain.

159. The Delegation of Brazil stated that it was in full agreement with the conclusions prepared by the Chair. The Delegation sought guidance from the Chair as to where the issue of further coordination between WIPO and the CBD and FAO should be addressed. The Delegation recalled that many Delegations were keen on such coordination. This was an important element presented by the Representative of the CBD on the recommendations adopted by the Ad Hoc Open-ended Working Group on Access and Benefit-sharing. especially with respect to the role of intellectual property rights in the implementation of access and benefit-sharing arrangements. The Delegation invited WIPO to respond to those tasks.

160. The Chair recalled the general Conclusions presented earlier to the Committee which identified such close cooperation between the CBD and WIPO. The Chair invited the Secretariat to provide further observations on the issue.

161. Mr. Gurry, on behalf of the Secretariat, recalled that the Conclusions of the first session of the Intergovernmental the Committee on Genetic Resources, Traditional Knowledge and Folkore, encouraged WIPO to maintain close working relations with both the CBD and FAO. The Secretariat was doing so and would continue to do so in the future. He further stated that it understood the question raised by the Delegation of Brazil to refer to a specific issue featured on page 37, paragraph 4 of the Annex of document WIPO/GRTKF/IC/2/11, which contained the Report of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing. Mr Gurry noted that the recommendation of the Working Group was for the COP, at its sixth meeting, which would take place in Amsterdam, in 2002, to invite WIPO to prepare the study referred to therein. Therefore, it seemed that the Committee could only address the issue raised by Brazil after WIPO received that invitation following the COP meeting in 2002, possibly at the third session of the Committee, and not before.

162. The Delegation of India referred to the activities contained in document WIPO/GRTKF/IC/2/6. With regard to Activity 1, the Delegation stressed the need for the inclusion of more traditional knowledge periodicals, many of which were in local languages. Regarding Activity 3, the Delegation stressed the importance for authorities to consult with the experts in the field and in the country of origin of traditional knowledge when any international search in traditional knowledge was undertaken. Finally, the Delegation stated that, while it supported the electronic exchange of traditional knowledge in Activity 4, the question of ownership and protection of such databases needed to be addressed simultaneously through some *sui generis* legal system at the national and international levels.

163. The Delegation of Pakistan pointed out that developing countries were eager for activities related to the documentation of traditional knowledge. However, they were unable to do so due to their financial constraints. As such, the Delegation stressed that there was a need for the creation of a fund to assist the development of such documentation.

Folklore

164. The Secretariat of WIPO introduced the two documents relevant to this agenda item, namely the “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” WIPO/GRTKF/IC/2/7 and the “Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/8). The Secretariat drew the attention of the Intergovernmental Committee to paragraph 51 of document WIPO/GRTKF/IC/2/8 which invited the Committee to take note and make general comments

on the contents of the document and the proposed next steps contained in paragraphs 7 and 8 of the document.

165. The Chair stated that the work of the Committee was based on three pillars, namely Genetic Resources, Traditional Knowledge and Folklore. All three pillars would be given the same importance in the discussions of the Committee. The Chair reminded the Intergovernmental Committee that document WIPO/GRTKF/IC/2/8 was a preliminary report only, and that a full discussion on the question of the protection of expressions of folklore would take place at the next session of the Committee. He also informed that the Delegation of Italy had handed over to him its responses to the questionnaire on national experiences as regards the protection of folklore.

166. The Delegation of Ecuador stated that the historical background relating to the protection of expressions of folklore set out in document WIPO/GRTKF/IC/2/8, showed the difficulties and limitations inherent in the existing copyright system. For example, the latter protected only literary and artistic expressions. However, expressions of folklore went beyond these, the Delegation stated, referring to the description of expressions of folklore in the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted by WIPO and UNESCO in 1982. The Delegation also identified other difficulties, such as the identification of the authors of expressions of folklore, expressions of folklore held by more than one community, and the term of protection provided by copyright. The Delegation stated that further work should focus on updating model provisions for national laws and that a *sui generis* system of protection would be needed. Such work would contribute to the preservation of cultural heritage and should also cover documents and musical instruments.

167. The Delegation of Egypt expressed its support for the general approach reflected in the statement made by the Delegation of Ecuador. It noted that no distinction should be made between expressions of folklore and traditional knowledge; both concepts were interrelated to the extent that any attempt at separating one from the other would be highly difficult. Practically, everything could be considered as knowledge, whether traditional or modern and whether individual or collective. The question was “who” owned such knowledge. Where the owner was an individual, domestic and international legislation provided protection for the person, his knowledge, creations and inventions. However, where the owner was a community, no existing mechanism provided for such protection. The Delegation believed that folkloric expressions and traditional knowledge originated from one and the same source. In this context, the question was whether protection was sought for such expressions and knowledge per se, for holders of such expressions and knowledge or for both. The answer was simply that protection was sought for both as was the case of individual creations and knowledge and holders of such creations and knowledge. Essentially, the common denominator between folkloric expressions and traditional knowledge lied in the fact that both were traditional and collective and were used in the present by an individual, community or people on a particular territory or particular country. The Delegation noted that in the documents prepared for the second session of the Committee, “expressions of folklore” and “traditional knowledge” were used, in some cases, as concepts distinct from one another and, in others, as one and the same or having a common ground with no clear-cut edges. Some even believed they should be included under “genetic resources.” Folklore covered flora, fauna, water, stars, stones etc. It had become essential now to provide a precise definition for each field as far as material, resources, expressions or knowledge, for which protection was sought, were concerned. From the delegation’s point of view, such interference and confusion could be noted within “folklore” itself. Each culture chose, from its national

language, the term that was convenient to it and extended or limited the space it occupied. In a UNESCO document, for instance, a resolution on the preservation of folklore, adopted by the General Conference in Paris, on November 15, 1989, stipulated, in the English version, that "Folklore (or traditional and popular culture) is …" while the French text omitted the initial word "folklore" by stating: "La culture traditionelle et populaire est …". Obviously, those phrases were neither similar nor concordant in their meanings. Further differences appeared in other languages and cultures. Special attention should be therefore attached, in finalized documents, to local cultural terms, whether regarding "expressions of folklore" or "traditional knowledge" in general, or, more specific terms designating genres and sub-genres. For example, epics, a well known genre in western culture, did not exist in the Arabic culture, but were, nevertheless, referred to using a very similar and equivalent term: "sirah." The same applied to many terms designating other folkloric genres. Similarly, there was no significant difference, in the Delegation's view, between knowledge of the content of a particular story, song or dance and knowledge of a treatment in folk or traditional medicine. There was no significant difference, also, between performing a dance or a song, telling stories or applying a traditional treatment, because, in all cases, the basis was traditional knowledge. However, the countries of Arabic culture had not reached the level attained by countries such as Finland, Sweden, Germany or Romania in collecting, archiving and classifying expressions of folklore and traditional knowledge. Therefore, there was an urgent need for assistance in the collection, maintenance, archiving, creation of databases and classification activities, and, eventually, protection. In this context, a number of important questions needed to be answered with utmost precision. What should be protected? Who should be protected? What should be the means of protection? What should be the term of protection? Once a number of theoretical, practical and application problems were settled, preparation of a model or domestic law would be simple. In view of the fact that nothing could be achieved without agreeing on a set of basic principles, a specialized mechanism should be established, even for a limited period of time, and charged with the task of studying those elements among others and finding appropriate solutions that could be acceptable at the international and community levels. When calling for the protection for traditional knowledge and expressions of folklore, the Delegation did not mean to freeze or prevent other parties from benefiting from such assets. Its objective was rather to make them available for the benefit of all human beings and allow them to be developed in such a manner as to respond to present and future needs of humanity, while maintaining, on one hand, the right of the holder of the innovation, whether an individual or a community, and preserving, on the other, such traditional knowledge and expressions of folklore to be communicated from generation to generation. By granting rights to holders of traditional knowledge and expressions of folklore, States would contribute to the maintenance of their creative activities, development of their tools, knowledge and expressions, improvement of their intellectual and material levels, and of deepening their awareness of their human nature and their indispensable role. Advanced societies could consider traditional knowledge and expressions of folklore as prior art and apply to them the adequate legislation. In view of the fact that developing societies faced a different situation due to different social, cultural, economic and historical circumstances, traditional knowledge and expressions of folklore of such communities should be dealt with under an international flexible and unique system of protection that took such considerations into account. While underlying the necessity and importance of providing protection against spoliation and abuse, the Delegation insisted on the necessity to prevent possible clashes of cultures and feelings of injustice and subjugation, and to promote respect of the other.

168. The Delegation of the Islamic Republic of Iran stated that folklore was an important part of the cultural heritage of all countries, and particularly of developing countries in that they

considered folklore as a basis for their cultural identity. Folklore was not a matter relating to the past only, the Delegation stated. New technological developments had facilitated the improper use of folklore items, rendering it important to provide serious and effective protection for folklore at the national and international levels. On the other hand, the Delegation added, the development of trade globalization had positive and negative effects on expressions of folklore particularly tangible expressions of folklore. Increased trade had allowed for tangible expressions, such as handicrafts, to be traded in foreign markets and to become well known, while, on the other hand, the misappropriation of expressions of folklore had lead to a weakness or elimination of the origin of the concerned product, falling prices, disorders in distribution channels and a loss of national identity. The Delegation referred to the rich treasures of folkloric heritage available in its country, referring particularly to its hand-woven carpets and other handicrafts. The Delegation stated that, for example, in 1993 the total value of carpet and handicrafts exports amounted to 1.7 billion US dollars, amount which, in recent years, had fallen significantly. The craft sector in the Islamic Republic of Iran employed some 2.5 million people, it stated. Although the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted by WIPO and UNESCO in 1982, were a good starting point, technological, legal, social and trade changes since 1982 necessitated their updating. The adoption of a legal framework for supporting expressions of folklore at the national and international levels and within intellectual property rights would be necessary, the Delegation stated. The Delegation described the protection afforded to expressions of folklore in its copyright legislation of 1969. Finally, the Delegation proposed that WIPO conduct studies on different aspects of folklore, including on those aspects which could not be supported within the existing intellectual property rights system, and develop an effective and practical approach by cooperating with other international organizations, such as UNESCO, and by using the experiences of Member States.

169. The Representative of the European Community stated on behalf of the European Commission that the importance of folklore in a human being's cultural identity, an identity which was just as strong in Europe as in other parts of the world, could not be disputed. Referring to fears that cultural identity was being diluted, distorted and misused, particularly with the advent of new technologies, the Representative stated that the European Commission shared the view that it was time to further examine the issue of folklore, on a global basis, building on past efforts in a way that focused the analysis in concrete and practical terms. The Representative referred to a study it had commissioned entitled "Report on the International Protection of Expressions of Folklore under Intellectual Property Law," which, the Representative added, did not reflect the official stance of the European Community. However, the Representative stated that the Study was thought provoking and contributed to the discussion. Recognizing that, while in Europe folklore was considered to be part of the public domain but that other countries and cultures might have different concerns and interpretations, the Representative stated that the Committee would be well advised to adopt a cautious and flexible attitude that would guarantee an effective balance of interests. There appeared to be three major issues at stake in this context: a defensive commercial interest, an active commercial interest and ethical concerns. A defensive commercial interest was relevant where cultural communities wished to protect their folklore from being exploited commercially by others. An active commercial interest would be relevant where communities wished to benefit from the economic advantage attached to treating their expressions of folklore as a commodity. Ethical concerns arose when cultural communities wished to protect their folklore so that its evolution faithfully respected their traditions and modes of life. The Representative submitted that discussions within the framework of intellectual property should concentrate on the more transactional, commercial aspects of folklore rather than on

ethical issues. Referring to the statement made on behalf of the European Community and its Member States at the first session of the Intergovernmental Committee on the specific issues which should be addressed, the Representative framed these in terms of concrete questions: Who were the rightsholders? What was being protected? What was the scope of protection (in other words, what kind of limitations and exceptions should apply or be permitted)? And what would the duration of protection be? Faced with these questions within the context of present copyright law, some difficulties would become apparent, the Representative stated. In this regard, the Representative referred to suggested solutions such as use of "paying public domain," certain aspects of trademark law, industrial designs, geographical indications and unfair competition, but added that these all had their respective limitations and shortcomings. Article 2 of the WIPO Performances and Phonograms Treaty, 1996 also included performers of expressions of folklore. The Representative referred also to the role of databases established for the protection of folklore and that the need for the identification, classification and documentation of folklore had been referred to during the Fact-finding Missions conducted by WIPO in 1998 and 1999. The Representative stated that the European Commission looked forward to the completion of the WIPO study on the economic importance of database protection. The work of the Intergovernmental Committee should also take into account work in other international fora, and referred specifically to UNESCO. Finally, the Representative stated that the European Commission was ready to contribute further to discussions on this subject in the Intergovernmental Committee in a constructive spirit, remaining, at the same time, faithful to the main principles of intellectual property protection.

170. The Delegation of India, speaking on behalf of the Asian Group, made certain specific proposals. First, Governments should conduct consultations at the national level among producers of handicrafts and other expressions of folklore, and should provide the results of these processes and national experiences to the Committee. Second, Member States should establish national focal points for the protection of crafts and other expressions of folklore in order to facilitate, at the national level, the promotion and legal protection of crafts items and, at the regional level, the promotion of crafts items and other expressions of folklore and the establishment and coordination of a regional system for their protection. Third, WIPO should explore practical options for the protection of tangible expressions of folklore through existing intellectual property rights and, if necessary, study the possibility of establishing additional intellectual property rights for handicrafts and other tangible expressions which were not protected by existing rights. Finally, WIPO should conduct practical studies on the exploitation of intangible expressions of folklore, particularly in light of new technologies.

171. The Delegation of India, speaking on behalf of its country, stated that it appreciated an extension of time within which to complete the "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore" document (WIPO/GRTKF/IC/2/7). Additional time would enable India to undertake a more comprehensive study of the subject. The Delegation noted, as stated in paragraphs 17 to 21 of document WIPO/GRTKF/IC/2/8 that the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, adopted by WIPO and UNESCO in 1982 had not had extensive impact on the legislative frameworks of Member States of WIPO. The Delegation stated it was of the view that expressions of folklore should be given similar treatment like any other form of traditional knowledge. The Delegation stated that WIPO's Fact-finding Missions in 1998 and 1999, as elaborated in paragraph 34 of document WIPO/GRTKF/IC/2/8, identified the main intellectual property needs and expectations of traditional knowledge holders particularly in the field of expressions of folklore. All of these concerns should be adequately addressed by WIPO through more studies, consultations and

discussions with Member States to promote as well as to provide legal protection for all forms of expressions of folklore through intellectual property rights. The Delegation stated that there would also be need to develop a legal protection system for those forms of folklore that are at present not adequately protected under existing intellectual property rights, and that a *sui generis* system of protection would be required.

172. The Delegation of Thailand stated that it supported the statement made earlier on behalf of the Asian Group. As expressions of folklore were found in many forms and represented many forms of creativity, the Delegation stated, the modification of copyright law would not be appropriate, and a new *sui generis* system would be needed. However, the term "*sui generis"* was a broad and ambiguous term and it needed to be clarified. The Delegation suggested that the framework represented in the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO could provide a useful model in relation to the protection of folklore. Finally, the Delegation stated that with respect to terminology, consultations should be held with the holders of traditional knowledge and expressions of folklore.

173. The Delegation of Sudan, after emphasizing the importance of the protection of expressions of folklore, had certain specific comments on document WIPO/GRTKF/IC/2/8. First, the Delegation noted, with reference to paragraphs 12 and 13 of the document, article 15(4) of the Berne Convention for the Protection of Literary and Artistic Works, 1971 provided protection only where the author of the work was unknown. However, the Delegation stated, protection should be provided in cases where the author was known. Second, unlike the position under copyright law, expressions of folklore should be protected for unlimited time. Third, with reference to certain of the answers that had been provided in response to question I.3 of the "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore", which were summarized on page 23 of document WIPO/GRTKF/IC/2/8, the Delegation stated that it did not agree with the proposition that expressions of folklore should be seen as part of the public domain. Referring to the works of Shakespeare which were now part of the public domain, the Delegation stated that expressions of folklore required continuous protection. Fourth, the Delegation stated that international legislation was required as only States could provide protection for expressions of folklore. Fifth, the Delegation agreed, as discussed in paragraphs 24 to 27 of document WIPO/GRTKF/IC/2/8, that protection of the rights of performers did not itself protect expressions of folklore. Sixth, the Delegation stated that in respect of the protection of expressions of folklore in foreign countries, the provision of reciprocal protection in national laws would not be sufficient without an international convention. In addition, the Delegation endorsed the needs and concerns as identified during the WIPO Fact-finding Missions in 1998 and 1999 and the WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999, which were described from paragraphs 30 to 35 of document WIPO/GRTKF/IC/2/8. The Delegation stressed the need to protect expressions of folklore through an international instrument. Finally, the Delegation requested that additional time be provided to respond to the "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore" (document WIPO/GRTKF/IC/2/7).

174. The Delegation of Algeria, speaking on behalf of the African Group, stated that it appreciated the extended time within which to respond to the folklore questionnaire. The Delegation stressed the need for the proper legal protection of expressions of folklore, for which there was a need to update and implement the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted by WIPO and UNESCO in 1982, as well as the need for a binding *sui*

generis system. The Delegation suggested closer cooperation between WIPO and UNESCO, and requested that WIPO provide additional technical assistance.

175. The Delegation of Malaysia stated that the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted by WIPO and UNESCO in 1982, should be updated to take into account technological advances since 1982. The Model Provisions were, the Delegation stated, a sufficient starting point for the elaboration of an instrument. Regarding terminology, the Delegation noted that handicrafts had been referred to in document WIPO/GRTKF/IC/2/8 as the Delegation had suggested at the first session of the Committee. Finally, the Delegation urged the States to submit responses to the folklore questionnaire, and supported calls for further consultations at the national level.

176. The Delegation of Romania underlined the cultural dimension of the movements of authentic dancers in their own communities, performing Spanish flamenco, Russian *Kazaciok*, Romanian *calusari* or *hora* or American or African indigenous people rituals. In a world of globalization, cultural diversity should be preserved, taking in consideration that expressions of folklore arose from the deep feelings inherited from generation to generation. Those expressions conveyed the spirit and the "soul" of the respective communities. All over the world people could learn to execute some steps of Irish, Jewish, Indian or Greek dance, but they never could dance in the same way because they could not feel the same way that those who inherited that kind of dance. This was true as far as dance and music were concerned, but it also applied to other expressions of folklore that involved human feelings and emotions, bound by the geography and the history of the place where communities dwell. Local recipes should also be preserved as a manner of protecting small communities against the uniformity of industrialized food. The Delegation stated that Romania had been concerned by the issue of folklore protection since the middle of the nineteenth century when the Act of Establishment of the Romanian Academy in 1866 included, among its responsibilities, the identification and preservation of the folkloric traditions. In 1926 the renowned Romanian sociologist, D. Gusti took the first steps of initiating the establishment of the Romanian Institute for Ethnology and Dialectology under the Romanian Academy. All actions that had been taken were intended to identify, classify, and preserve the expressions of folklore. In 1934 a national Village Museum was established in Bucharest, where visitors could see real Romanian houses collected from all over the country built between the 17th and the 20th centuries. The national cultural traditional heritage, particularly rich and beautiful, was protected at a national level, but such protection was fragmented, incomplete and not quite effective. Besides the Institute of Ethnography and Folklore with its Ethnology and Dialectology branch, Romania had also established the National Center for Preservation and Utilization of Folklore Tradition and Creation under the authority of the Ministry of Culture and Religious Affairs. There were also many associations and foundations that supported folklore. They promoted the commercialization of different handmade products as laces and needle works, painted eggs, glass and wood icons, painted in the orthodox tradition, traditional masks and the organization of folkloric songs and dances festivals and shows. In Romania there was also a folklore magazine, called "ETNOS." The Delegation said that in the countryside, an increasing number of villages had their own locally traditional museum. Exercising their right to freedom of expression, the minorities in Romania kept their own cultural traditions, like their own languages, traditional wearing, specific songs and dances, religious and cuisine customs in the same manner as the Romanian majority. The Delegation informed that national law had established since 1992 a fee called "folkloric stamp," which amounted to 2 % of the selling price of some devices supporting expressions of folklore such as CD, cassettes, and printings, and 5% of the selling price of tickets for the folklore shows.

These amounts were collected by a single private association and intended to support the ethnographic and folkloric patrimony. The Romanian Copyright Law, on the one hand, protected folklore within the limits and conditions provided for by Article 15(4) of Bern Convention, and on the other hand, provided an indirect protection through the neighboring rights of performers including their performances at folklore shows. The performers definition provided for the Romanian Copyright Law was not in compliance with Article 2 of the WPPT. The Delegation had paid careful attention to the numerous arguments referring to why expressions of folklore should be protected. The Delegation was confident that WIPO could find the best and most appropriate answer to the question of how to protect them, so as to reach the following main objectives: to assure authenticity in the expressions of folklore; to minimize inappropriate uses of expressions of folklore and cultural harm caused by such uses; to assure appropriate compensation for exploitation of folklore.

177. The Delegation of Venezuela supported the extension of time within which to complete the folklore questionnaire. The Delegation also stated that any model provisions for the protection of folklore should also respect and protect cultural, historical values as well as the characteristics of each people. The delegation supported the statements of Ecuador and Egypt in this respect.

178. The Delegation of Morocco referred to the importance of expressions of folklore as being part of the national heritage and expressions of identity and culture. The Delegation referred to the unauthorized copying of handicrafts and other tangible expressions of folklore when exported. The Delegation expressed the need for the international protection of expressions of folklore. The Delegation recalled the Fact-finding Missions conducted by WIPO in 1998 and 1999 which, the Delegation, stated, had showed the value of traditional creativity as well as the lack of an adequate protection framework and the need for the establishment of a *sui generis* system of protection. Pending further completed responses to the folklore questionnaire, the Delegation suggested WIPO provide assistance to national governments to compile expressions of folklore, organize national and regional consultations, and that there be coordination between WIPO and other relevant international bodies. Finally, the Delegation supported the statement made on behalf of the African Group.

179. The Delegation of China stated that it had already replied to the folklore questionnaire. Existing laws, the Delegation stated, could provide protection to the adapted works and performance for expressions of folklore, but copyright law was limited and insufficient. In this regard, the Delegation advised that regulations related to expressions of folklore were under discussion. WIPO should cooperate with UNESCO, and should undertake in-depth studies of national laws regarding expressions of folklore, the Delegation stated. The Delegation also expressed support for WIPO organizing regional meetings on this subject.

180. The Representative of UNESCO recalled the cooperation between WIPO and UNESCO that dated back to 1973, and referred to various UNESCO activities in this area. Particular reference was made to the decision at the 31st General Conference of UNESCO held in October and November 2001 to establish a new international treaty in respect of intangible cultural heritage. This treaty, the Representative stated, would aim to create international and national obligations relating to the identification, preservation and protection of intangible cultural heritage. The Representative stated that WIPO would be invited to be associated with this process in so far as intellectual property aspects were concerned.

181. The Delegation of Kyrgyzstan agreed that the development of model provisions for national laws was important, after which an international instrument should be developed.

182. The Representative of the Indian Movement "Tupaj Amaru" said that the preservation and protection of expressions of folklore should merit special attention on the part of States and the international community. As regards the oldest international instruments that were relevant – albeit in a very restricted manner – mention should be made of the Berne Convention for the Protection Literary and Artistic Works and its Article 15(4). That provisions referred essentially to the works known as "folklore", the origin of which was lost in time and, consequently, the identity of their authors was unknown, although it was assumed that they were natives and that they were inspired by indigenous talent. In the application of the Berne Convention, it had been noted that the provisions of the Convention, which had constantly been revised up the present time, had not been sufficient or effective in the copyright sphere to guarantee the possession, control, preservation and restitution of cultural assets, in particular expressions of folklore, the source of which lied in the ingenuity of aboriginal civilizations. In the Representative's view, by its very nature and the scope of its application, copyright had not proved to be an appropriate institution for protecting traditional creations of folklore nor regulating its use in accordance with the interests of its authentic authors. Member States should draw up an additional binding protocol to protect folklore from the challenges of the time. It should be specified that, in the opinion of WIPO intellectual property experts, traditional creations of indigenous peoples such as the so-called folk tales and legends, songs, melodies, musical instruments, dances, designs or patterns were the product of a slow process of creative development and, through their maintenance in a particular community, were much older than the duration of copyright protection granted by States with regard to authors' works (UNESCO/WIPO/WG.1/FOLK/2 Add.). Within the problem with which the Committee was dealing, the "model provisions for national laws on the protection of expressions of folklore against illicit exploitation," drawn up jointly by UNESCO and WIPO in 1985, certainly provided a more accurate reflection of the elements and features of the cultural identity of indigenous peoples, recommendations which did not merit special attention on the part of legislators of developing countries. The Representative said that the proposals formulated by WIPO urged in particular States to provide their national legislation with a flexible legal framework so as to be able to adopt standards (in the form of a law, a chapter of a Code, a Decree or Decree-Law) so that they were more suited to the specific conditions and historical development of each country. The Representative referred to the definition of expressions of folklore under Article 2 of the Model Provisions and concluded that the international community should assume the historic responsibility of returning both cultural assets and knowledge patented without the prior consent of the indigenous communities. For the purposes of the right to restitution, compensation and rehabilitation, which were terms stipulated in international law, the indigenous peoples claimed reparations for their cultural heritage and fair compensation for the victims of the damage and countless losses suffered as a result of the plundering of their genetic resources and traditional knowledge.

183. Noting that several requests had been made for additional time within which to complete the questionnaire, the Secretariat of WIPO proposed that the deadline for completion of the "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore" (document WIPO/GRTKF/IC/2/7) be further extended to January 31, 2002. However, the Secretariat stated that if there were to be such a further extension, the final report on the folklore questionnaire, which would be discussed at the third session of the Committee, would only be made available after February 28, 2002.

184. There being no objections, the Chair concluded that the steps outlined in paragraphs 7 and 8 of document WIPO/GRTKF/IC/2/8 were accepted, save that the deadline for

completion of the questionnaire would be January 31, 2002, and that the final report would be made available after February 28, 2002.

Future Work

185. Mr. Gurry, on behalf of the Secretariat, announced that the third session of the Committee was scheduled to take place in Geneva from June 17 to 21, 2002. He added that the Secretariat was in the process of investigating whether it would be possible to extend the Session by two days, which would be the June 13 and 14. He explained that if this were possible, it would mean that the session would last from June 13 to 21, 2002, which would allow five full days for the discussions. He also signaled that the fourth session of the Committee was tentatively scheduled for December 9 to 17, 2002. Regarding the substantive organization of work, he requested a few days for the Secretariat to analyze carefully the discussions at this session of the Committee. He pointed out that at the third session a full report would be available on responses received for the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge and a full report on responses to the Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore. He indicated that the Secretariat had sufficient indications for the furtherance of the work on intellectual property and access to genetic resources and benefit-sharing and concerning the defensive protection of traditional knowledge as prior art.

186. The Delegation of Belgium, speaking on behalf of the European Community and its Member States, expressed its wish to raise an issue that had been touched upon at the first session of the Committee, namely that of the active participation of indigenous and local communities. Such participation was necessary to encompass views of all stakeholders who were relevant to the work of the Committee. However, the Delegation added, a prerequisite for such participation was the availability of financial assistance. It pointed out that such assistance could in many cases be properly ensured by Member States. It added that nevertheless the appropriateness of setting up a general mechanism for financial assistance through funds should also be considered. It noted that probably in some specific cases the use of WIPO funds could be the only way to serve the purpose of effective participation of indigenous and local communities. It added that the proper forum to consider and make recommendations to the General Assembly upon this issue would probably be the Program and Budget Committee. The Delegation therefore wished to suggest that the Program and Budget Committee be recommended to consider the issue of financial assistance in order to ensure the participation of indigenous and local communities at the sessions of the Committee.

187. The Delegation of Switzerland commented that high priority should be given to the clarification of terminology, because the Committee could only work effectively and constructively when it had determined in detail what the relevant terms meant. Furthermore, the Delegation noted that the future work of the Committee should be carried out in close cooperation and coordination with other relevant international bodies, in particular the CBD. The Delegation suggested that WIPO should address in a timely manner any questions related to intellectual property put before it by international bodies. Additionally, it advised that all of the Committee's work should be guided by the principle of practicality, because its efforts would only be successful if the solutions that the Committee developed were feasible. Finally, the Delegation considered it important to the future work of the Committee that indigenous and local communities are involved on an increased basis. It explained that this was one reason why it had proposed that the Secretariat should prepare a questionnaire regarding possible Activity 6, as identified in document WIPO/GRTKF/IC/2/6, which could

be circulated among indigenous and local communities to determine their interests and needs when they documented traditional knowledge. The Delegation also supported the proposal made by the Delegation of Belgium on behalf of the European Community and its Member States, recommending that the Program and Budget Committee of WIPO should consider the issue of financial assistance to ensure the effective participation of indigenous and local communities at the future meetings of the Committee.

188. The Delegation of Venezuela supported the idea of studying a fund to finance representatives of indigenous and local communities and reminded the Committee that during this Session many delegations had emphasized the need to initiate work on a *sui generis* form of protection for traditional knowledge. The Delegation requested the Secretariat to prepare a document for the next session of the Committee with elements for a possible *sui generis* system. It further proposed that the Committee should reelect Mr. Henry Olsson as the Chair for its next session.

189. The Delegation of Brazil supported the proposals of Venezuela, including the proposal on reelecting Mr. Olsson as Chair. It stressed that it was important to address the Tasks which were defined at the first session of the Committee, especially the Task focusing on the development of *sui generis* models of protection, as outlined in the proposal of Venezuela. Concerning the establishment of databases of traditional knowledge, the Delegation expressed the importance of focusing on the critical views of traditional knowledge holders concerning the following points: (i) the costs of implementation and maintenance of such databases; (ii) ownership of information contained in the databases; (iii) the definition of which information should be available; (iv) consolidating an understanding on what is in the public domain and what would avoid the threat of biopiracy; and (v) the issue of a defensive and positive system of protection. It further proposed to hold training courses focusing on existing forms of protection and supported Belgium and Switzerland concerning financial assistance to indigenous and local communities. On the issue of coordination between the CBD and WIPO the Delegation referred to the suggestions contained in document WIPO/GRTKF/IC/2/11, regarding the recommendations adopted by the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity, especially the role of intellectual property rights in respect of access and benefit-sharing arrangements.

190. The Delegation of Egypt supported the proposal of Venezuela that the Secretariat should prepare a document for a *sui generis* instrument and that Mr. Olsson should be reelected as the Chair at the next session. It added that the availability of the documents in Arabic was important and reiterated its hope that the Committee would develop a binding instrument on this aspect of intellectual property.

191. The Delegation of Ecuador supported the proposals of Venezuela on the preparation of a document to develop a *sui generis* system and on the reelection of the Chair. In addition, the Delegation requested that the Secretariat should submit some work on benefit-sharing and intellectual property.

192. The Delegation of Pakistan urged WIPO to finance the participation of developing countries in future sessions of the Committee.

193. The Delegation of China suggested to hold regional meetings before the third session of the Committee to discuss special issues, for example, the work of a task force on traditional knowledge.

194. The Chair referred to the statement made by Belgium on behalf of the European Community and supported by some Delegations concerning a recommendation by the Committee to the effect that the WIPO Program and Budget Committee should further consider the possible financing by WIPO of the participation of indigenous and local communities at the session of the Committee and asked whether the Committee could approve such a recommendation. As there were no objections, it was so decided. He also noted the requests for documents on a elements of *sui generis* protection for traditional knowledge.

195. The representative of ATSIC, speaking on behalf of the indigenous communities present at the Committee session, stated that it had been a positive experience to participate in this meeting. He commended the Chair for his conduct of the session and extended this comment to the work of the Secretariat of WIPO. He emphasized that the intellectual property of indigenous and local communities in traditional knowledge was an integral component in the life of these communities. He stated that the representatives of indigenous and local communities had seen that WIPO did respect this and that the principle of prior informed consent and the participation of community representatives had been reinforced in the discussions of the Committee. The Representative welcomed the coordination with the CBD and other UN agencies and noted specifically that the Permanent Forum on Indigenous Issues of the United Nations had recently been established. The Representative requested that the Permanent Forum should be given particular attention and that the work of the Working Group on Indigenous Populations (WGIP) should be taken into account. He recommended that WIPO should establish a fund, such as the Voluntary Fund of the WGIP.

[Annex follows]

ANNEX

LIST OF PARTICIPANTS

I. ÉTATS/STATES

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

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

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James GRAHAM, Technical Officer, HTP/EDM/TRM, Geneva

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

Thu-Lang TRAN WASESCHA (Mrs.), Counsellor, Intellectual Property Division, Geneva

Jayashree WATAL, Counsellor, Intellectual Property Division, Geneva

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

Rolf JÖRDENS, Vice Secretary-General, Geneva

Makoto TABATA, Senior Counsellor, Geneva

ORGANISATION EUROPÉENNE DES BREVETS (OEB)/EUROPEAN PATENT ORGANIZATION (EPO)

Johann AMAND, Deputy Director, International Technical Cooperation, Munich

Bart CLAES, Examiner, Patent Law Directorate (Dir. 521), Munich

Rainer MOUFANG, Patent Law Directorate (Dir. 522), Munich

Ingwer KOCH, Patent Law Directorate (Dir. 523), Munich

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES (OCDE)/ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

Bénédicte CALLAN (Mrs.), Administrator, Biotechnology Unit, Paris

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

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

Mohamed Lamine MOUAKI BENANI, Counsellor, Permanent Delegation, Geneva

ORGANISATION DE LA CONFÉRENCE ISLAMIQUE (OCI)/ORGANIZATION OF THE ISLAMIC CONFERENCE (OIC)

Amadou Tidiane HANE, ambassadeur, observateur permanent, Délégation permanente, Genève

Jafar OLIA, observateur permanent adjoint, Délégation permanente, Genève

Organisation de l'Unité africaine (OUA)/Organization of African Unity (OAU)

Sophie KALINDE (Mrs.), ambassadeur, Délégation permanente, Genève

Mustapha CHATTI, attaché, Délégation permanente, Genève

ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE (OIF)

Xavier MICHEL, ambassadeur, observateur permanent, Délégation permanente, Genève

Sandra COULIBALY LEROY (Mme), adjointe à l'Observateur permanent, Délégation permanente, Genève

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

Hassane YACOUBA KAFFA, chef du Service de la propriété littéraire et artistique, Yaoundé

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

Emmanuel SACKEY, Examiner (Bio-Chemistry), Technical Department, Harare

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

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

SECRÉTARIAT DU FORUM DES ÎLES DU PACIFIQUE/PACIFIC ISLANDS FORUM SECRETARIAT

Peter John WILLIAMS, Special Adviser, Suva

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

American Association for the Advancement of Science (AAAS)
Stephen A. HANSEN (Senior Program Associate, Science and Human Rights Program, Directorate for Science and Policy Programs, Washington, D.C.)
Rosemary COOMBE (Ms.) (Consultant, Research Chair, Law Communications and Social Studies, York University, Toronto)

American Folklore Society
James Sandy RIKOON (Department of Rural Sociology, University of Missouri, Columbia)

Association asiatique d'experts juridiques en brevets (APAA)/Asian Patent Attorneys Association (APAA)
Dato V.L. KANDAN (Senior Vice-President, Seoul)

Association internationale des sélectionneurs pour la protection des obtentions végétales (ASSINSEL)/ International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL)
Bernard LE BUANEC (Secretary General, Nyon)
Patrick HEFFER (Deputy Secretary General, Nyon)

Association internationale pour la protection de la propriété intellectuelle (AIPPI)/International Association for the Protection of Intellectual Property (AIPPI)
Thierry CALAME (Assistant General to the Reporters, Zurich)

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

Berne Declaration
François MEIENBERG (Campaign Director, Food and Agriculture, Zurich)
Ana María PACON (Mrs.) (Munich)
Manon A. RESS (Ms.) (Washington, D.C.)

BIOTECHNOLOGY INDUSTRY ORGANIZATION (BIO)
Richard WILDER (Lawyer, Powell, Goldstein, Frazer & Murphy LLP, Washington, D.C.)

Brazilian Association of Intellectual Property (ABPI)
Alice RAYOL (Ms.) (Rio de Janeiro)
Maria Thereza WOLFF (Mrs.) (Biotechnology Coordinator, Rio de Janeiro)
Alice SANDES (Ms.) (Biotechnology Technician, Rio de Janeiro)

Center for International Environmental Law (CIEL)
Matthew STILWELL (Managing Attorney, Geneva)
David VIVAS (Senior Attorney, Geneva)

CENTRE D'ÉTUDES INTERNATIONALES DE LA PROPRIÉTÉ INDUSTRIELLE (CEIPI)/CENTRE FOR INTERNATIONAL INDUSTRIAL PROPERTY STUDIES (CEIPI)
FRANÇOIS CURCHOD (PROFESSEUR ASSOCIÉ À L'UNIVERSITÉ ROBERT SCHUMAN, STRASBOURG)

Centre international pour le commerce et le développement durable (ICTSD)/International Centre for Trade and Sustainable Development (ICTSD)
Graham DUTFIELD (Intellectual Property (IP) Policy Officer, Oxford)
Christopher BELLMANN (Programme Officer, Outreach and Partnership, Geneva)
Marc GALVIN (Documentation Officer, Geneva)

Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC)
Daphne YONG D'HERVÉ (Ms.) (Senior Policy Manager, Paris)
Timothy ROBERTS (Chair, Working Group on Interface BLT, Paris)

COMITÉ CONSULTATIF MONDIAL DE LA SOCIÉTÉ DES AMIS (QUAKERS) ET DE SON BUREAU AUPRÈS DE L'OFFICE DES NATIONS UNIES (FWCC)/FRIENDS WORLD COMMITTEE FOR CONSULTATION AND QUAKER UNITED NATIONS OFFICE (FWCC)
Brewster GRACE (Director, Geneva)
Jonathan HEPBURN (Programme Assistant, Geneva)
Geoff TANSEY (Consultant, Geneva)
Stuart ROBINSON (Geneva)

Commission des aborigènes et des insulaires du détroit de Torres (ATSIC)/Aboriginal and Torres Strait Islander Commission (ATSIC)
Robert Leslie MALEZER (Woden)

Confédération internationale des éditeurs de musique (CIEM)/International Confederation of Music Publishers (ICMP)
Jenny VACHER-DESVERNAIS (Ms.) (Chief Executive, Lausanne)
Richard C. OWENS (International Intellectual Property Rights Advisor, London)

Conférence circumpolaire inuit (ICC)/Inuit Circumpolar Conference (ICC)
Violet FORD (Ms.) (Consultant, Ottawa)

Conseil européen de l'industrie chimique (CEFIC)/European Chemical Industry Council (CEFIC)
Dieter LAUDIEN (Chairman, International Property Task Force, Brussels)
François CHRÉTIEN (Former Chair of IP Group, Brussels)

Conseil SAME/SAAMI Council
Mattias ÅHREŃ (Legal Adviser, Stockholm)

CropLife International
William TEOLI (Syngenta, Greensboro)

Fédération ibéro-latino-américaine des artistes interprètes ou exécutants (FILAIE)/Ibero-Latin-American Federation of Performers (FILAIE)
Luis COBOS (Presidente, Madrid)
Miguel PÉREZ SOLÍS (Asesor, Madrid)
Paloma LÓPEZ (Sra.) (Asesora, Madrid)

Fédération internationale de l'industrie du médicament (FIIM)/International Federation of Pharmaceutical Manufacturers Associations (IFPMA)
Eric NOEHRENBERG (Director, Intellectual Property and Trade Issues, Geneva)
Florent GROS (Novartis, Geneva)

Fédération internationale de l'industrie phonographique (IFPI)/International Federation of the Phonographic Industry (IFPI)
Maria MARTIN-PRAT (Mme) (Deputy General Counsel, Director of Legal Policy, London)

Fédération internationale des conseils en propriété industrielle (FICPI)/International Federation of Industrial Property Attorneys (FICPI)
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Fédération internationale des musiciens (FIM)/International Federation of Musicians (FIM)
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Thomas DAYAN (adjoint au secrétaire général, Paris)

First Nations Development Institute
Jo RENDER (Ms.) (Program Officer, Corporate Engagement, First Peoples Worldwide, Fredericksburg)

Genetic Resources Action International (GRAIN)
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GROUPEMENT INTERNATIONAL DE TRAVAIL POUR LES AFFAIRES INDIGÈNES (IWGIA)/INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS (IWGIA)
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Indian Movement "Tupaj Amaru"
Lazaro PARY ANAGUA (General Coordinator, Geneva)

INDIGENOUS PEOPLES' BIODIVERSITY NETWORK (IPBN)
Alejandro ARGUMEDO (Coordinator, Cusco)
Catherine BONNARD (Mme) (médecin, Antenne technology, Genève)
Francois WEBER (Geneva)
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INDUSTRIE MONDIALE DE L'AUTOMÉDICATION RESPONSABLE (WSMI)/WORLD SELF MEDICATION INDUSTRY (WSMI)
Yves BARBIN (représentant, Pierre Fabre Santé, Plantes et Industrie, Gaillac)
Barbara STEINHOFF (Mrs.) (Bundesfachverband der Arzneimittel-Hersteller BAH, Bonn)

Institut international des ressources phytogénétiques (IPGRI)/International Plant Genetic Resources Institute (IPGRI)
Michael HALEWOOD (Scientist, Legal Specialist, Rome)

INSTITUT MAX PLANCK DE DROIT ÉTRANGER ET INTERNATIONAL EN MATIÈRE DE BREVETS, DE DROIT D'AUTEUR ET DE CONCURRENCE/MAX-PLANCK-INSTITUTE FOR FOREIGN AND INTERNATIONAL PATENT, COPYRIGHT AND COMPETITION LAW
Silke VON LEWINSKI (Ms.) (Head, Department of International Law, Munich)

Institute for African Development (INADEV)
Paul KURUK (Executive Director, Professor, Cumberland School of Law, Birmingham)

Institute for Agriculture and Trade Policy (IATP)
Shefali SHARMA (Ms.) (WTO Program Officer, Geneva)

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

Médecins sans frontières (MSF)
Ellen 'T HOEN (Ms.) (Coordinator, Globalisation Project, Access to Essential Medicines Campaign, Paris)
Manon A. RESS (Ms.) (Advisor, Access to Essential Medicines Campaign, Washington, D.C.)

Mejlis of the Crimean Tatar People
Mustafa DZHEMILEV (Chairman, Simferopol)
Eldar SEITBEKIROV (Deputy Chief Director, "Golos Krima" newspaper, Simferopol)
Nadir BEKIROV (Head of Department on Political and Legal Issues, Simferopol)
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Organisation internationale de normalisation (ISO)/International Organization for Standardization (ISO)
Timothy J. HANCOX (Technical Programme Manager, Standards Department, Geneva)

Programme de santé et d'environnement/Health and Environment Program
Albert TAMBA CHINDE (Project Coordinator, Yaoundé)
Marie NKENGNE MADZO (Mlle) (juriste, Yaoundé)

Promotion des médecines traditionnelles (PROMETRA)
Prosper HOUETO (biologiste, environnementaliste, Dakar)

Union des confédérations de l'industrie et des employeurs d'Europe (UNICE)/Union of Industrial and Employers' Confederations of Europe (UNICE)
Bo Hammer JENSEN (Director, Novozymes A/S, Bagsvaerd)

Union internationale des éditeurs (UIE)/International Publishers Association (IPA)
Benoît MÜLLER (Secretary General, Geneva)
Hugh JONES (Copyright Counsel, International Group of Scientific, Technical and Medical Publishers (STM) and the Publishers Association (UK), London)
Carlo SCOLLO LAVIZZARI (Legal Council, Geneva)

Union mondiale pour la nature (IUCN)/World Conservation Union (IUCN)
María-Fernanda ESPINOSA (Ms.) (Indigenous Peoples Advisor, Social Policy Programme, Gland)
Tomme YOUNG (Ms.) (Gland)
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WWF - Fonds mondial pour la nature/WWF - World Wide Fund for Nature
Gonzalo OVIEDO-CARRILLO (Head, People and Conservation Unit, Gland)
Aimée GONZALES (Ms.) (Senior Policy Adviser, Trade and Environment, Gland)
Paul SANCHEZ NAVARRO (Coordinator, CBD Project, Gland)
Elizabeth REICHEL D. (Ms.) (Consultant, People and Conservation, Gland)

World Federation for Culture Collections (WFCC)
Philippe DESMETH (Chairman, Patent and Industrial Property Committee, International Cooperation Programme Officer, Belgian Coordinated Collections of Microorganisms (BCCM), Brussels)

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

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

Nuno PIRES DE CARVALHO, chef de la Section des ressources génétiques, de la biotechnologie et des savoirs traditionnels connexes, Division des questions mondiales de propriété intellectuelle, Bureau des affaires juridiques et structurelles/Head, Genetic Resources, Biotechnology and Associated Traditional Knowledge Section, Global Intellectual Property Issues Division, Office of Legal and Organization Affairs

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