

## **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**Nineteenth Session**  
**July 18 to 22, 2011, Geneva**

### **REPORT**

*Adopted by the Committee*

1. Convened by the Director General of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) held its nineteenth session in Geneva, from July 18 to 22, 2011.

2. The following States were represented: Afghanistan, Algeria, Argentina, Australia, Austria, Azerbaijan, Barbados, Belgium, Bolivia (Plurinational State of), Bosnia, Brazil, Botswana, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Ethiopia, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Haiti, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Kenya, Kuwait, Lebanon, Malaysia, Morocco, Mexico, Monaco, Mongolia, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Republic of Moldova, Saudi Arabia, Sudan, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Swaziland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Togo, Tunisia, Turkey, United Kingdom, Uruguay, United Republic of Tanzania, United States of America, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe (100). The European Union and its 27 Member States was also represented as a member of the Committee.

3. The following intergovernmental organizations (“IGOs”) took part as observers: African Regional Intellectual Property Organization (ARIPO), African Union Commission (AUC), European Patent Office (EPO), United Nations Environment Program (UNEP), United Nations University, World Trade Organization (WTO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD) and South Centre (9).

4. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Amauta Yuyay, American Folklore Society (AFS); Art-Law Centre; Assembly of First Nations (AFN); Association for the Development of the Angolan Civil Society (ADSCA); International Association for the Protection of Intellectual Property (AIPPI), Azerbaijan Lawyers Confederation, Chamber of Commerce and Industry of the Russian Federation (CCIRF); Civil Society Coalition (CSC); *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ)*; Coordination of African Human Rights NGOs (CONGAF); Creators Rights Alliance (CRA); CropLife International; El-Molo Eco-Tourism, Rights and Development; Ethnic Community Development Organization (ECDO); Foundation for Aboriginal and Islander Research Action (FAIRA); Friends World Committee for Consultation (FWCC); Ibero-Latin-American Federation of Performers (FILAIE); GRTKF International; Indian Council of South America (CISA); Indian Movement “*Tupaj Amaru*”; Indigenous Peoples Council on Biocolonialism (IPCB); Institute for African Development (INADEV); *Instituto Indígena Brasileiro para Propriedade Intelectual (INBRAPI)*; Intellectual Property Owners Association (IPO); International Association for the Protection of Intellectual Property (AIPPI); International Center for Trade and Sustainable Development (ICTSD); International Chamber of Commerce (ICC); International Committee of Museums of Ethnography (ICME); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Federation of the Phonographic Industry (IFPI); International Federation of Reproduction Rights Organisations (IFRRO); International Publishers Association (IPA); International Society for Ethnology and Folklore (SIEF); International Trademark Association (INTA); International Union for Conservation of Nature (IUCN); International Video Federation (IVF); IQ Sensato; Knowledge Ecology International (KEI); L’auravetl’an Information and Education Network of Indigenous People (LIENIP); Library Copyright Alliance; Max Planck Institute for Intellectual Property, Competition and Tax Law (MPI); Métis National Council (MNC); Mbororo Social Cultural Development Association (MBOSCUDA); *Organizaciones Indígenas de la Cuenca Amazónica (COICA)*; Queen Mary Intellectual Property Research Institute (QMIPRI); Rromani Baxt; Sámi Parliament; The International Committee for the Indigenous Peoples of the Americas (INCOMINDIOS); The Saami Reproduction Rights Organization; Third World

Network (TWN); Traditions for Tomorrow; Tulalip Tribes; World Self-Medication Industry (WSMI) (56).

5. The list of participants is annexed to this report as Annex I.

6. Document WIPO/GRTKF/IC/19/INF/2 Rev. provided an overview of the documents distributed for the nineteenth session.

7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions and provides the essence of interventions, without reflecting all the observations made in detail or necessarily following the chronological order of interventions. Certain delegations handed opening statements in to the Secretariat. As these all addressed the Future Work item on the Agenda, they are included under that item in this report.

8. Mr. Wend Wendland of WIPO was Secretary to the nineteenth session of the IGC.

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

9. The Chair, His Excellency Ambassador Philip Richard Owade, opened the session and invited the Director General of WIPO, Mr. Francis Gurry, to take the floor.

10. The Director General welcomed the participants to the session, noting that it had been 10 years since the establishment of the IGC. He recalled that the 2009 WIPO General Assembly had given the IGC its strongest mandate yet. The mandate foresaw text-based negotiations and an intense work program including Intersessional Working Groups (IWGs). Unprecedented progress had been made under that mandate since September 2009, especially within the last 18 months. There were now single negotiating texts for each of the three main topics. He said that it had been an extremely intense schedule and extended his thanks to all delegations for their very active and energetic involvement. This had taken place in an excellent and constructive atmosphere which had helped achieve results. He also acknowledged the effective contribution of indigenous experts who had participated in the process and, renewed the appeal for further funding for the WIPO Voluntary Fund for Accredited and Indigenous Communities (the Voluntary Fund) to enable the participation of indigenous experts in future meetings. The mandate of 2009 foresaw that the IGC would submit a text(s) of an international legal instrument(s) which would ensure the effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs), and also that the WIPO General Assembly would decide on convening a Diplomatic Conference. Being the last session of the IGC before the General Assembly, the delivery of the biennium's work to the General Assembly with a view to future work was certainly an extremely important item that the IGC would be considering. Mr. Gurry lastly extended his gratitude to Ambassador Owade for ably chairing the IGC during the last meetings, noting that he had presided over the most productive years of the IGC, the ones that had taken the IGC the furthest distance. He had done so with extraordinary energy and commitment. In addition, the Chair had consulted many of the participants, in particular in the course of the last week. He wished the participants a very constructive and productive session.

11. The Chair, in his opening remarks, noted that delegations had shown tremendous commitment, resourcefulness and resolve to make progress. However, the work and progress made so far had to be sustained. At this final stage, the IGC had two challenges to overcome - the IGC had to make progress on substance by taking forward to the WIPO General Assembly a cleaner, neater and elegant text that should reflect an outcome the IGC would be proud of. At the same time, a decision had to be taken for the General Assembly on future work that would preserve the integrity and continuity of the work of the IGC. He was confident that he could count on the individual and collective effort of the IGC. The IGC owed it to future generations and to humanity to succeed and failure was not an option. He recalled that, at the last session

of the IGC in May 2011, he had been asked to discuss with delegations the work program, expected objectives and working methodology for the present session. Accordingly, he had consulted with Geneva-based delegations on two occasions, on June 24, 2011 and on July 15, 2011. In addition, since the last meeting, Member States had organized two important opportunities for consultation and discussion of technical and procedural issues: first, Oman had organized a Symposium on databases and documentation, a report of which was made available to the present session of the IGC as document WIPO/GRTKF/IC/19/INF/10. Second, Indonesia had hosted a meeting in Bali, Indonesia of Like-minded Countries (LMCs), which had resulted in the Bali Recommendation, made available as document WIPO/GRTKF/IC/19/8. The respective Member States were thanked for having organized these meetings as they were all helpful in advancing the work of the IGC. In his capacity as IGC Chair, he had been invited to both meetings, but because they occurred on almost the same dates, he regrettably had only been able to attend the meeting in Bali. He was impressed by the outcome of that meeting in terms of substance and process. These consultations, both in Geneva and elsewhere, had proved invaluable to him in the preparation for the present session. He had taken note of the various comments and suggestions, and would later make proposals on the program for the week and the working methodology. He recalled that under the IGC's current mandate, the IGC was required to report to the General Assembly taking place in September 2011, which was expected to take important decisions on the future of the IGC's work. IGC 19 was expected, therefore, to discuss and reach agreement, under the Future Work agenda item, on the decision to transmit to the Assembly. At the present session, the IGC also had to make real progress in its "text-based negotiations" on TK, TCEs and GRs. The challenge at hand was, therefore to devise a work program and a working methodology that were transparent, credible, inclusive and efficient in order to make good use of the time available. He stressed that the present session was a working, negotiating session and he hoped for a constructive working atmosphere. To this end, no opening statements were provided for in the draft Agenda. Member States wishing to make opening statements were advised to hand them in to the Secretariat and they would be reflected in the report, as had happened at IGC 18. In acknowledging the importance and value of the indigenous representatives present at the meeting, he recognized the concerns they had on the substance of the work, as well as on the procedure. He reiterated that, in so far as drafting proposals were concerned, observers' proposals could remain in the text if supported by a Member State. On that understanding, he would continue to enable observers to make statements and proposals at all times, and ensure that they could do so interspersed with Member State proposals. He also strongly encouraged Member States and observers to interact with each other informally, as this increased the chances that Member States would be aware of, understood and perhaps supported observer proposals. Consultations were important to increase the chances that valuable statements by indigenous representatives were supported and included in the text(s). He also intended to meet with the indigenous representatives during the course of the week.

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

*Decision on Agenda Item 2:*

*12. The Chair submitted the draft Agenda circulated as WIPO/GRTKF/IC/19/1 Prov. 4 for adoption and it was adopted.*

### **AGENDA ITEM 3: ADOPTION OF THE REPORT OF THE EIGHTEENTH SESSION**

13. The Delegations of Canada and Mexico made corrections to the report.

*Decision on Agenda Item 3:*

*14. The Chair submitted the draft report of the eighteenth session of the IGC for adoption and, subject to the corrections mentioned, it was adopted.*

### **AGENDA ITEM 4: ACCREDITATION OF CERTAIN ORGANIZATIONS**

*Decision on Agenda Item 4:*

*15. The IGC unanimously approved accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/19/2 as ad hoc observers, namely: Botswana Khwedom Council; Center for Studies and Research in Law of the Intangible (CERDI); and Culture of Afro-Indigenous Solidarity (Afro-Indigène).*

### **AGENDA ITEM 5: PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES: VOLUNTARY FUND**

16. The Chair introduced documents WIPO/GRTKF/IC/19/3 and WIPO/GRTKF/IC/19/INF/4.

17. In accordance with the decision of the IGC at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63) IGC 19 was preceded by a half-day panel of presentations, chaired by Mr. Tomás Alarcón, President of Juridical Commission for Self-Development of Andean Indigenous First Peoples (CAPAJ), Tacna, Peru. The presentations were made according to the program (WIPO/GRTKF/IC/19/INF/5). The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is contained below in the form received:

“The theme for the panel discussion was “Making *Sui Generis* Protection Work: Best Practices in Community-Led Strategies for the Protection of Traditional Knowledge and Traditional Cultural Expressions”. The panel comprised: Angela R. Riley, Professor of Law, Director of the American Indian Studies Center, University of California, Los Angeles, United States of America; Ms. Valmaine Toki, Member of the United Nations Permanent Forum on Indigenous Issues (UNPFI), 2011-2013, and Lecturer, Faculty of Law, University of Auckland, New Zealand; Mr. Willem Collin Louw, Chair, Working Group of Indigenous Minorities in Southern Africa, Secretary, South African San Council, and Member of the Provincial House of Traditional Leaders, Upington, South Africa; and Ms. Lucia Fernanda Inácio Belfort, Executive Director, *Instituto Indígena Brasileiro para Propriedade Intelectual* (INBRAPI), Chapecó, Brazil.

Professor Riley, the keynote speaker, stated that *sui generis* systems grew out of societal structure and intergenerational obligations. They had to be flexible and dynamic as well as communal and collective. Furthermore, she distinguished between non-codified *sui generis*

customary law, codified customary law, statutory law as well as positive law, with the possibility of these being interrelated. Professor Riley referred to a global revolution, linking tangible and intangible property rights to human rights. She referred to property law as a means of protecting both tangible and intangible cultural resources. In this respect, she specifically highlighted Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). She also emphasized the importance of land, which was intertwined with TK, as well as the access to information and legal fora. Three central points were identified. First, situating Indigenous Peoples' TK in a framework with a connection to place as well as intellectual property law. She mentioned the connection to sacred tangible knowledge which facilitated the creation of sacred intangible knowledge. According to her, Indigenous Peoples' rights did not fit neatly into the established international property law. Second, she touched upon discussions of TK protection in community-led examples. This process included appreciating the diversity of the world's indigenous groups, employing new models of consultation and collaboration, and tailoring rights and remedies. Regarding new models of consultation and collaboration, she presented examples, such as the *Hopi Cultural Preservation Office's Protocol for Research, Publication and Recordings*. Concerning tailoring rights and remedies, she referred to *sui generis* trademark protection. She also stressed the existence of regional laws, such as the Pacific Model Law. Third, she referred to future ongoing issues of concern and research emphasizing the following crucial areas for future research: ensuring rights to land and resources, reconciling Indigenous peoplehood in a world of nation-states, and contemplating the proper relationship with existing intellectual property regimes. In conclusion, Professor Riley highlighted that intangible resources were the heart and soul of Indigenous peoples; they would continue to be exploited if left unprotected.

Ms. Toki affirmed that the relationship *Maori* as an indigenous people had with their TK was an indigenous right. Despite the guarantees articulated in the Treaty of Waitangi that *Maori* had "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other taonga" in accordance with Article 31 of the UNDRIP, the Wai 262 report found that *Maori* did not have exclusive possession or ownership. Some key findings from the Report included the use and implementation of the concept of *kaitiaki* or caretaker throughout the existing legal system. The Tribunal Report recommended the establishment of a Commission with adjudicative, administrative and facilitative functions. However, the current legislative framework, such as Section 17 of the Trademarks Act, contained similar provisions. She concluded that indigenous rights to TK should be recognized by a *sui generis* right that was equivalent to that of exclusive possession or ownership. She referred to recommendation 28 of the tenth session of UNPIL welcoming WIPO, in accordance with the UNDRIP, to engage with Indigenous peoples on matters concerning intellectual property, GRs, TK and folklore, and called for equal participation of Indigenous peoples within the WIPO process.

Mr. Collin Louw gave the background and current status of the San people. Regarding TK, he stressed the negative impact of the recording of the San plant and medicinal knowledge by bioprospectors which led to the transfer of such knowledge to the public domain. As a response and in order to promote unity, the San formed a regional organization representing the San Councils from each country. Furthermore, the San established a team which engaged in negotiations with the Council for Scientific and Industrial Research (CSIR). The San negotiation team entered an agreement with the CSIR, and as a result they gave the San 6% of the royalty income from the *Hoodia* plant patent. According to him, the current challenges comprised government compliance, recording of TK, and finally, shared TK. He concluded that it was not possible to separate TK from the broader heritage rights that were owned by Indigenous peoples.

Ms. Inácio Belfort addressed the issue of creating an international *sui generis* regime that would protect TCEs, TK and GRs of Indigenous peoples and local communities which respected the established principles of international law as it relates to Indigenous peoples (such as the ILO Convention 169 of 1989, Article 2, 4, 6, 7, 13 and 15). The social, cultural, and environmental

contexts of each country had to be taken into account. Full and effective participation of Indigenous peoples and local communities required initiatives that were socially and culturally adequate for capacity-building. She referred to the “Fag Tar Project” as a good example of a capacity-building activity promoting respect for diversity with emphasis on gender issues which was being developed in preparation for Rio+20 and CBD COP11. The customary law, customs and practices of Indigenous peoples should be considered as a source of solutions and should be respected during proceedings on free, prior informed consent. Brazil’s environmental diversity related to its cultural diversity, with areas of high importance located within Indigenous lands and within reserves managed by local communities. She noted that among the lessons learnt from years of working in capacity-building with Indigenous peoples and local communities in the fifty regions of Brazil and Latin America, it was important to recognize the existence of guidelines, such as gender equality and respect of cultural diversity, applicable to Indigenous peoples and local communities for the creation of a future regime for the protection of TK, TCEs and GRs”.

18. The Advisory Board of the WIPO Voluntary Fund met on July 19 and July 20, 2011 to select and nominate a number of participants representing indigenous communities to receive funding for their participation at the next session of the IGC, subject to the renewal of the IGC’s mandate by the 2011 WIPO General Assembly and provided that additional funds in the Voluntary Fund became available.

19. Following the Advisory Board’s deliberations, it proposed to the Director General of WIPO for consideration and approval that, with a view to facilitating examination of the applications to the Voluntary Fund by the Advisory Board, revision of the format and content of the application forms be undertaken, and that application forms completed in any of the official UN languages other than English be translated into English. The Board’s deliberations were reported in document WIPO/GRTKF/IC/19/INF/6.

*Decision on Agenda Item 5:*

*20. The Committee took note of documents WIPO/GRTKF/IC/19/3, WIPO/GRTKF/IC/19/INF/4 and WIPO/GRTKF/IC/19/INF/6. The Committee strongly encouraged and called upon members of the Committee and all interested public or private entities to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.*

*21. The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Sjamsul HADI, Deputy Director, Ministry of Culture and Tourism, Jakarta Pusat, Indonesia; Mr. Benny MUELLER, Legal Advisor, Legal and International Affairs, Swiss Federal Institute of Intellectual Property, Bern, Switzerland; Mr. Raúl MARTÍNEZ, First Secretary, Permanent Mission of the Republic of Paraguay, Geneva; Mr. Mandixole MATROOS, Permanent*

*Mission of the Republic of South Africa, Geneva;*  
*Dr. Emin TEYMUROV, Attaché, Permanent Mission of the Republic of Azerbaijan, Geneva;*  
*Ms. Debra HARRY, Executive Director, Indigenous Peoples Council on Biocolonialism (IPCB), Nixon, United States of America;*  
*Mr. Les MALEZER, Chairperson, Foundation for Aboriginal and Islander Research Action (FAIRA), Woolloongabba, Australia; and,*  
*Mr. Ngwang Sonam SHERPA, Chairperson, Nepal Indigenous Nationalities Preservation Association (NINPA), Kathmandu, Nepal. The Chair of the Committee nominated Mr. Vladimir Yossifov, Vice Chair of the Committee, to serve as Chair of the Advisory Board.*

## **AGENDA ITEM 6: TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE**

22. The Chair referred to document WIPO/GRTKF/IC/19/4 “The Protection of Traditional Cultural Expressions: Draft Articles”. He stressed that the overall aim was to undertake real text-based negotiations and to reduce the complexity of the current drafts by reducing the number of options in the articles or by drafting them in such a way that the alternatives were clearly identified and visible. The IGC had to transmit to the General Assembly texts that were as clean as possible, although there were still numerous policy questions to be resolved. During the session, he would suggest key issues for discussion in plenary. Relevant articles would be up on the screen, and concise textual proposals could be made. Following that discussion, a facilitator would be asked to produce a cleaner version of the articles. The facilitator would use the version of the text as it was at that stage on the screen. He would leave it to the facilitator to consult with interested delegations (Member States and observers), as he or she wished. The meetings between the facilitator and interested delegations would be informal. He expected the facilitator to attempt the drafting and then discuss with interested delegations and did not wish to replicate the large informal drafting groups that had taken place at IGC 18. He emphasized that it was not the facilitator's job to reach consensus, but rather to try to draft the text in such a way that it would gain the acceptance of the plenary. Later in the week he would ask the facilitator to present the articles to the plenary, which could, if it so wished, accept the revised articles as the next draft for the future work of the IGC. On the other hand, a Member State could decide that it preferred the original text that had been on the screen before the facilitator had begun his or her work. In that case, the facilitator's drafts would not be taken up and would only appear in the report of the session. If that methodology worked well for TCEs, the same could be tried for TK and GRs. Following consultations, the Chair proposed that Ms. Kim Connolly-Stone (New Zealand) facilitate the work on TCEs. Ms. Connolly-Stone had been the rapporteur on TCEs at IGC 17 and had produced an excellent summary of the issues, which had been included in the report of that session. He asked the participants to give her the support needed. He also invited her to listen carefully to the discussion that would take place in the plenary and to return to the plenary with her redrafted articles later in the week. He then proposed addressing certain key issues raised in some of the most important articles. The other issues and articles would have to be addressed at a later stage, should the mandate of



the IGC be renewed. In his view, the articles that were the most critical, as indicated by many delegations over the years, were Articles 1, 2, 3 and 5. These dealt respectively with critical issues: protected subject matter, beneficiaries, scope of protection and exceptions and limitations. Many, if not all, of the same issues also arose in the TK text, and while that text would be dealt with separately, the work on TCEs would no doubt help in the work on the TK text. At some stage, the IGC could consider discussing the two texts together, but that was not yet practically feasible. Article 1 had links with Article 2 and defined the scope of protected TCEs. Paragraph 1 set out a description of the potential subject matter, listing its characteristics, such as being “transmitted from generation to generation,” for example. Then, a long list of examples was heavily bracketed and underlined. Did that mean that the list of examples was not appropriate for an instrument at an international level which would aim at giving a broad framework to enable Member States to implement specificities at the national level? The IGC could reflect on whether the definition of TCEs should include a list of examples, as was the case in subparagraphs (a) to (d); or should remove the specific examples which were currently listed, but keep the general introductory categories of TCEs such as “phonetic or verbal expressions”, “musical or sound expressions”, “tangible expressions”, and “expressions by action”; or should leave it to national legislation to specify the type of expressions that could be the subject matter of protection, essentially removing the lists of examples. The general idea that many delegations had expressed in the past was that the international instrument would provide the broad framework, which each country could use to define more specific objects of protection, according to its national specificities. In other words, examples could appear in national legislation. That would allow a much more concise text at the international level and could perhaps satisfy the range of specific cultural elements present on each member country's territory. The Chair posed the following question: could the list of examples in Article 1(1) be removed? He then opened the floor for comments.

23. Ms. Connolly-Stone responded to the invitation to be the facilitator for TCEs. It was an honor to assist the Chair to bring some clarity to the documents. What the Chair had proposed sounded feasible and, if there was consensus in the IGC to take that role, she would be happy to accept.

24. The Delegation of the United States of America found the Chair's question interesting. However, it wanted to know the exact language that would replace the specific references in Article 1 should the list of examples be deleted. It was a good idea which it wanted to discuss further.

25. In response, the Chair stated that he left it to Member States as they would be better placed to answer the question.

26. The Delegation of Canada supported the Chair's introductory remarks. The Chair was asking the right questions in trying to frame the discussion around Article 1. It had been consistent in calling for a simple and broad definition of the subject matter. As clearly indicated, an international instrument should be flexible enough to accommodate the various situations across the world. In that respect, it certainly supported removing the long ‘laundry list’ of examples. It encouraged participants to keep in mind that the forum was WIPO, and, therefore, the IGC needed to think of the subject matter of protection relating to IP when coming up with a definition.

27. The Delegation of the Bolivarian Republic of Venezuela stated that if Article 1 was general enough, it would not make sense to put a list of things that would have a limiting effect. Listing things in legal terms implied limitations. For Article 1, it was better to delete the examples to avoid confusion.

28. The Delegation of Japan, concerning Article 1(1), thought that the scope of TCEs was still vague and too large. For example, the requirement of being “traditional” and the scope of the

public domain were not yet clear. It had repeatedly mentioned that the scope of TCEs had to be clearly defined to such an extent that predictability and certainty were ensured.

29. The Delegation of Oman thought the examples given were very useful. It was not an exclusive list, and it did allow some clarity.

30. The Delegation of South Africa, speaking on behalf of the African Group, said that it had made a consistent argument that certainty had to be obtained on definitions that were still unclear. The list of examples was only illustrative and indicated the areas which needed to be clear. The examples should therefore be maintained.

31. The representative of INBRAPI supported comments by the Delegation of South Africa, on behalf of the African Group. The list provided certainty and clarity. In addition, it agreed with Article 31 of the UNDRIP, which included examples but did not exclude other TCEs that had not been listed. Therefore, she preferred keeping the list, and even perhaps adding other items that were not yet there.

32. The Delegation of Trinidad and Tobago said that while it appreciated the view that there was a need to simplify the text, simplicity could not be sacrificed for certainty. In that regard, it wished to see the items expressed remain in subparagraphs (a) through (d). It agreed on that point with the Delegations of Oman and of South Africa.

33. The Delegation of Sudan commented on the use of the term “unique” which it wished to replace it with the term “original”.

34. The representative of Ibero-Latin-American Federation of Performers (FILAIÉ) made an observation regarding the use of the words “and knowledge”. TCEs and TK had to be clearly distinguished. The protected subject matter would be “any form, tangible or intangible, or a combination thereof in which traditional culture and TCEs (replacing TK) are embodied...”; “and knowledge” would be deleted from that paragraph. As regards the examples listed, they should be kept, but the list should be limited to the category labels, *i.e.*, (a) phonetic or verbal expressions; (b) musical or sound expressions; (c) expressions by action; (d) tangible expressions. And, in all of those subparagraphs, one should add “irrespective of whether they are fixed or unfixed”.

35. The Delegation of the Islamic Republic of Iran stated that TCEs covered a wide range of expressions, which was the reason why the list was indicative. It believed that having the list helped States to better identify other examples and better implement the future instrument domestically and internationally. The examples had to be kept in the text.

36. The Delegation of the European Union and its 27 Member States (the EU), in relation to paragraph 1, supported the second option proposed by the Chair, which was to remove the specific examples currently listed but keep the general introductory categories of TCEs. Generally, the categories were clear but the examples were too detailed and created confusion. They did not clarify precisely the subject matter of protection.

37. The representative of Tupaj Amaru believed that the deletion of the list of protected material was inconsistent with other instruments. In particular, it went against the UNDRIP, which had specific mention of the protectable subject matter. Deleting the list would render it ambiguous. These issues had been on the table since 1982 in committees, conferences and meetings between WIPO and UNESCO where the subject matter of protection had been defined. Despite that work, States seemed to want to take a step back, and make the supposedly binding instrument more vague. The indigenous peoples who had been working on those issues for years were completely opposed to deleting that list. Finally, it would need to be seen how, in future, legislators would interpret the instrument which would be approved at a Diplomatic Conference.

38. The representative of the Indian Council of South America (CISA) stated that the list should be kept and additional items included, as the representative of INBRAPI had said. He did not want nation states or even regional groups to define or restrict what the subject matter of protection was.

39. The Delegation of Australia suggested that the IGC should, in seeking clarity, recall that it was seeking to draft the text of an international instrument, not a domestic law. It was not appropriate for WIPO, being an IP body, to seek to protect all forms of cultural heritage even though they might be recognized in other international instruments and be genuine matters of concern for indigenous and other peoples. The task was to focus on the specific area of cultural heritage that WIPO could properly address. That could be expressed as “traditional artistic creativity”. So the word “artistic” could be added in the fourth line before “creativity”. As to the question of lists and examples, the difficulty was that as the lists got longer, they not only became more cumbersome but they tended to deviate from what was genuine artistic creativity into areas such as sacred places, which may be covered by the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage. However, that was not necessarily a reason for bringing it into an IP instrument. It was safer to stay with the broad outline of the headings in subparagraphs (a), (b), (c) and (d), but to be very cautious of going into detailed examples, leaving that to domestic law.

40. The representative of GRTKF International, following the comments made by the Delegation of Australia and as a beneficiary as defined in Article 2, stated that subparagraphs (a), (b), (c) and (d) had to remain. If they were removed, States would be at liberty to add what they wanted and not having specific guidelines would create confusion. It was important that it remained because it gave credence and strength to Article 1.

41. The representative of IPCB supported the interventions by the representatives of INBRAPI and CISA and voiced her preference for the retention of the list in the text. The list was consistent with Article 1 of the UNDRIP, and put into context the protected subject matter. This gave a framework for the implementation of the instrument.

42. The Delegation of the United States of America had a suggestion based on a precedent in other WIPO international instruments, which had clarifying notes that indicated what the intention of the Member States was in implementing the basic text. The text of subparagraphs (a), (b), (c) and (d) could be put in clarifying notes. It would then be more appropriate to add things as time went on.

43. The Delegation of Barbados saw value in having the choice that provided clarity at the national level. It was clear that examples of TCEs included not only poetry and riddles, but also sports and games and works of mas. It supported the interventions made by the delegations of Trinidad and Tobago and other countries and observers who had supported the retention of the list of examples. The proposal by the Delegation of the United States of America was one possibility that could be considered, but for the time being, it supported simply leaving the examples in the text.

44. The representative of the Arts Law Center of Australia wished to include “arts and crafts” and “signs and symbols”. That was relevant to Indigenous Australian artists and creators. The list had to extend beyond existing IP protection to protect those items that fell outside the scope of current IP protection.

45. The Delegation of the Republic of Korea, regarding Article 1.1, believed that the subject matter of protection had to be as specific as possible. The list of examples helped to understand the concept of TCEs more clearly. It preferred including the examples as currently listed.

46. The Delegation of Indonesia supported retaining the list of examples. It also pointed out some redundancy in the wording in the chapeau of the definition itself. It suggested adding “of expressions” after “are any form” in the first line. Following that, in the second line, after “or a combination thereof,” it wished to add “which are indicative of”. That would imply that any form of expression would be indicative. It also wished to put in brackets “in which” as well as “tangible or intangible ... as defined in Article 2.”

47. The representative of INBRAPI referred to the proposal made by the Delegation of Australia to include the word “artistic” in the chapeau. Very many TCEs, such as games or sports or knowledge about traditional medicine, did not necessarily consist of artistic creativity. She insisted that the list be kept to provide legal clarity and certainty.

48. The Delegation of South Africa agreed with the proposal made by the Delegation of Indonesia and by the representative of INBRAPI concerning the word “artistic”. Adding that word would drastically reduce the scope of protection. It wished, in line with the proposition made by the Delegation of Indonesia, that it be bracketed, because it changed the fundamental meaning of the scope of protection by limiting it.

49. The representative of CAPAJ agreed in principle with keeping the list under subparagraphs (a), (b), (c) and (d), pending the determination by the General Assembly of the nature of the legal instrument being drafted.

50. The Delegation of Argentina on paragraph 1 had preliminary comments on the introductory paragraph. It wished to have square brackets around the words “and knowledge”. It was not prepared to accept that notion in the introductory paragraph, even though it would continue to reflect on it. Turning to the list, the Delegation supported keeping the introductory categories but removing the specific examples. It had concerns in relation to several of the listed examples. Therefore, like other delegations, it believed that the intelligent solution would be to simply mention the introductory categories.

51. The Delegation of the Plurinational State of Bolivia said the list had to be kept, because it granted legal certainty. It could not be reduced for cosmetic reasons. Furthermore, it was an indicative, not exhaustive list. Countries in their own legislations could add different subject matter.

52. The representative of Tupaj Amaru had always advocated for the instrument to be specific and in accordance with other international instruments. Therefore, his proposal for the first paragraph was as follows: “The present international instrument has the aim of protecting TCEs/EoF in all their tangible or intangible forms, in which the cultural heritage is expressed, appears or is manifested and which is passed on from generation to generation over time and space”.

53. The Delegation of Morocco supported what had been said by the Delegation of South Africa on behalf of the African Group. Bearing in mind the Chair’s proposal and some of the statements and observations made by other delegations, it proposed an alternative paragraph 1 for consideration: “Member States may foresee a list of objects to be protected, which would cover, in particular: phonetic or verbal expressions, musical or sound expressions, expressions by action, and tangible expressions”.

54. The Delegation of India supported the proposal made by the Delegation of Indonesia adding “of expressions” as well as “which are indicative of”. In light thereof, it wished to place “are embodied” in square brackets. It also believed that adding the word “artistic” would reduce the scope of protection, so it supported the inclusion of the square brackets. It also felt that the phrase “tangible or intangible... as defined in Article 2” had to be deleted. Regarding the square brackets around “and knowledge”, it had been from the very beginning of the view that there were areas of overlap between TCEs and TK. What was not covered in the TK document

needed to be covered under the TCEs document, so it preferred retaining the words “and knowledge” in the text so that TCEs which were not covered under TK received protection under that document. There were a few gray areas which could fall outside of TK protection, and it wished to have them covered in the TCEs document.

55. The Delegation of Thailand stressed that Article 1.1 was about giving a definition of the subject matter of protection, and providing an indicative but not limited list of examples. It wished to keep the chapeau short but broad. Therefore, it did not support adding the words “artistic”, which would limit the definition. But if the chapeau was kept short and broad, then a list of examples was definitely required, which would indicate the subject matter of protection.

56. The Delegation of the United States of America supported reducing significantly the list of expressions in Article 1 and proposed an alternative for subparagraph (d) in an effort to streamline the existing list, it proposed bracketing “tangible expressions such as”. The text would read: “material expressions of art, such as”. It also wished to bracket “sacred places” because that was not something typically seen in an IP document, which would cover human expressions of art.

57. The Delegation of Algeria shared the same ideas as the Delegation of South Africa. First, the text would not be read and applied solely by lawyers or legal practitioners, but by others who were not necessarily experts in IP. Second, pertaining to forms *.i.e.* tangible and intangible forms. It was more consistent to turn subparagraph (d) into subparagraph (a) and, in that case, it wished to delete “tangible expressions such as” because in some cases one would have to explain what the intangible expressions were. So if “tangible” was included, “intangible” also had to be explained. Instead of “such as” the text should read: “in particular” or “particularly” which was commonly used in legal texts.

58. The representative of CISA said that the special Rapporteur Ms. Erica-Irene Daes, in her report “Principles and Guidelines for the Protection of the Heritage of Indigenous People”, had made it clear that sacred places were part of cultural expressions. He reminded delegations that these TCEs belonged to indigenous peoples, and not States or colonizers. Therefore, indigenous representatives should be consulted before any deletion. He supported keeping “and knowledge,” as stated by the Delegation of India. Also, the term “artistic” was limiting, as the representative of INBRAPI had said. “From generation to generation” could not be a criterion, because indigenous peoples had and were continuing to develop their expressions and there were cases where indigenous peoples were initially denied their expression only to be brought back to them a century or two later because of colonization. The proposal by the Delegation of Morocco went against the right of self-determination. Reducing the list would be restrictive, also bearing in mind that some States did not want to have an international monitoring or arbitration body. Therefore, he wished to keep those in the text. As to “tangible expressions such as”, that was another reduction.

59. The Delegation of Brazil questioned why in subparagraph (a), under “phonetic and verbal expressions”, there was “signs and symbols”, which were not phonetic or verbal expressions. This was a question, not a position.

60. The representative of Tupaj Amaru introduced further proposed text as follows: “Legal protection of TCEs against any misuse, as stipulated in the present article, shall be applied in particular to (1) phonetic or verbal expressions [UNESCO uses “oral” expressions] such as stories, popular tales, epics, popular legends, poetry, riddles and other narratives; as well as words, signs, names and sacred symbols; (2) musical or sound expressions, such as songs, rhythms, and indigenous instrumental music; (3) expressions by actions, such as dances, plays, ceremonies, rituals in sacred places, traditional games, and other performances, theater and dramatic works based on popular performances; (4) tangible expressions, such as works of art, in particular drawings, designs, paintings sculptures, pottery, terracotta, mosaics, woodwork and jewelry, architectural and funerary spiritual works. Protection and safeguarding

will be applied to TCEs which constitute the living memory of an indigenous people or a local community and belong to this people or community as forming an intrinsic part of their identity and their cultural, social and historic heritage”.

61. The Delegation of the EU was surprised that the term “artistic”, as proposed by the Delegation of Australia, was so problematic, given that it did appear in Section 2 of the UNESCO-WIPO Model Provisions. On the general addition of text and alternatives in the process, it was not sure on how to proceed. But it wanted to ask what the meaning of Paragraph 1 alt. would be. As it read, there was a chance that it could be seen as meaning that one could pretty much add anything to the scope of protection. That seemed to be the effect of the phrase “Member States may add”.

62. The Chair moved on to paragraph 2, which set out the substantive criteria that specified which TCEs would be protectable. The IGC could look very carefully at the terminology used to designate and capture the key elements of the subject matter as well as related terms such as “characteristic”, “indicative” and “unique”. Were these terms synonymous? And, in that case, which terms should be kept? Alternatively, were there any differences between those terms? He suggested looking for any commonalities that would allow simplifying the text. There was some repetition in the language of the body of paragraph 2 and subparagraphs (a), (b) and (c) of Article 1 as well as with the last paragraph of Article 2. The word “indicative”, for example, was used three times throughout the text. The expression “maintained, used and developed” also appeared in both the body of paragraph 2 and in subparagraph (c). These were just examples that had struck the Chair as being obviously redundant. He suggested that the IGC streamline the language to get rid of the repetition and come up with a clean text on the criteria of protection. Could the IGC, for instance, simply keep the body of Article 1.2 and dispense with subparagraphs (a), (b) and (c)? Or could some of the text be merged? Finally, there was also a long list of potential beneficiaries in subparagraph (c). Perhaps the IGC could simply mention “beneficiaries” and refer to Article 2? This could make the text a lot easier to read.

63. The Delegation of Canada supported most of what the Chair had said. It suggested the following simplified language: “Protection should extend to any TCE which is (a) indicative of the cultural and social identity and cultural heritage of the beneficiaries as set out in Article 2 and (b) maintained or used by the beneficiaries as set out in Article 2”.

64. The Delegation of Indonesia suggested adding the following paragraph: “Protection shall extend to any TCE that is associated with the cultural and social identity of the beneficiaries as defined in Article 2, and is used, maintained or developed by them as part of their cultural or social identity or heritage in accordance with the national law and customary practices”. That would simplify what had been reflected in the discussions.

65. The Delegation of the United States of America supported the proposal made by the Delegation of Canada as it made the language much more streamlined. It, however, wished to replace “indicative of” with “a unique product of”.

66. The representative of the Tulalip Tribes had a problem with both “unique” and “indicative”. The term “indicative” was related to “indicator” or “pointer”. He also had an issue with the singular “indigenous people”, and believed it should be “peoples”. The problem with “unique” was that some traditions were shared among communities. He represented the Coast Salish people in British Columbia (Canada) and in the United States of America who shared some traditions. The word “unique” limited it to that which was unique or circumscribed to a single community. Should that word remain in the text, there would be very little under that regime that would be protected as far as their traditions were concerned. He therefore preferred the second proposed alternative. He wanted to study it more before accepting the language as it was.

67. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia. However, it thanked the Delegations of Canada and of the United States of America, as well as the representative of the Tulalip Tribes, for their simplified versions. Both proposed amendments could be considered together and perhaps merged.
68. The representative of GRTKF International referred to the Chair's suggestion of eliminating subparagraph (c), and making reference to "beneficiaries as defined in Article 2". He observed that subparagraph (c) referred to "nations" and "states" and made reference to Article 2. In Article 2 "states" disappeared but "nations" remained. He wanted to know what was meant by "nation" because that term was included as a beneficiary in Article 2.
69. The Delegation of Mexico proposed two grammatical corrections. Firstly, it preferred the use of the term "characteristic" over "indicative". It better expressed the concept that it wished to put across: the characteristic product of a people or community. Secondly, it preferred using the word "product" ("*producto*" in Spanish) over "fruit" ("*fruto*" in Spanish).
70. The representative of Tupaj Amaru proposed the following text: "Protection and safeguarding shall apply to all TCEs, which constitute the living memory of an indigenous people or a local community and belong to that people or community as an intrinsic part of their cultural, social and historic identity or heritage". The terms "states", "nations" and "families" should not be included. The IGC had to agree on the terms which would apply to all communities at all times: indigenous peoples and local communities.
71. The Delegation of Australia recognized the importance of the provision in the structure of the entire text, in defining exactly what parts of TCEs should be subject to international protection. Therefore, clarity in the meaning of the terms used was very important. It invited the Delegations of either Indonesia or Thailand to explain the meaning of the text they had added or supported, namely "associated with the cultural and social identity of the beneficiaries". It wondered, for example, if that meant that games such as football that had originated in the European Union should be subject to international protection in their countries or baseball which had originated in the United States of America would be protected cultural expressions in Indonesia or Thailand, or whether they believed those sorts of internationally popular games were so associated with cultures in many different countries that they, in fact, would not be protected. If that was the principle, perhaps TK such as yoga, which was widely practiced, would not be protected.
72. The Delegation of South Africa, speaking on behalf of the African Group, noted the complexity of the issues at hand. It was of the view that the provisions could also be reduced to a paragraph in line with what had been proposed by the Delegation of Indonesia. It was appreciative that the words used in that context were equally important. For instance, the words "unique", "characteristic" and "indicative" were limiting. They reduced the scope of that provision and to that extent "associated" was more open and easily identifiable. But it was being used in the context of the specificities of the cultural and social identity. That provided some clarity on the term "associated".
73. The representative of CISA stated that "nations" needed to be changed to "indigenous nations." Also, the term "product" had to be replaced by another word, which could encompass the spiritual nature of some expressions. Moreover, "land tenure" was linked to "sacred places" in paragraph 1 and had to be examined carefully. In addition, in subparagraph (c), he wished to put brackets around "in accordance with the national law" because it contradicted the right to self-determination. Lastly, the phrase "indigenous people" should not appear in the document.
74. The Delegation of the Islamic Republic of Iran had carefully studied the suggestion made by the Delegation of Indonesia and believed the proposed text was clearer and more streamlined. It could adequately accommodate the existing views and it was also precise enough.

75. The Delegation of Oman underscored the importance of the words used, such as “peoples”, “nations” or “states”. That would have an impact in the future, and therefore the IGC had to be very careful in choosing the right terms. Looking at subparagraph (c), one could see just how important that was. The word “nations” had to be used when appropriate, because it was understood within the Arab world.

76. The Delegation of the EU supported the efforts to streamline the text. However, it could not give any firm indications on the proposals made by the Delegations of Canada and Indonesia. It highlighted its preference for “unique” as a criterion. Concerning the discussion on the term “associated”, it had to be borne in mind that the IGC was not necessarily aiming at being restrictive, but needed a relative degree of legal certainty. Some had mentioned that there could be TCEs which belonged to more than one group or community or people. It wished to reflect over it, but in the meantime, its preference was for “unique”.

77. The representative of CAPAJ commented on the statement made by the Delegation of Oman regarding the word “nations”. That term had a different meaning in Canada. He proposed that in subparagraph 1.2(c), the term “First Nations” be included; they were indigenous peoples constitutionally recognized in Canada.

78. The representative of INBRAPI said that subparagraph (c) raised some issues for indigenous peoples. The representatives of Tupaj Amaru, CISA and GRTKF International had highlighted that the expression “states” was not clear. “States” should not be on that list because they did not develop or produce TCEs, suggesting that perhaps, the issue could be taken up in Article 2. She agreed with the proposal made by the Delegation of Indonesia, with a few reservations. One of those was to replace, after “cultural and social identity of the”, the word “indigenous peoples and local communities” with “beneficiaries”. She asked the Delegation of Indonesia to consider that amendment. Finally, she made reference to the importance of indigenous peoples’ links with the earth and the land, following the statement by the representative of CISA. She wished to add “in conformity with the customary law governing land ownership” at the end of the paragraph. Those changes would make the proposal by the Delegation of Indonesia acceptable.

79. The Delegation of Uruguay referred to subparagraph (c), and following its participation in the IWGs, it understood the inclusion of “nations” and “states” as a way not to exclude countries such as Uruguay, where there were no indigenous communities or peoples, but where there were TCEs which needed to be protected. Therefore, the IGC had to try to better draft the article and in particular mention “nations”, “states”, “indigenous peoples and communities” and “local communities”. That way, everything would be included.

80. The Delegation of Mexico had two proposals. On subparagraph (c), in order to simplify the text and to relieve everybody’s concerns, it proposed deleting the last lines starting from “in accordance with the customary land tenure system or law...”. On paragraph 2, it proposed a comprehensive text of subjects to be protected, as follows: “Protection should extend to any traditional cultural expression which is characteristic of a people or community, including indigenous peoples, local communities and cultural communities.”

81. The Delegation of Thailand responded to the query raised by the Delegation of Australia on the proposed paragraph 2 as presented by the Delegation of Indonesia and supported by the Delegation of Thailand and other countries. It preferred the word “associated” over “unique”, “indicative”, etc. because TCEs were not just a product, but were associated with the holder or beneficiaries. The word “used” was actually proposed at the last session of the IGC and it was in the original text. The new proposal only added “maintained,” so that it would be a more complete sentence for the TCEs that are “used, maintained and developed” by the people.

82. The Delegation of Indonesia agreed with the explanation provided by the Delegation of Thailand.



83. The representative of the *Organizaciones Indígenas de la Cuenca Amazónica* (COICA) touched on “land tenure” as included in subparagraph (c) and said that it was recognized in international law, particularly in the UNDRIP.

84. The representative of GRTKF International was uncomfortable with the way subparagraph (c) was drafted. Indigenous peoples were treated by the UN as indigenous peoples. Other categories were being introduced in the said paragraph followed by indigenous peoples. The IGC had to be very clear as to what it was doing: using “indigenous peoples” as a global category recognized by the UNDRIP, and using other categories introduced it into a secondary position. As an anthropologist and indigenous leader, he was uncomfortable with the way the discussion was going, since he had raised the issue about “nations” and “states” and had not received any explanation. When introducing language, the IGC had to be conscious of the effect it had on the whole text.

85. The Chair opened discussion on Article 2. The scope of beneficiaries was one of the key outstanding policy issues that needed to be dealt with. The identification of the beneficiaries was closely related to the scope of the proposed instrument. One of the issues was the extent to which the scope should expand beyond indigenous peoples and local communities. This included consideration of whether the term “nations” should be included in the definition of beneficiaries. Moreover, the IGC could consider the role of individuals in the creation and holding of TCEs, and of the communal nature of the rights being afforded. The IGC might also wish to consider whether more than one community or people could qualify for protection. That obviously touched upon the allocation of rights for distribution of benefits among communities, which shared the same or similar TCEs in different countries. He observed that these were political questions that the IGC might not be able to make much progress on at that stage, but the opportunity had to be seized to streamline Article 2. The IGC could, for example, decide that Article 2 provide the general definition or description of beneficiaries, including a list of potential beneficiaries, for the purposes of the entire text on TCEs. Therefore, any mention of beneficiaries in other articles would simply refer to “beneficiaries as defined in Article 2”. The Chair noted that in the first cluster of options, the main issue was that option 1 was basically a closed list, whereas option 2 was an open-ended list, introduced by “including / for example”. He posed the following question: could the IGC merge the two options, perhaps by putting the words “including / for example,” in brackets, with a view to eventually eliminating it? There would be benefit in having only one list of potential beneficiaries. In the second set of options, there was a possibility of merging the two options. Further, if option 1 made a reference to customary laws, would it then be possible to dispense with option 2?

86. The Delegation of Indonesia noted that consensus had been reached on Article 2 at the meeting in Bali, Indonesia. The LMCs had fine-tuned the text, merging the two options, in line with their proposal for Article 1.2. That covered TCEs holders, including indigenous and local communities, as well as nations, as proposed by some member countries. The group had come up with that proposal in an attempt to simplify and construct points of mutual understanding. It proposed the following text: “Beneficiaries of protection of traditional cultural expressions as defined in Article 1 shall be indigenous and local communities or, where traditional cultural expressions are not specifically attributable to or confined to an indigenous and local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.” It also proposed a new paragraph 2: “For the purposes of this article, the term “local communities” shall include any classification of social or cultural identity of a Member state as defined by domestic law”.

87. The representative of the Chamber of Commerce and Industry of the Russian Federation (CCIRF) questioned the definitions of terms related to beneficiaries. She could not find in the Glossary (document WIPO/GRTKF/IC/19/INF 7) definitions of “state”, “cultural community” or “nation” and sought to have more clarity.

88. The Delegation of Barbados agreed with having one list of beneficiaries. But that list had to take into account the reality in Barbados. Until a more satisfactory solution was found, it would continue to support options 1 and 2 which included the word "nation". Unfortunately, the proposal made by the Delegation of Indonesia was unacceptable. Article 2 of their proposal was concerned with the TCEs of indigenous and local communities, and national entities where the TCEs were not specifically attributable to an indigenous or local community, or where it was not possible to identify the community. When read as a whole, it did not appear to deal with the TCEs of people who could be identified and who rightfully should be beneficiaries, but who were not indigenous people or part of a local community. The proposal was actually a step backwards.

89. The Delegation of the Islamic Republic of Iran thanked the Delegation of Indonesia for presenting a clearer text for Article 2. It added the phrase "individuals and families" after the words "local communities". That reflected the reality in the Islamic Republic of Iran. They had families and individuals who, generation after generation, had had TCEs of their own, and those TCEs were part of their unique cultural identity.

90. The Delegation of the United States of America generally agreed with the Chair that it would be good for the Article to provide a definition that could be referenced throughout the text, eliminating the need to define beneficiaries in each Article, when indigenous peoples or other terms were utilized. In terms of option 1, it bracketed "communities" and "nations". It also supported generally some of the statements made by the Delegation of Barbados in expressing concerns about some of the other options that were more recently presented, although since those had already been bracketed, it did not wish to reiterate those concerns.

91. The representative of CISA wanted to put "self-determination" back in the document, since it had been taken out. With regard to the concept of "nations", he wished to put in option 1, "indigenous nations", to make the distinction between a State that would characterize itself as a nation and indigenous nations. He did not agree that the issue be determined by domestic or national law.

92. The Delegation of the EU, in response to one of the questions raised by the Chair, agreed that it was an extremely important Article, and the IGC should, throughout the text, as far as possible, refer to that Article as defining beneficiaries. It did not support the inclusion of the word "nations". It made a drafting suggestion for simplification of option 1, first sentence: "Indigenous, local and cultural communities".

93. The representative of CAPAJ said that the Delegation of Indonesia had made a proposal which he was unable to support, because it was domestic law that would determine the beneficiaries. That was outside the scope of the undertaking, which was public international law. Domestic law had to be aligned with international law, and not the other way round. What was being proposed was that indigenous nations should be beneficiaries; they had an identity, beyond that of the country in which they lived. Indigenous communities were a part of indigenous nations. For example, some indigenous nations were spread over four countries, and, consequently, the beneficiaries had to be determined by an international legal instrument, and not by domestic law.

94. The Delegation of the Plurinational State of Bolivia referred to options 1 and 2, which considered individuals as beneficiaries, and was extremely concerned by the use of such a term. Insofar as the beneficiaries were concerned, the use of the term "individual" negated the collective nature of the indigenous communities, the reference to the inheritance or the passing from one generation to the next. It suggested that the word "individuals" be removed or at the very least put in square brackets.

95. The Delegation of Trinidad and Tobago supported the intervention made by the Delegation of Barbados. It understood the plight faced by Caribbean countries in that there

were no distinct indigenous people or local communities. As such, it supported the retention of any option under Article 2, which included the term “nations”.

96. The Delegation of Thailand noted the importance of the Article. It believed that the two options in Article 2 could be merged, as proposed by the Chair. The proposal by the Delegation of Indonesia could be considered for discussion. For that reason, it proposed simplifying and merging the options in the original text, with some of the wording as follows: “Measures for the protection of traditional cultural expressions shall be for the benefit of the peoples and communities, including indigenous and local communities, nations or any other beneficiary of protection, as defined in Article 1, in whom the custody and safeguarding of the traditional cultural expressions are entrusted or presumed to be vested in accordance with the relevant national laws, and/or customary practices”. It added that after the Bali meeting, Thailand had held national consultations where the experts had supported that option.

97. The Delegation of Sudan said that the term “minorities” in option 2 may lead to conflict at the national level, because the term as used in the text differed from the definition used in other international human rights instruments, for example, the UNESCO Declaration of 2001. It recommended deleting it.

98. The representative of Tupaj Amaru said that when speaking about beneficiaries, one had to speak about the rights of the creators. Indigenous peoples had for a long time been deprived of their traditions and TCEs and had their natural resources stolen from them. The beneficiaries from TK and TCEs had initially been the colonizers, and now the agribusiness and pharmaceutical companies. TCEs were of a collective nature, as mentioned by the Delegation of the Plurinational State of Bolivia. What was being covered was a collective activity, and not an individual activity. He did not agree with the inclusion of “individuals” or “families”, since TCEs were collective by definition. Indeed, there were creators like Beethoven or Einstein, but that was a different kind of creativity. He proposed the following draft for consideration: “For the purposes of the present instrument, beneficiaries shall be the possessors, creators, guardians, and holders of traditional cultural expressions/expressions of folklore, which are the indigenous peoples, local communities and their descendants: (a) who have been entrusted with the custody, care and the safeguarding, protection and preservation of TCEs, in accordance with the laws and customary practices and international law on intellectual property, and those who, thanks to law or customary practices and the international intellectual property norms currently in force; and (b) who, according to customary practices and laws, maintain, preserve, develop and use and control TCEs as authentic and genuine elements of their cultural and social identity and their cultural heritage”.

99. In response to the comment made by the Delegation of the Plurinational State of Bolivia on “individuals”, the Delegation of Canada recalled the conclusions of the report of WIPO on TK, page 219: “In some cases individuals can distinguish themselves and are recognized as informal creators, or inventors, separate from the community”. It had on a number of occasions supported the inclusion of “individuals” under Article 2. It reiterated its support for that inclusion, as it would be unfortunate if some individuals, even in exceptional circumstances, were excluded from any benefit which could accrue to them from an international instrument. Thus individuals belonging to such communities had to be retained under Article 2.

100. The representative of FILAIE requested clarification on the last two lines of Article 2, which, as worded in Spanish, were incomprehensible: “In case a traditional cultural expression is specific to a nation, the authority as determined by national law.” Was that a national authority establishing the TCE of a specific community? In any case, the paragraph led to confusion, and he sought clarification, or perhaps a better translation.

101. The Delegation of Switzerland supported the EU and others questioning the inclusion of “nations”. In its view, the beneficiaries should only be indigenous peoples and local communities. Nations, as far as it referred to States, alluded to national protection of cultural

heritage which was of course an important issue, but one addressed by UNESCO and not WIPO. It was aware that indigenous peoples were referred to as nations in some jurisdictions, but they were still covered by the term “indigenous peoples”. In the context of Article 2, “nations” caused confusion. It joined previous speakers regarding the deletion or bracketing of the word “individuals”. In its view, TCEs were collective in nature. Individual authorship was more a copyright issue. That did not exclude the possibility that a particular community could decide who or if an individual inside a community held a specific TCE. It referred to the preamble of the Nagoya Protocol which dealt with that point. That could address the concern raised by the Delegation of Canada.

102. The representative of the Tulalip Tribes supported the intervention by the Delegation of Switzerland. He emphasized that undoubtedly individuals within an indigenous people or local community could hold certain rights, but those would be determined within the collective, and they would not be freestanding rights of individuals such as copyright and personal rights. The same issue pertained to “nations”. In his view it would be very problematic if nations were thought of as holding TK, because they were not transmitting it, and it was not necessarily part of their national identity, in the way that it formed part of the integral identity of indigenous peoples and local communities. He agreed with the Delegation of Switzerland that there were UNESCO treaties that dealt with that kind of national cultural heritage.

103. The representative of IPCB supported the comments made by the Delegation of Switzerland and by the representative of the Tulalip Tribes in relation to the need for clarity on who the beneficiaries were. In the previous sessions, including in the IWGs, it had been clear that the beneficiaries were the owners, the holders and the originators of the TCEs, and not anybody else. She said the term “indigenous peoples” encompassed all types of indigenous peoples and was a standardized phrase within international human rights law. She did not support the use of the word “nations” as beneficiaries of TCEs.

104. The representative of INBRAPI strongly supported the views expressed by the Delegation of Switzerland. There had been many calls for the text to be short, clear and clean; however a lot of wording in the text did not make sense. For example, in Option 2, she did not understand how “relevant national laws and practices” could be the beneficiaries of legal protection. The beneficiaries of legal protection were persons, whether natural or legal, and, as the Delegation of Switzerland had rightly proposed, they were indigenous peoples and local communities. There were inconsistencies in the proposals, and she called upon everyone to respect the earlier proposed framework. There was a need to bring out the collective nature of the knowledge of indigenous peoples and local communities. That had to be clearly expressed. As regards individuals, in Brazil, for instance, even though a shaman was an individual holder of the wisdom, the wisdom was the collective property of the tribe. Therefore individuals should not be the beneficiaries.

105. The Delegation of the Russian Federation supported the views expressed by the Delegation of Switzerland and the representatives of the Tulalip Tribes and INBRAPI, as they were very convincing.

106. The Delegation of the Islamic Republic of Iran stated that collectivity was not the main criteria distinguishing TCEs from other sorts of IP. The main criterion was “being passed from generation to generation,” and other sorts of IP, such as copyright or patents, could not meet that criterion.

107. The Delegation of South Africa agreed with the proposal made by the Delegation of Indonesia. It stated that there was a need to be consistent in the eligibility criteria and the beneficiaries. The eligibility criteria included not only the issue of “passing from generation to generation”, but also social and cultural identities and continued maintenance of those. It agreed with the positions expressed by the Delegation of Switzerland and the representative of

Tulalip Tribes that the ownership of TCEs was collective, and that the individuals held it in custody on behalf of the community and not for their own benefit.

108. The representative of GRTKF International supported the position of the Delegation of Switzerland. Being from Saint Lucia, he addressed the issues of “nations” as presented by the Delegation of Barbados recalling that there were indigenous peoples in Barbados that generated TCEs. He referred to the decree issued by Don Carlos, King of Spain, in the early 1500s, recognizing that countries in the Caribbean, including Barbados, had indigenous peoples. The question was, if there were still indigenous people in Saint Vincent and the Grenadines, in Trinidad and Tobago and in Dominica, where had the indigenous people of Barbados gone? He said there were also local communities in Barbados. He recalled that Barbados was signatory to the CBD and the Nagoya Protocol, which both used the term “indigenous and local communities”. He questioned how that State would implement the Nagoya Protocol, using such a basic term as “indigenous and local communities”. A solution could be found for the situation in Barbados within the context of the WIPO-CARICOM initiative on the establishment of a framework for the protection of TK, TCEs and GRs.

109. The Delegation of Kenya stated that the issue of nations needed to be qualified, as the term had several connotations. It supported the comments made by the delegations of South Africa and of Switzerland on the eligibility criteria and beneficiaries.

110. The Delegation of Australia expressed its hope that it was also recognized as being a consistent supporter for the position under Article 2 that beneficiaries should be indigenous peoples and local communities. The protection provided under Article 1 had to apply to expressions that, as stated by the Delegation of the Islamic Republic of Iran, were passed from generation to generation, and in addition, as supported by the Delegations of Kenya, South Africa and Switzerland, that were distinctive to an indigenous people or local community and continued to be part of the living culture of that people or community. The IGC had to be very careful and probably exclude any provision where the traditional custodians could not be recognized, as that was inconsistent with the continuing living culture. The position of individuals as beneficiaries needed to be seen within a communal ownership context, and therefore, they would probably not be beneficiaries specifically.

111. The Delegation of Panama supported the proposal put forward by the Delegation of Switzerland and other delegations that ownership should be collective. It recalled that Panama had a law and other regulations since 2000 which established a special IP regime for the collective rights of indigenous peoples for the protection and defense of their cultural identity and their TK. It was important to ensure that ownership would be in the hands of the indigenous peoples and that it would be collective, while ‘nations’ would have a much more general meaning.

112. The representative of CISA noted that indigenous peoples and nations had their own laws, and stated that the development of *sui generis* protection had to recognize those laws to protect these indigenous peoples and nations. He proposed the following alternative text: “The law of indigenous peoples or indigenous nations includes the traditional and customary law and its development, including the *sui generis* protection of their traditional cultural expressions”. He believed that the new phrasing could help distinguish between the notion of “nations” as understood by some small island States and “indigenous nations”.

113. The Delegation of Mexico supported the proposal made by the Delegation of Switzerland for its clarity, simplification of the text and its uniformity.

114. The Delegation of Barbados referred to the question raised by the representative of GRTKF International in relation to where the indigenous people of Barbados had gone. There were no identifiable indigenous people in Barbados, and that the vast majority of TCEs could be said to be held by the Barbadian society as a whole. It stated that there would be no progress

on the question of beneficiaries until a satisfactory solution would be found to address the particular situation in Barbados. It referred to the support expressed by the Delegation of Canada regarding individuals. It wondered if the word “societies,” which would be a collection of individuals, could be a better proposal than “nations”. It emphasized that its concerns had to be addressed, as it would not negotiate a treaty for certain countries to the exclusion of itself, and the progress would depend on proposals rather than criticism of the use of the term “nations”.

115. The Chair opened the discussion on Article 3, dealing with the scope of protection of TCEs. It seemed to him that Alternative 3 was a sensible attempt to merge all the ideas and issues contained in both Alternatives 1 and 2, and included language on acknowledgment, offensive use, non-authentic use of TCEs in trade, equitable remuneration and collective copyright-like rights. The Chair suggested the use of Alternative 3 as a basis for future work, and dispensed with Alternatives 1 and 2, as they were rather confusing, especially with references to Articles A, B and C. Moreover, the language on secret TCEs in Alternative 3 was similar to that of Article A. Notably it covered issues such as succession, disclosure, use or other exploitation of secret TCEs. He asked if Article A could be deleted. Working with Alternative 3 would allow the IGC to have a much cleaner text.

116. The Delegation of Australia suggested that the cleaner provision on which to pursue negotiations was actually Article B of Alternative 2: “The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should be safeguarded in a reasonable and balanced manner”.

117. The Delegation of Japan indicated its preference for Articles A and B of Alternative 2. Article 3 constituted one of the most important parts of the instrument, therefore there was a need to seek appropriate wording, especially taking into account the objectives and principles on which substantive provisions were applied. The Delegation reiterated the importance of the general guiding principles and their comprehensiveness. It proposed modifying the wording of Article A for the sake of consistency with the TK text, namely Article 3.1, Option, 3, which it had proposed and supported at the previous session. Its proposal read as follows: “Protected traditional cultural expressions, which are kept secret by beneficiaries/indigenous peoples or local and traditional communities, or nations, should be protected from unauthorized fixation, disclosure, use or other exploitation in an appropriate way”. With regard to Article B, it believed Alternative 2 could be a possible basis for further discussion, and it proposed the following modifications, in the same spirit as Article A: in the first paragraph of the Article, “as appropriate” should be inserted after “safeguarding”; in the second sentence, “as appropriate” should be inserted before “have the right.”

118. The Delegation of the United States of America supported the Delegations of Australia and Japan regarding the first paragraph of Alternative 2 being an elegant and simple way to express the concept that the IGC was looking for and an appropriate alternative to work from.

119. The Delegation of the EU wished to join the Delegations of Australia and Japan in supporting Alternative 2 as an elegant solution.

120. The Delegation of Indonesia, on behalf of the LMCs, accepted Alternatives 1 and 3 in the context of a new proposed paragraph, where Article 3 on the scope of protection would be the first paragraph. Regarding Alternative 1, Article B, the chapeau of paragraph 1 of Article 3 would read as follows: “In respect of traditional cultural expressions, adequate and effective and practical measures should be provided to as follows:”. As to subparagraph (a), the attempt was to elaborate it based on several alternatives, in particular Article A, on secret TCEs. It read as follows: “prevent the disclosure of secret traditional cultural expressions;”. Regarding subparagraph (b), it wished to amend Alternative C as follows: “acknowledge the beneficiaries to be the sources of the traditional cultural expressions;”. The proposed subparagraph (c) referred to Alternative 3 of the original text and read as follows: “protect against the offensive

use of traditional cultural expressions and any distortion, mutilation or other modification of, or derogatory action, including any false, confusing or misleading indications, which in relation to goods or services, suggest any endorsement by or linkage with the beneficiaries in relation with the said traditional cultural expressions which would be prejudicial to the beneficiaries' reputation or integrity". The Delegation also proposed a new paragraph 3 as reflected in Alternative 1, Article B. Paragraph 2 would read: "Member States shall ensure that the relevant beneficiaries have the exclusive and inalienable collective right to authorize and prohibit the following:". As for subparagraph (a) and (b), they would be the ones reflected in Alternative 1, Article B.

121. The representative of FILAIE recalled that the discussion was related to the exercise of moral rights. He suggested that the following line in Article C be deleted: "which would be prejudicial to the beneficiaries, indigenous people or local community's or nation's reputation or integrity". Since the community could oppose any mutilation, modification or use, there was no need to use the phrase "prejudicial to the reputation or integrity". Also, in case of violation it would be extremely difficult to prove prejudice before a court. There was rather a need for reaffirming the rights of local communities. They would not be obliged to prove that there had been a prejudice to their reputation or integrity. That expression could be deleted from Articles C and B, where there was once again a reference to *prejudice*, as it would be very difficult to demonstrate and evaluate that prejudice.

122. The representative of Tupaj Amaru was disappointed to see that there seemed to be a deliberate intent to weaken the scope of legal protection of TCEs. He recalled that the discussions related to an international instrument which contained mechanisms for sanctions in the event of violation of the rights of indigenous peoples. He proposed the following text: "Scope of protection. For the purposes of this instrument, protection of the rights of the owners or holders, hereinafter referred to as beneficiaries, and, in accordance with Article 2, shall apply to the following illicit acts and practices, as stipulated in this article: (a) reproduction, publication, adaptation, interpretation or public performance, communication to the public, distribution, renting, making available of the public domain, including fixed photography of TCEs without the prior informed consent of the owners; (b) any use of TCEs or adaptation of such TCEs for commercial purposes running counter to the interests of the indigenous peoples or local communities which are the legitimate owners of that cultural heritage; (c) any deformation, modification, falsification or mutilation of TCEs or acts of bad faith intending to damage, offend, or prejudice the reputation and the identity and cultural integrity of indigenous peoples or local communities, whatever region they may inhabit; (d) any acquisition by a fraudulent means or violent actions of the intellectual property rights over TCEs shall be sanctioned; (e) any indication or false or improper or misleading use of TCEs for the trade in goods and services without the prior informed consent of the holders shall be subject to both civil and criminal sanctions".

123. The Delegation of the United States of America clarified one of its earlier comments. It emphasized its preference for Alternative 2, Article B, paragraph 1. It also clarified that it wanted to bracket the second paragraph, in its effort to streamline the text.

124. The Delegation of South Africa, with a view to streamlining the text, found the proposal put forward by the Delegation of Indonesia on behalf of the LMCs to be acceptable, and supported that position.

125. The Delegation of the Islamic Republic of Iran supported the proposal made by the Delegation of Indonesia. It also wished to put in brackets the word "collective" in paragraph 2.

126. The Delegation of Thailand associated itself with the proposal by the Delegation of Indonesia. That was the outcome of a rather lengthy debate at the meeting of the LMCs in Bali, Indonesia. It explained that subparagraph 1 was based on the first part of Alternative 3 in the

original text dealing with moral protection, whereas paragraphs 2(a) and (b) indicated the economic and moral protection.

127. The Delegation of Sudan stated that, in the Article, all the rights, including moral and economic rights, were put together, and there was no clear distinction between them. .

128. The Chair opened the discussion on Article 5. In his view, paragraph 5(1) was not controversial and could be discussed at a later stage. He suggested that the IGC focus on paragraphs 2, 3 and 4. Paragraph 2 dealt with uses of protected TCEs that would be permitted, provided they complied with the three-step test. Paragraph 2, alt, dealt with uses of protected TCEs that would be permitted provided they were fair and there had been attribution and respect for the TCEs. Paragraph 3 dealt with uses that would be permitted if they were permitted for copyright works under copyright law, and provided such uses complied with the three-step test. It seemed that paragraph 2, alternative, 2 and paragraph 3 were roughly trying to find the appropriate basis upon which Member States could allow uses of protected TCEs. He believed it was possible to merge these articles and/or select only one as the basis for continuing work. Paragraph 4 dealt with specific exceptions, namely uses related to preservation and safeguarding of cultural heritage, as well as inspiration and borrowing from TCEs. In relation to subparagraph (b), he recalled that the UNESCO-WIPO Model Provisions, 1982, included such an exception for borrowing. The original WIPO draft of Objectives and Principles, in contrast, did not contain such a provision, and neither did the text that had come out of IWG 1. That proposed texts had been added by a delegation at IGC 17, and it would basically allow any third party to create on the basis of a TCE and to claim copyright over its creation, should it be original. That could potentially allow TCEs to be readapted by contemporary creators who would create the derivative works based on TCEs and claim copyright over those derivative works. That was a significant policy question which he asked the IGC to comment on. The addition of “by the beneficiaries or in association with them,” which had been proposed by the Delegation of India, would limit the scope of the exception and also raised important questions which could be considered by the IGC. In his view, subparagraph 4(b) as drafted needed further thought and clarification.

129. The Delegation of Australia believed the issue raised in subparagraph 4(b) was a very important and deserved careful consideration. In Australia it was a fact that indigenous knowledge and art were extremely valuable to the communities, and as many delegations had said the purpose of this protection was to assist the financial independence and viability of indigenous and local communities. With that in mind, it was of great economic importance to those forms of communities that they were able to express their art in new forms, and particularly commercially valuable forms, through new expressions. It would be a significant mistake to attempt to limit and tie down the development of new forms of art by disallowing TCEs to serve as an inspiration. Arguably an inspiration was not a form of misappropriation that the instrument had been seeking to prevent. It also noted that in New Zealand, a very thorough study by the Waitangi Tribunal, after 21 years of careful deliberations, suggested that derivative works should not be subject to the communal rights of traditional holders.

130. The Delegation of the United States of America indicated its preference for the word “customary” over “normal,” to be consistent with other language. It also requested that a change be made to subparagraph 4(a): “The use of traditional cultural expressions in archives, libraries, museums or cultural institutions, including for purposes of preservation, display, research and presentation”. The Delegation also supported subparagraph 4(b).

131. The Delegation of Indonesia, on behalf of the LMCs, wished to include subparagraph (a) in paragraph 1 of the original text, which would then read as follows: “Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions within and among communities in the traditional and customary context by the beneficiaries as determined by customary laws and practices consistent with national laws of the Member States”. It also



proposed to delete subparagraph (b). In relation to paragraph 2, it proposed simplifying the two paragraphs in the original text, which would read as follows: "Limitations on protection should extend only to utilizations of traditional cultural expressions taking place outside the membership of the beneficiary community or outside the traditional or customary context." With regard to paragraph 3, it proposed the following text: "Member States may adopt appropriate limitations or exceptions under international law, provided that the use of traditional cultural expressions does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and does not unreasonably prejudice the legitimate interests of the beneficiaries." With regard to paragraph 4, it made similar changes as to paragraph 1, where the chapeau and subparagraph (a) were incorporated. It read as follows: "Regardless of whether such acts are already permitted under paragraph 3 or not, the making of recordings and other reproductions of traditional cultural expressions for their inclusion in archives and inventories for non-commercial cultural heritage safeguarding purposes should be permitted."

132. The Delegation of Canada noted that a lot of very interesting ideas had been put forth on Article 5. It aligned itself with the comment made by the Delegation of Australia regarding subparagraph 4(b). It was consistent with the spirit of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. It also supported the language suggested by the Delegation of the United States of America on alternative paragraph 4(a). In relation to the new wording suggested by the Delegation of Indonesia, on paragraph 3, it proposed, instead of "does not conflict," the following: "is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community."

133. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia. Specifically, it supported paragraphs 1 and 3 as amended by the Delegation of Canada. However, with regard to the reference to the UNESCO Convention in relation to paragraph 4(b), it wished to give it further consideration, as Thailand was not yet a party to the Convention.

134. The representative of the Tulalip Tribes understood the need for education and research for noncommercial purposes and generally supported their importance. He was concerned about open-ended rights to preserve and display. He gave the example of a stone carving stolen in the late 1800s was by the University of Washington and held in one of their drawers for 75 years. It was a TCE, but to the nation it was a living ancestor and had a living spirit. According to the nation's narrative, it was a living human being that was held in darkness and in captivity for over 75 years. He concluded that, if there were exceptions and limitations, there had to be a covering statement that they could not be offensive to indigenous peoples and local communities, and that these acts could not be permitted when sacred and spiritual forms of expression were dealt with in a non-commercial way or with museums.

135. The Delegation of India supported in principle the proposal made by the Delegation of Indonesia on behalf of the LMCs. In relation to paragraph 4, it expressed its support and appreciation of the need for preservation. However it was not in favor of the very broad exception. With regard to "inspired/borrowed," its concern was that, if the intention was to promote creativity within the community that was covered by paragraph 1. The creation of original works had the potential to completely negate and undermine the protection which would be given under that treaty in the name of inspiration and borrowing. The wording was too broad. Even though the intention was to promote creativity, it could completely undermine the rights guaranteed in the instrument.

136. The representative of the Arts Law Center did not support Article 5, subparagraph 4(b), and wished to see it removed from the text, as it was problematic. The text should support indigenous peoples to be in control of the use of their TCEs. If that exception was left in the text, it would leave TCEs open to further misappropriation and misuse by individuals and non-indigenous peoples. It had to be up to indigenous communities to decide who could use or borrow their TCEs.

137. The Delegation of South Africa supported the submission by the Delegation of Indonesia on behalf of the LMCs. It wished to delete the new elements on *fair practice* introduced by the Delegation of Canada. It also aligned itself with the Delegation of India on the point that it would be counterproductive to allow subparagraphs (a) and (b), as rephrased, as it would give a free license to use the material that was supposed to be protected.

138. The Delegation of the EU looked forward to receiving a consolidated version of the comments to further reflect on them. In relation to paragraph 2, it expressed a preference for the first alternative. In relation to paragraph 3, it suggested that the phrase “Except for the protection of secret traditional cultural expressions against disclosure” be bracketed. It considered that such an interest in disclosure would possibly be protected in terms of moral interests. It also suggested that the last part of that sentence, “provided such exceptions and limitations to the protection of traditional cultural expressions are limited to certain special cases that do not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries” be bracketed. There was also a need for simplification, given that the three-step test would already appear under paragraph 2. It expressed support for paragraph 4, however, as it had added paragraph 3, the text had to read “whether such acts are already permitted under paragraphs 2 and 3.” As to subparagraph 4(b), it was of the opinion that inspiring or borrowing was not, strictly speaking, an act which would be relevant under copyright law. It would still be permitted to be inspired by Shakespeare, even if he were still protected under copyright law today. Inspiration was not misappropriation. It also requested that “by the beneficiaries or in association with them” be bracketed.

139. The Delegation of Mexico posed a question to the WIPO Legal Counsel on the meaning of “fair practice” which appeared in the alternative to paragraph 3. Its possible translation into Spanish was rather vague. It proposed the expression “good faith practices” or “practices in good faith”.

140. The representative of CISA believed that most of the text, including paragraphs 2, 3, 4, should have been deleted. He also referred to the intervention made by the Delegation of the United States of America in relation to display in libraries and museums without indigenous peoples’ free, prior and informed consent (FPIC) which had been taken out of the document. He thought that subparagraph 4(a) could be kept with some revision. However paragraphs 2, 3 and 4(b), including proposals by the Delegations of Indonesia and the United States of America, needed to be bracketed. He concluded that for indigenous participants to have a real say in that exercise, their fair and equal participation was necessary.

141. The Delegation of Algeria referred to paragraph 4(b) and was of a view that the text was pointless, as the beneficiaries, being owners of their work, were entitled to authorize or prevent the use of the work and could create other works based on their own work. It believed that part of the text could be deleted.

142. The representative of IPCB was disheartened with the proliferation of text and concepts coming up in exceptions. She wondered why there was an attempt to create protection against the unauthorized use of TCEs, and yet come up with a long list of exceptions. She also referred to non-commercial use by giving the example of the USA where non-commercial use of TCEs could easily move into commercial use, as universities were required by law to seek to exploit any discovery that could be commercially useful. There should be no exception for non-commercial use. She expressed her concern and opposition to subparagraph 4(b). One of the original reasons for the establishment of the IGC process was to deal with the issue that TCEs were being misappropriated and, whether called “inspired by” or “borrowed” or “stolen,” it was still misappropriated TCEs. There could be no exceptions allowed for that. She also added a final self-standing paragraph that read: “Any exception regarding the external use of the traditional cultural expressions of indigenous peoples requires their free, prior and informed consent.”

143. The Delegation of the Bolivarian Republic of Venezuela considered that exceptions and limitations should be few in number. It was concerned with the comments by the Delegation of Australia regarding the purpose of the process being to allow indigenous communities to have access to trade. It believed the purpose of the process was to protect TK, and that forum existed because of the exploitation of TK in the most unjust way.

144. Ms. Kim Connelly-Stone (New Zealand) took the floor in her capacity as the facilitator on TCEs to describe how she saw the facilitator's task. She recalled that the Chair had asked her to put together a cleaner text through an informal process in consultation with IGC participants. Her intention was to come up with something that could bridge the gaps, but not necessarily to get everybody to agree. She welcomed any further suggestions from Member States and observers regarding the simplification of the text. She would thereafter start drafting some initial text that would be shared with the IGC through the regional coordinators. The second version would then be the facilitator's text which the IGC plenary could consider using as a document.

145. The Delegation of India agreed in principle with the explanations by the facilitator. It was of the view that, since the consultation and drafting were not going to be elaborate, the facilitator should take note of the different positions raised by the delegations. It requested that no proposals be deleted. If one option was not possible, then there could be two or a maximum three options reflecting the different positions taken. This would avoid the situation that happened at IGC 18, where Member States proposals were deleted.

146. The Delegation of Thailand wondered whether the facilitator's text would only cover the articles that had been discussed during the session.

147. The Delegation of the Bolivarian Republic of Venezuela shared the views expressed on FPIC, as it appeared on the screen.

148. The Chair confirmed that the facilitator's text would cover the articles that had been discussed.

149. The Delegation of Oman reported that Oman had co-organized with WIPO an International Technical Workshop on Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions, which had taken place in Muscat, Oman in June 2011. The Symposium had been organized as part of a technical cooperation agreement between Oman and WIPO. The Symposium had been structured as an opportunity for States, communities and others engaged in the documentation of TK and TCEs to share experiences and perspectives as well as to debate diverse models. The meeting was technical, substantive and productive. Participants had had the opportunity to be apprised on the latest developments regarding the use of databases, registers and inventories for the protection, preservation and promotion of TK and TCEs. Participants exchanged and coordinated information and ideas on an inter-regional basis. A report of the meeting, submitted by the Delegation of Oman, was available as document WIPO/GRTKF/IC/19/INF/10).

150. The Delegations of Lebanon and Sudan supported the statement made by the Delegation of Oman.

151. [Note by the Secretariat: This took place at a later stage in the session] Ms. Connolly-Stone introduced her facilitator's text on TCEs (Note by the Secretariat: Her report is annexed to this report as Annex II). She recalled that she had been asked to undertake informal consultations and draft a clean and elegant version of the articles on: subject matter, beneficiaries, scope of protection and exceptions and limitations. She had started by gathering suggestions for simplification, listening to the discussion in the plenary, and holding an informal session. She had received a number of comments from delegations on the first draft. The table in her report was used to present the articles and the facilitator's comments. Recalling the Chair's direction to try to have no more than two options in each

article, she started by identifying two basic policy approaches that the delegations seemed to have been taking in relation to each of the articles. Those were, the ones that had taken quite a flexible approach and those that had preferred a more prescriptive approach. In each article, she had tried to identify two policy approaches, and then to simplify and consolidate the various existing text proposals related to each of those policy approaches. She had not been able to keep everybody's particular language, but hoped delegations would be able to see their concepts and ideas reflected in the consolidated text. The table included, under each article, a description of the policy approach and the text of the options. The far right column of the table captured some of the issues identified along the way that would need to be addressed at a later stage. She also provided some explanation of the approach taken, and indicated the changes between the first and the second drafts. On Article 1 (Subject matter of protection), she had identified two policy approaches. Some delegations had wanted to have a fairly simple definition of the subject matter, and were not keen on including examples in the list. The other approach was a more detailed definition of eligibility criteria that would provide greater certainty and make sure that particular things were protected through the listing of examples. She separated the text into two options. Option 1 represented the more streamlined and flexible approach. She explained that she had taken the language that had already been included in the text and tried to streamline it by removing duplication. Referring to paragraph 1, that started with a basic definition, Option 1, while she had tried not to square-bracket her own text, she did do so where there were outstanding policy issues as that was the easiest way to reflect them. For example, "and knowledge" was bracketed to note that some delegations seemed unable to agree to a definition of TCEs that included a reference to *knowledge*. She suggested that that be discussed later. Moving on to the list of categories, she noted that all that was included in subparagraph (d) was based on numerous suggestions. Paragraph 2 was structured in a more simple way, by listing four eligibility criteria. Paragraph 3 of Option 1, in accordance with the drafting proposal by a delegation, reflected the terminology used to describe protected subject matter. As to option 2, the text was based on one of the versions that the IGC had been working from, and slightly amended in accordance with the suggestion from the "Bali text". The list had no square brackets. Some proponents of the list approach had not agreed with everything on the list, and that would need to be addressed at a future point. Paragraph 2 was a more narrative form of the descriptions of the criteria for eligibility, and paragraph 3 remained unchanged. She noted that, in both options, she had followed the suggestion made by a number of delegations that there was no need to repeat who all the beneficiaries were in this article, and reference could be made to the "beneficiaries as defined in Article 2". In relation to Article 2, on beneficiaries, two policy approaches were identified, however it included three options. The first policy approach was that of the delegations that had been looking to have a definition of beneficiaries which was limited to indigenous peoples and local communities. Even within that general policy approach there were differences in terms of terminology. Some delegations were very clear in saying "indigenous peoples", and that was certainly supported by the indigenous peoples participating in the IGC. However some delegations were still uncomfortable with that and preferred "indigenous communities". In that option, she included a placeholder "indigenous peoples/communities" on the understanding that the issue still had not been decided by the IGC and would need to be worked through. While Option 1 dealt only with indigenous peoples and local communities, Option 2 tried to collect together all the other options of categories proposed in different definitions. She wished to propose one further simplification that had not been included in the finalized draft which was to delete the last phrase "who develop, use, hold or maintain traditional cultural expressions" because reference was made to Article 1. Option 2 had a list of all the potential candidates for beneficiaries that had been discussed, including indigenous communities, local communities, traditional communities, cultural communities, families, nations, individuals. Subparagraph (h) reflected the formulation of beneficiaries as in the "Bali text": "Where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law." That was a way to include a number of options in one option, and to reflect all the different categories the IGC was dealing with. Option 3 was based on a proposal by a delegation to deal

with the difference of opinion the IGC had on the use of the term “nations”, and read as follows: “Beneficiaries of protection of traditional cultural expressions, as defined under Article 1, are indigenous peoples, local and traditional communities, including small-island states.” Some delegations seemed comfortable with that option, but it needed to be discussed at a later stage. With regard to Article 3, on scope of protection, she had attempted to reflect the two basic policy approaches expressed by the IGC. Option 1 had maximum flexibility to determine the scope of protection, while Option 2 was more detailed and prescriptive. The prescriptive approach reflected two different approaches - one was of the delegations wishing to describe the sorts of activities that should be regulated, but provide flexibility on how that would be done, what sort of law would be used, whether there be a rights-based approach, etc.; the other was that of the delegations that preferred to specify that a rights-based approach would be used. The text of Option 1 was taken from one of the options in the text on TCEs and read as follows: “The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should/shall be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.” “Should/shall” reflected the disagreement that would need to be addressed at a future point. Option 2 dealt with adequate and effective legal administrative or policy measures, and reflected the different elements of the protection that had been put forward in various proposals. The first identified element related to protection for secret TCEs, the second – acknowledgment, the third - offensive use, distortion or mutilation, the fourth - preventing misleading use of TK and goods and services. Subparagraph (e) listed all the alternative proposals dealing with commercial exploitation, from the most flexible to the most prescriptive. Alternative 1, which read as follows: “where appropriate, enable beneficiaries to authorize the commercial exploitation of TCEs by others”, provided States with an option to provide commercial exploitation or not and to determine how that would be done. Alternative 2 dealt with equitable remuneration. However, it could be removed if there was no support for it. Alternative 3 dealt with the strongest form of protection: exclusive inalienable rights. That option was condensed from the option that had been reflected in the text and the alternative proposal that had been put forward by the Delegation of Indonesia. The option reflected a merged list of things that the holders of TCEs would have exclusive rights to, and included “any use for commercial purposes other than their traditional use” and “the acquisition or exercise of intellectual property rights.” With regard to Article 5, on exceptions and limitations, there seemed to be two general approaches within the IGC – that of the delegations that preferred to have least exceptions, and that of the delegations that wished to have more exceptions. The commentary on the policy approach for Option 1 noted that that would allow the least exceptions than under Option 2 and, when combined with Article 3 on scope of protection, gave more protection overall for TCEs than under Option 2. The facilitator noted that there seemed to be a wide-ranging agreement on certain candidates for exceptions, including exceptions for customary use, a test for developing domestic exceptions, and some exception for libraries and museums. However, quite strong division related to exceptions concerning derivative works and application of the existing exceptions under copyright and trademark law. The facilitator’s text in paragraph 1 of Option 1 was put in square brackets, as there was some disagreement as to whether the text needed to deal just with customary context, or it also had to refer to national laws of the Member States. Paragraph 2 dealt with application of exceptions only to uses of TCEs outside of traditional context. Paragraph 3 dealt with a test that Member States would have to apply when developing domestic exceptions, and two tests had been proposed. Answering the question that had been posed by the Chair as to whether one option could be deleted or both could be merged, the facilitator noted that merging had been a failure and the options were therefore separated as alternatives 1 and 2. Alternative 1 included concepts, such as acknowledgment, offensive use and compatibility with fair practice, and Alternative 2 was based on the three-step test but included only two steps while the third step would still need to be worked out. Paragraph 4 dealt with specific exceptions, such as libraries and archives. Based on comments heard in plenary and during informal consultations, the list of cultural institutions had been extended. Reflecting some suggestions from the floor, the first draft of the facilitator’s text included language relating to the need for compatibility with the offensive use test regardless of these exceptions. However, it had been taken out of the

second draft for eventual lack of support. Option 2 reflected Option 1, with two additions and had more exceptions in it. The two additions included the exception for derivative works or creations of original works of authorship inspired by TCEs. The facilitator noted that during her informal consultations, a suggestion had been made that if there was better understanding of what was meant by “inspired by”, there could be more clarity regarding the scope of that exception, and opponents of that exception would become more comfortable with it. Paragraph 5 dealt with the exception regarding trademark and copyright law. In conclusion, she thanked everyone who had helped in the process.

152. The Chair thanked the facilitator for her commendable work. He was of the view that all options had remained in the text but in a much neater form. He invited delegations to make general comments on policy issues, on style and presentation, emphasizing that no drafting proposals or indications of preference should be made.

153. The Delegation of South Africa commended Ms. Connolly-Stone for her excellent work and commitment to represent fairly the different approaches. It noted that it was a much neater document with clearer options. That was a step in the right direction. It expressed hope that there would be similar goodwill and commitment in working towards the same goal.

154. The Delegation of the United States of America supported the statement by the Delegation of South Africa. It commended the facilitator for having managed to condense all of the various policy options into a streamlined text that would be a very good start for the next IGC. It saw the draft as something that could be used as a basis for moving forward, with the understanding that some delegations would need to more accurately reflect their policy approaches and additional text changes.

155. The Delegation of India joined the Delegations of South Africa and the United States of America in commending the work done by the facilitator in streamlining the policy issues. It noted that there were two areas on which it might have textual changes within the policy options. However, it believed that the document would facilitate progress towards achieving the desired goal.

156. The Delegation of Australia expressed its satisfaction and admiration for the work done in producing the paper. It recalled the great satisfaction of the IGC, following the IWG1 on TCEs, and the cooperation and success that had been achieved in the IWG. The produced text provided a valuable and very useful framework to advance negotiations in the IGC.

157. The representative of Métis National Council (MNC) thanked the facilitator for the draft and made an observation that references to customary laws and community protocols had been removed.

158. The Delegation of the EU joined others in thanking the facilitator and noted that she had set a very high standard for other facilitators who would still need to present output of their work.

159. The Delegation of Indonesia commended the facilitator’s work on accommodating all points that had been put forward, and in particular reflecting some of the “Bali text”.

160. The representative of the Tulalip Tribes noted that the facilitator’s text was a progressive document. He also expressed his disappointment with the Member States, as some issues introduced by indigenous peoples had been left off the table. He emphasized that he was aware of the rule of the need for a Member State support in order for those views to go forward. However, Member States were stepping forward to give such support. He noted that the IGC was at least two years away from a final draft and it would be prudent to have as many of the views in the document that would go forward for further discussion and elaboration. One of his biggest disappointments was the failure to include the issue of the covering rule on the offensive or derogatory use test. He thought that was especially important in any exemptions that were

allowed. In conclusion, he reiterated his call on the Member States to support the views to be reflected in the text.

161. The Delegation of Thailand said the analysis of policy and text options, as well as comments would facilitate further consideration at the national consultation levels, as well as at the next IGC, if the mandate were to be renewed. It recognized that there was a lot of work to be done, but it could see the light at the end of the tunnel.

162. The Delegation of Sri Lanka joined others in congratulating the facilitator's good work. It noted that two legal terminologies had been used: *national law* and *domestic law*. It wondered which would be the correct version to use in the document.

163. The Chair responded that the difference in the terminology was due to the fact that there were delegations that preferred one or the other. It was important to maintain both, until the issue was resolved.

164. The Delegation of Mexico acknowledged the excellent and exemplary work done by the facilitator, and believed the draft would guide the IGC in its future work.

165. The representative of Tupaj Amaru aligned himself with the previous statements in recognizing the work of the facilitator. He noted that the text had not been translated into Spanish or French which made it impossible to comment on the details. However, he believed the text included many of the aspects that had been reflected in the debates. Regarding the issue of beneficiaries, he was of the view that it had not been resolved, and in some places the text had become more complicated. He also regretted that the facilitator had not taken into account the concerns of indigenous peoples and their proposals on specific articles and provisions based on other international instruments. He stated that indigenous peoples had not participated on an equal footing with Member States, and there was a need to define the status of indigenous peoples in the forum.

166. The Delegation of Argentina commended the facilitator for having managed to bring together the different comments and observations. It noted that the text would be a good basis for domestic consultations. It hoped for the official translation of the document into other languages, should the IGC decide to work on the basis of that document.

167. The Delegation of Nepal congratulated the facilitator and agreed with her approach.

168. The Chair noted that there was an agreement that the text could move forward to the next biennium and next session of the IGC as the working document on TCEs, and invited Ms. Connolly-Stone to respond to some of the questions or comments that had been made.

169. Ms. Connolly-Stone responded to some points that had been raised. Regarding the issue of *national* and *domestic law*, she noted that she had not chosen any particular term while drafting. However, she recalled that at the previous session of the IGC there had been agreement on one of the options. Responding to the comments made by the representative of the Tulalip Tribes, she confirmed that she had had to follow the rules and had not included proposals by an observer unless supported by a Member State. With regard to the offensiveness criteria, she personally thought that it was a good proposal. However, according to the feedback received, there was no consensus to include it, but it was noted and could be a compromise for the future.

170. The Delegation of Thailand clarified the issue regarding *national* and *domestic law*. It confirmed that at the previous session of the IGC, during one of the evening drafting sessions, it had been decided to keep "national law".

171. The Chair confirmed that this had been the case. He thanked the facilitator for her work which the IGC could be proud of. He concluded by confirming that the text would be forwarded

to the next biennium and next session of the IGC, and that all the comments that had been made would not be in that text, but would be reflected in the report of the meeting.

*Decision on Agenda Item 6:*

172. *The Committee requested that document WIPO/GRTKF/IC/19/4 (“The Protection of Traditional Cultural Expressions: Draft Articles”) be transmitted as a working document to the next session of the Committee. Articles 1, 2, 3 and 5 of the document should be replaced by the options for those articles, together with their associated comments and policy considerations, as presented to the Committee during the session by the facilitator on traditional cultural expressions, Ms. Kim Connolly-Stone (New Zealand). The Committee also requested that document WIPO/GRTKF/IC/19/4, as so amended, be included as part of the Committee’s report to the WIPO General Assembly taking place from September 26, 2011 to October 5, 2011.*

173. *The Committee also requested that document WIPO/GRTKF/IC/19/9 (“Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Cultural Expressions”) be transmitted as a working document to the next session of the Committee.*

174. *The Committee invited the Secretariat to update the glossaries available in documents WIPO/GRTKF/IC/19/INF/7 (“Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions”), WIPO/GRTKF/IC/19/INF/8 (“Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge”) and WIPO/GRTKF/IC/19/INF/9 (“Glossary of Key Terms Related to Intellectual Property and Genetic Resources”), to combine them in a single document and to publish that glossary as an information document for the next session of the Committee.*



## AGENDA ITEM 7: TRADITIONAL KNOWLEDGE

175. The Chair recalled that the Draft Articles on the Protection of Traditional Knowledge (document WIPO/GRTKF/IC/18/7), which had been prepared at IWG 2, had been discussed in the plenary at IGC 18. Following the discussion, the IGC had established an open-ended drafting group to reduce the number of options and alternatives in the text, and to identify significant, outstanding policy issues. IGC 18 had taken note of the text prepared by the drafting group and had requested that it be made available as a working document at the present session. That was document WIPO/GRTKF/IC/19/5. As the IGC had done with TCEs, the Chair suggested focusing at that session on: Articles 1 (protectable subject matter), 2 (beneficiaries), 3 (scope of protection) and 6 (exceptions and limitations). The same methodology as used for TCEs would be followed. The TK text was still quite complex and a little less advanced than the TCEs text. He proposed that Mr. Nicolas Lesieur (Canada) and Ms. Andrea Cristina Bonnet López (Colombia) be the facilitators for TK. They would work in the same way that Ms. Kim Connolly-Stone had worked on TCEs. The Chair asked the IGC to give the two facilitators all their support and assistance. A written summary of the issues on TK had been prepared and had been made available to the IGC. Many, if not all of those issues also arose in the TCEs text which was being worked on separately. The Chair introduced Article 1. There were links with Article 2, which would be dealt with separately. Article 1.1 dealt with the definition of TK. There were three options in the current text. Options 1 and 3 were general and open definitions. Option 2 was more descriptive. He observed that the IGC still disagreed on whether to have a general and open definition, or a more descriptive definition of the features of TK. The Chair suggested leaving that larger question at that stage. Regarding Options 1 and 3, which were two similar options for the more general approach, it was proposed to merge those two options in order to condense the options.

176. The Delegation of Canada noted that the objectives and principles which existed in document WIPO/GRTKF/IC/18/5 had been omitted. It did not recall that the IGC had taken a collective decision to exclude them from the TK text. It therefore suggested reinserting the objectives and principles in the same manner as had been done in the TCEs text.

177. The proposal by the Delegation Canada on the reinsertion of the objectives and principles in the TK text was supported by the Delegations of New Zealand, the EU, Australia and Japan.

178. The Chair, noting that there was no objection to the said proposal, said the objectives and principles would be reinstated.

179. The Delegation of New Zealand believed that Option 3 was clearer than Option 1. It suggested replacing Option 1 with Option 3.

180. The representative of Tupaj Amaru stated that it was an arbitrary exercise to define TK which had been in existence for millennia. After looking at other treaties and conventions, he proposed the following text: "For the purpose of this international instrument regarding traditional knowledge, such knowledge will be considered the dynamic and collective collection of millennial knowledge which make up collective knowledge, and which are in a continuous process of evolution, innovations, experience and creative practices, traditional technologies, ecological wisdom, closely linked to language, social relationships, spirituality, natural cycles, conservation and sustainable use of biological diversity, the close relationship with nature and the earth, which is maintained, preserved and collected by indigenous peoples and local communities from a time immemorial, and which is transmitted from generation to generation."

181. The Delegation of the United States of America supported the suggestion made by the Delegation of New Zealand to select Option 3 of Article 1.1. It suggested an amendment for purposes of clarity. It proposed to replace "resulting from intellectual activity" with "developed within".

182. The Delegation of Canada supported the proposal made by the Delegation of New Zealand on replacing Option 1 with Option 3. Further, it commented on the suggestion made by the Delegation of the United States of America. The phrase “resulting from intellectual activity” was consistent with the WIPO Convention, which dealt with intellectual activity. That was the reason why those words were in the text. It had a question relating to “learning”. It believed that learning was a process and did not fit in that option.

183. The Delegation of the Republic of Korea stated that the definition of TK must be concise and accurate. Option 1 had some issues which needed to be discussed, such as “collectively” and “intergenerational”. It proposed that Option 1 be merged with Option 3 to avoid potential ambiguity and arguments.

184. The Delegation of the Russian Federation supported Option 3. It stated that TK was defined by the word “knowledge” in Option 1. It was not clear. Option 3 had no such problem. So it supported Option 3.

185. The Delegation of Angola stated that significant developments had taken place since the issue of TK was raised at the international level. However, the work done in the past was insufficient as the IGC had not produced an appropriate definition of TK. It believed that time had come for the IGC to do that. It supported Option 3.

186. The Delegation of the EU supported Option 3 of Article 1.1, which was the proposal it had made during IGC 18. It preferred a broad definition, which would be simple, comprehensive and straightforward. Option 3 met those conditions.

187. The representative of the MNC reiterated some of the comments made by the Delegation of the Republic of Korea in terms of the importance of acknowledging the collective and inter-generational nature of TK. She stated that it was a system of knowledge that was held by many communities, including specifically indigenous peoples and local communities. She wished to see that added to the merger of the options.

188. The representative of IPCB stated that, if Options 1 and 3 were merged, she proposed to insert “and contemporary” after “traditional” in Article 1.2(b). It was very important that the instrument protected not only historical or traditional works but also contemporary works that were eligible for collective protection.

189. The representative of CISA wondered how to treat Option 2 after merging Options 1 and 3.

190. The Chair explained that the idea was to keep Option 2 but to merge Options 1 and 3.

191. The Delegation of Indonesia, on behalf of the LMCs, proposed the following definition, which emanated from Option 2: “Traditional Knowledge is knowledge that is dynamic and evolving, which is generated in a traditional context, collectively preserved and transmitted from generation to generation and includes but is not limited to know-how, skills, innovations, practices and learning, that subsist in a codified, oral/verbal or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity and natural resources. Traditional knowledge may be sacred or secretly held by beneficiaries, or widely available.”

192. The representative of Tupaj Amaru preferred Options 2 and 3. He proposed new text: “(a) The legal protection of traditional knowledge of indigenous peoples and local communities includes all acts and practices whose illicit use will apply to traditional knowledge which will make up the collective ancestral spiritual cultural heritage, which is immaterial and intellectual and which should be considered as sacred, secret mysteries of life. (b) Traditional knowledge which are linked to the use, the intrinsic use and management of natural resources within the context of traditional life, and which are considered vital to the conservation and sustainable use

of biodiversity, biological diversity in order to guarantee food security. (c) Traditional Knowledge which relates to the land, territory, flora and fauna and other traditional resources, which are possessed, occupied or utilized by indigenous peoples and local communities. (d) Traditional Knowledge which is a part of the cultural heritage, the collective cultural heritage, identity, memory, social, cultural and human diversity covered in traditional forms of living or lifestyles. (e) Traditional Knowledge which is transmitted from generation to generation in diverse manners, and which are indivisible, imprescriptible and inalienable. The fair distribution of benefits should be established by customary practices and standards law and by the prior informed consent of peoples and local communities who are the owners of such traditional knowledge.”

193. The representative of CISA proposed to add “and to the permanent sovereignty over natural resources” after “development” in Article 1.1(a) of Option 2.

194. The Delegation of India supported the proposal made by the Delegation of Indonesia. Option 2 listed a number of items that could go into the definition of TK in addition to minimum conditions to be satisfied. It proposed to bracket “/verbal” in the proposal made by the Delegation of Indonesia. It believed that the term “oral” was suitable. Normally, “oral” was a word used to describe what was not documented.

195. The representative of CAPAJ believed that the proposal on retaining Option 2 and merging Options 1 and 3 was more appropriate for the protection of TK of its peoples. He gave an example of an indigenous people, with territory in Peru, Chile, Argentina and Bolivia. Since they had crossed borders, they were able to share that knowledge in different countries. He believed that those paragraphs in Option 2 would cover that need that they had to have trans-border activities.

196. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia, which was condensed in size and was a merger of all the options in Article 1.1. It reflected the gist of all the options.

197. The Delegation of South Africa, on behalf of the African Group, welcomed the proposal made by the Delegation of Indonesia, on behalf of the LMCs. It acknowledged its brevity, precision and yet comprehensiveness in its coverage. It proposed to insert “resulting from intellectual activities” after “dynamic and evolving”, and to bracket “which is”.

198. The Delegation of the Islamic Republic of Iran supported the proposal made by the Delegation of Indonesia. It proposed to bracket “collectively”. It questioned the use of the words “traditional context”. It believed that “generation to generation” implied the traditional aspect of knowledge. It wondered what it meant practically.

199. The Delegation of Egypt supported the proposal made by the Delegation of Indonesia. It believed that it was an excellent suggestion.

200. The representative of IPCB requested the facilitators to note that the term “indigenous peoples” was agreed upon at IWG 2. She wished to see that term used consistently throughout the text. She could not accept Option 3 of Article 1.2. Even though TK was widely known, it might not have been released with consent. It did not change the fact that indigenous peoples or local communities were still the owners of that knowledge. Regarding secret and sacred TK in Article 1.3, even if an indigenous community shared the information, the issue was not whether they shared that information, but whether it was used or misused. She suggested changing the word “shared” to “used or misused”.

201. The Delegation of Mexico considered that Option 2 was the most appropriate one because it adhered more to the characteristics of indigenous peoples. It proposed to add “processes” after “practices” in Article 1.1(a). It suggested moving the second paragraph of Article 1.1(a) to Article 3. It suggested adding “and may be sacred or secret” at the end of

Article 1.1(b). It also suggested that the Spanish text be corrected in order to be fully aligned with the English version. It suggested replacing “*de la*” before “*diversidad biológica*” with “*y a la*” in Article 1.1(d), and replacing “*encarnada en*” with “*inmanente a*”.

202. The Delegation of Nigeria stated that the definition of TK must be very clear and devoid of any ambiguity. It supported the comments made by the Delegation of South Africa, on behalf of the African Group.

203. The Delegation of Niger supported the definition proposed by the Delegation of Indonesia as amended by the Delegation of South Africa, on behalf of the African Group.

204. The Delegation of Ecuador considered that the proposal made by the Delegation of Indonesia was brief and was very desirable in a legal document. It believed that it was not necessary to have the word “verbal”. “Oral” was quite sufficient since that was how such knowledge had traditionally been passed on.

205. The Delegation of Senegal supported the proposal made by the Delegation of Indonesia and amended by the Delegation of South Africa, on behalf of the African Group.

206. The Delegation of the Islamic Republic of Iran had not received any reaction to its question. That confirmed its understanding that the phrase “traditional context” was a weak concept. It proposed to bracket the words “traditional context”.

207. The Delegation of Thailand proposed to add “traditional lifestyles” after “natural resources” in the proposal made by the Delegation of Indonesia.

208. The Chair introduced Article 1.2 and Article 1.3. Article 1.2 dealt with criteria for eligibility. There were three options. The core concepts of Option 1 were distinctiveness, the collective nature and cultural identity. Two different wordings for each of these criteria were identified. The Chair invited the IGC to work out whether one option of each criterion could be deleted. Option 2 was the same as Option 1, but contained two additional criteria: (1) not made widely known outside that community, and (2) is not the application of principles, rules, skills, normally, and generally, well-known. He said Option 3 was the same as Option 2, but without the criterion of the collective nature. He asked whether the IGC could accept Option 3 plus the criterion of the collective nature as a basis for further discussion. Article 1.3 dealt with secret TK. The Chair proposed to keep it as it was at that stage since there was only one option.

209. The Delegation of the EU supported Option 3 with the criterion of the collective nature. It also proposed to add the criterion of the transmission from generation to generation. It proposed to bracket “for a reasonable period of time with prior informed consent” in subparagraph (c).

210. The Delegation of Indonesia, on behalf of the LMCs, proposed new text for Article 1.2: “Protection under this instrument shall extend to traditional knowledge that is identified or associated or linked with the cultural identity of beneficiaries, as defined in Article 2.”

211. The Delegation of South Africa, speaking on behalf of the African Group, did not subscribe to Options 2 and 3 because of the phrases “widely known outside the community”. It also found that it was difficult to look at options of Article 1.2 as they stood because they were quite convoluted. It supported the proposal made by the Delegation of Indonesia, on behalf of the LMCs, but stressed that brevity did not lead to certainty. It wanted to make sure that the criteria were reflected clearly in that paragraph. It accepted the first criterion which was associated and linked to cultural identity. It proposed to add “associated with indigenous and local communities, generated, preserved and transmitted from generation to generation” at the end.

212. The Delegation of Japan believed that Option 2 was a good basis for further discussion in light of subparagraphs (d) and (e). Subparagraph (d) especially of Option 2 correctly and appropriately reflected the concept of public domain.

213. The Delegation of China stated that, in some countries with a very long history, cultural heritage including traditional medical knowledge might have been documented and broadly disclosed. Such TK was well-known by the public outside of local communities. However, it was still traditional and should be protected. The IGC could explore better ways of protecting such TK, instead of excluding them from protection. It supported Option 1.

214. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia. The proposal highlighted the criterion for the eligibility for protection without mentioning the subject matter of protection. It endorsed that proposal because of its brevity.

215. The Delegation of India clarified the intervention made by the Delegation of South Africa, on behalf of the African Group. One suggestion was to include specifically “indigenous and local communities”. The other one was to add “generated, preserved and transmitted from generation to generation”. Regarding the second suggestion, the term already appeared in Article 1.1. It was not necessary to repeat it. Regarding the issue of indigenous and local communities, there were different classifications which had been made to ensure the relationship between TK and the cultural identity of the communities. Rather than identifying the specific communities, the proposed text included “beneficiaries as defined in Article 2”. That was why the term “indigenous and local communities” was not specifically mentioned. It explained and clarified that both concerns were taken care of in Article 1.1. It believed that Article 1.2 was reasonable to identify TK which was eligible for protection.

216. The Delegation of Kenya supported the additions and comments made by the Delegation of South Africa, on behalf of the African Group.

217. The Delegation of New Zealand believed that Option 3 was a logical place to start for rationalizing the text. But, obviously, the criterion of “widely known” was the more difficult one. The issue of “widely known” was also reflected in the scope of protection. One possibility could be to reflect the concerns of the proponents of the criterion of “widely known” in Article 3.

218. The Delegation of Niger did not endorse the view that TK that was widely known did not require protection. Sometimes the knowledge had been made widely known without prior informed consent. It could not share the view that, if something was in the public domain, it was not protected. The whole concept of public domain was a western idea. It believed that protection should be afforded to TK that was kept, preserved and handed down within a traditional context. TK was something that was linked to the cultural identity of certain peoples. That view had to be respected. It supported the comments made by the Delegation of South Africa, on behalf of the African Group.

219. The Delegation of the United States of America suggested bracketing “made widely” and inserting the words “or used” after “known” in Article 1.2(b) of Option 2. Regarding Option 3 of Article 1.2, it supported the suggestion made by the Delegation of the EU. It also suggested bracketing “made widely” and inserting the words “or used” after “known” in Option 3.

220. The Delegation of the Islamic Republic of Iran fully supported the text proposed by the Delegation of Indonesia, since it was clear and simplified the text. Regarding the proposal made by the Delegation of South Africa, on behalf of the African Group, it fully subscribed itself to the explanation given by the Delegation of India. It suggested bracketing the proposal made by the Delegation of South Africa, on behalf of the African Group.

221. The Delegation of Canada thanked the Delegation of New Zealand for its recommendation. Regarding Option 3, it suggested bracketing “the unique product of or”. Since unique was a very subjective concept, attributing it to one community might actually be

difficult in some situations. It suggested adding “or in the public domain” at the end of subparagraph (c).

222. The Delegation of Australia agreed with the Delegation of New Zealand, thanking delegations who had made suggestions in relation to Option 3. It was certainly open to considering how Options 1 and 3 would work in conjunction with Article 3.

223. The Delegation of South Africa, on behalf of the African Group, acknowledged the inputs made by the Delegation of India and fully understood the explanation that had been given. Although it was part of the LMCs, it believed that it was better to be explicit than implicit. The IGC needed to be more elaborative in stating the criteria. For legal certainty, it was important not to build it into the subject matter but to elaborate it as a stand-alone criterion, especially from generation to generation. It fully concurred with the Delegation of India and there was no disagreement.

224. The Delegation of Mexico supported Option 3 with some amendments. Regarding subparagraph (b), it suggested adding “is created, shared, preserved and collectively transmitted from generation to generation” at the beginning, and adding “and could also be shared with other communities” at the end. It proposed the deletion of subparagraph (c) because it referred to knowledge that had been disclosed with or without PIC. It believed that subparagraph (d) was unclear. It would express its view after getting some clarification.

225. The Delegation of Egypt supported the text proposed by the Delegation of Indonesia, on behalf of the LMCs. It believed that a reference to indigenous and local communities had to be included.

226. The representative of IPCB believed that one of the key concepts, FPIC, was missing particularly when information or TK was used outside of the community. She supported the proposals made by the Delegation of Mexico in that regard. She did not support Options 2 and 3 because they seemed to give broad latitude to the concept of public domain. The proposal made by the Delegation of Indonesia and supported by the Delegation of South Africa, on behalf of the African Group, showed a lot of promise. The criteria must link directly to indigenous peoples and local communities. She did not see the difference between subparagraphs (c) and (d) in Option 3 and proposed to delete them. She disagreed with the use of the term “not widely known or used”, which included some additional criteria.

227. The representative of Tupaj Amaru proposed alternative text: “Traditional Knowledge is the product of intellectual collective activity covering human creativity, talent and genius and reflecting humankind's ability to mirror developments in society and in the world. Traditional Knowledge is an intrinsic part of the tangible and intangible heritage of indigenous peoples and local communities and is transmitted from generation to generation.”

228. The Delegation of the Republic of Korea supported Option 2 with one amendment. It proposed to add “or utilized” after “not made widely known”.

229. The Delegation of the Russian Federation supported Option 3 with the amendments proposed by the Delegation of the EU as a basis for further work.

230. The representative of INBRAPI supported Option 4 and the comments made by the representative of IPCB regarding public domain. She requested the IGC not to forget the notion of PIC of indigenous peoples and local communities for the use of the knowledge in the public domain. Otherwise, the IGC would be supporting the illicit use of such knowledge. She proposed to add “with the free prior informed consent of indigenous peoples and local communities” at the end of subparagraph (e) of Option 2, to make the paragraph acceptable to indigenous peoples and consistent with the principle of PIC adopted in the Nagoya Protocol.

231. The representative of the International Chamber of Commerce (ICC) said that, in some cases, widely known TK should not be subject to restraint. It was often the case that injustices could not be fully and completely remedied due to practical matters. Similar practical difficulties would apply to protection at any rate, except for formal acknowledgement of the source related to the information that is widely available or in the public domain.

232. The Delegation of Switzerland welcomed the thoughts of the Chair in the document on selected key issues for TK. The Delegation believed that the different options of Article 1.2 could be merged. At that stage, it generally preferred to work with brackets rather than with options as long as it continued to be comprehensible. It referred to the comments made by the delegations of India and New Zealand. It was neither necessary to repeat the definition because that was already dealt with in Article 1.1 nor to repeat the beneficiaries because that was dealt with in Article 2, nor to repeat the question of widely known or public domain because it could be covered under Article 3. It supported the general principle of PIC as mentioned by the Delegation of Mexico and others.

233. The representative of the Assembly of First Nations (AFN) aligned itself with the comments made by the representative of IPCB regarding public domain. With respect to Option 3, she supported the concepts in both subparagraphs (a) and (b). With respect to subparagraphs (c) and (d), she proposed the removal of the terms “not widely known” and “generally, well known”. Those concepts would implicitly only allow for the protection of secret TK. That was not the objective. Regarding the proposal made by the Delegation of the USA on inserting “or used”, that could be a very subjective test, where the use of TK by one person in a neighboring community may not implicitly respect the application of that TK being protected.

234. The representative of CAPAJ stated that the protection should be granted to indigenous peoples and local communities who held TK which was ancestral knowledge and was protected. There were parts of such knowledge which were known by others. Some of that knowledge had been acquired without the PIC of the originating peoples. Such knowledge could not be protected. He disagreed with the representative of the ICC arguing that the IGC should also prevent piracy.

235. The representative of the Tulalip Tribes believed that difficulties in protecting something should not mean not attempting to provide IP protection. The issue was about the exploitation and use without consent. He believed that the reference to “widely known” was not sufficient, and should include PIC, taking into account the customs and traditions of the people who hold the knowledge.

236. The Delegation of Sri Lanka fully agreed with the proposal made by the Delegation of Indonesia on behalf of the LMCs, and the clarification given by the Delegation of India.

237. The Delegation of Indonesia proposed alternative text for Article 1.3: “The specific choice of terms to denote the protected subject matter should be determined by national legislation.” That proposal was also in line with what had been suggested in the TCEs text.

238. The Delegation of the EU believed that secret TK should not be addressed separately.

239. The Chair introduced Article 2, which dealt with beneficiaries. The scope of beneficiaries was one of the key outstanding policy issues. There were 6 options. In relation to Article 1, some options repeated the criteria as listed in Article 1. The Chair wondered whether it was possible to avoid such repetition. The terms used to describe beneficiaries included the following: indigenous peoples, local communities, indigenous and local communities, nations, individuals and families. He suggested not dealing with the issues of “nations” and “indigenous peoples” at that stage. The underlying issues left were: (1) Whether or not to consider “individuals or families” as beneficiaries; and (2) Whether or not to consider a State as legal representative, where the TK holders were unknown. The Chair believed that the options could

be reduced after resolving those issues. He also suggested that Article 2 define beneficiaries for purposes of the entire text. Any mention of beneficiaries in other articles would simply refer to Article 2.

240. The Delegation of Australia considered that, in terms of focusing specifically on simplification, there was a strong argument for taking account of the TCEs discussions and thinking about whether there was anything that needed to be different from TCEs in relation to TK.

241. The Delegation of Indonesia, on behalf of the LMCs, proposed text for Article 2 as follows: “2.1 Beneficiaries of protection of traditional knowledge as defined in Article 1 shall be indigenous and local communities or, where traditional knowledge is not specifically attributable to or confined to an indigenous and local community or it is not possible to identify the community that generated it, any national entity determined by domestic law. 2.2 For the purposes of this Article, the term “local communities” shall include any classification of social and cultural identity of a member state as defined by domestic law.” That text aligned with the TCEs text. The proposal narrowed the divergences and reflected the relationship with Article 1.

242. The Delegation of the Republic of Korea believed that TK holders should be indigenous and local communities because they were the ones who generated and transmitted the knowledge. It preferred the text: “Beneficiaries of protection are those indigenous and local communities who have generated, preserved and transmitted traditional knowledge that is covered by Article 1.” That text had been proposed at IWG 2. It was convinced that Article 2 should define beneficiaries for purposes of the entire text.

243. The Delegation of the EU preferred Alternative 2 with the deletion of the words: “generated, preserved and transmitted”. It was against including nations, individuals and families in the definition of beneficiaries.

244. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia, on behalf of the LMCs. The wording was flexible enough to accommodate TK held by entities other than local and indigenous communities. For example, local communities in Thailand were defined to include families and individuals, because in some circumstances TK was handed down from generation to generation through family members.

245. The Delegation of the Islamic Republic of Iran supported the proposal made by the Delegation of Indonesia, on behalf of the LMCs. However, it proposed to add “families and individuals” after the term “local communities”.

246. The Delegation of Canada preferred Alternative 1 with an addition “, including individuals,” after “local communities”.

247. The Delegation of Switzerland stated that indigenous peoples and local communities should be the beneficiaries. It supported the comments made by the Delegation of the EU in this regard.

248. The representative of GRTKF International preferred Alternative 2 as supported by the Delegations of Switzerland, the EU and the Republic of Korea. Beneficiaries should be restricted to indigenous and local communities

249. The representative of CAPAJ affirmed that the objective was to protect collective creations. Individual creation could have general protection under IP. He was grateful to those States which recognized that the beneficiaries must be the collective creators. He proposed to bracket “individuals”.

250. The representative of the Ethio-Africa Diaspora Union Millennium Council commented on the text proposed by the Delegation of Indonesia. In relation to Article 2.2, he appreciated the



intent to be flexible. However, the text as proposed could also deny protection for communities. He believed that the article should include the definitions of “local communities”, “cultural communities”, as well as “minorities”. Thereafter some latitude could be given to States to include additional beneficiaries. That would give minimum protection to certain communities and not allow derogation from States.

251. The Delegation of Malaysia fully supported the proposal made by the Delegation of Indonesia on behalf of the LMCs and the comments made by the Delegation of Thailand.

252. The representative of Tupaj Amaru proposed alternative text: “Beneficiaries of legal protection of traditional knowledge as defined in Article 1 are indigenous peoples and local communities, and their descendants, who are traditionally the custodians and safe guarders of traditional knowledge in conformity with their customary law and usages. The indigenous peoples are those who maintain, conserve, develop, use and transmit traditional knowledge from generation to generation as genuine, authentic symbols of their social and cultural heritage.” He believed that it was inclusive and, solved all the problems, summarizing everything that the IGC had discussed.

253. The representative of IPCB stated that she would be very concerned if the determination of beneficiaries was left to States. She objected to the use of the term “determined by domestic and international law”. Regarding the issue of individuals, as member of a collective group, her rights as an indigenous woman derived from the collective rights. It was not something that she owned individually. There was no need to protect the individuals because the collective group was the holder of the rights. She therefore supported the delegations of Switzerland, the EU and the Republic of Korea.

254. The Delegation of the Plurinational State of Bolivia stated that the word “individual” should be deleted because it was incongruent with the notion of collective knowledge, which was the basis of TK. The inclusion of the word “individual” limited the concept to the private sphere.

255. The Delegation of the Russian Federation noted that reference had been made to families and individuals. It believed that there was no need to mention families and individuals specifically because one of the main characteristics of TK was precisely the fact that it was collective knowledge. The question of *nations* could be left to the determination of the respective States. A further study on this point was probably necessary.

256. The representative of the Tulalip Tribes stated that Article 35 of the UNDRIP stated that indigenous peoples had the right to determine the responsibility of individuals to their communities. He did not believe that individuals could develop TK. They might have unique knowledge, but it was not traditional.

257. The representative of MNC stated that there was an extensive discussion on beneficiaries in the first draft of the facilitator’s text on TCEs. She believed that bringing that forward into the discussion under the TK text would be beneficial and would certainly capture the issues of indigenous peoples.

258. The Delegation of Mexico proposed the deletion in the Spanish version, of the words “*entre otros*”. It had no objection to removing the brackets around “peoples” and proposed the use of general terms. It supported the comments made by the Delegation of Switzerland, suggesting the elimination of the words “nations, families or individuals”. It proposed to add “and when the holders of traditional knowledge have disappeared but their knowledge remains, the state could, in accordance with domestic law, remain their legal representative of such peoples” at the end.

259. The representative of the Institute for African Development (INADEV) shared the concerns raised by the representative of IPCB on national law defining the term “beneficiaries”. He provided a justification that was based on a different concern. When looking at the case of

Africa and other areas, important ethnic groups were split between or amongst current nations, due to the artificial nature in which national boundaries were drawn. If the IGC were to define the term beneficiaries with reference to only national law, it could result in an inconsistency. He gave an example of his tribe which was split between Burkina Faso and Ghana. If he chose to protect his group in Ghana as a beneficiary, the same would not necessarily be the case in Burkina Faso.

260. The representative of Tupaj Amaru said that the proposal by the Delegation of Mexico was unacceptable.

261. The Chair introduced Article 3, which dealt with scope of protection. There were three options plus one alternative. The common element of those options was moral rights-style protection, in Article 3.1(f) and Article 3.2 of Option 1, Article 3.2 of Option 2, Article 3.3 of Option 3, and paragraph 2 of Alternative Option 3. He proposed to keep them as they were at that stage, as that form of protection appeared in all the options. Option 1 provided a list of exclusive rights which the beneficiaries shall/should have. It also provided that contracting parties shall/should provide adequate and effective legal means/measures to ensure the application of those rights taking into account relevant customary laws and practices. A definition of "exploitation" was provided in that option. He noted that there were minor conceptual differences between Option 1 and Option 2. Basically, Option 2 was more or less a reformulation of Option 1. But it also provided more latitude to the States compared to Option 1. He suggested adding "/adequate and effective legal means/measures to" at the end of the chapeau in Option 1 and then dispensing with Option 2. Option 3 classified TK into two kinds: (1) TK which had not been disclosed by TK holders outside the traditional context, and (2) TK which had been previously disclosed. The scope of protection differed. Alternative Option 3 set out different forms of protection: (1) protection for secret TK; (2) moral rights-style protection; and (3) prior informed consent for commercial use, where TK was secret or not widely known outside a community. He hoped that the IGC could agree to keep just one option. He discouraged adding more options.

262. The Delegation of Indonesia stated that the LMCs had included a proposal on Article 3 in document WIPO/GRTKF/IC/19/10. Principally, Option 1 was preferred. The proposed text was: "3.1 Contracting Parties shall ensure that the beneficiaries have the exclusive collective rights to: (a) enjoy and exclusively control and utilize their traditional knowledge; (b) authorize or deny the access and use of their traditional knowledge; (c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms; (d) prevent misappropriation and misuse, including any acquisitions, appropriation, use, practice or utilization of their traditional knowledge, without their prior and informed consent and establishment of mutually agreed terms; (e) require, in the application for IP rights involving the use of their traditional knowledge, the mandatory disclosure of traditional knowledge holders and their country of origin as well as evidence of compliance with prior and informed consent and benefit-sharing requirements in accordance with domestic laws or requirements of country of origin; (f) prevent the use of traditional knowledge without: acknowledging the source and origin of that traditional knowledge; acknowledging and attributing the traditional knowledge holders where known; and respecting the cultural norms and practices of its holders. 3.2 Contracting parties shall provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices. 3.3 For the purposes of this instrument, the term 'utilization' in relation to traditional knowledge shall refer to any of the following acts: (i) Where the traditional knowledge is a product: (a) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or (b) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context; (ii) Where the traditional knowledge is a process: (a) making use of the process beyond the traditional context; (b) carrying out the acts referred to under sub clause (i) with respect to a product that is a direct result of the use of the process. (iii) Research and development leading to profit making or commercial purposes."

263. The Delegation of Japan stated that Article 3 constituted one of the most important parts of the proposed instrument. It believed that the IGC should stick to the appropriate wording, especially taking into account objectives and principles. It reiterated the importance of the general the guiding principles, in particular flexibility and comprehensiveness. For that reason, it had proposed the text currently in Option 3 at IGC 18. It believed that Option 3 was the most appropriate and preferable one.
264. The Delegation of South Africa, on behalf of the African Group, supported the proposal made by the Delegation of Indonesia. It was comprehensive and took into consideration the practicalities of the application of that knowledge. The scope was sufficiently covered.
265. The Delegation of the Islamic Republic of Iran supported the proposal made by the Delegation of Indonesia. It suggested bracketing the word “collective” in Article 3.1.
266. The Delegation of New Zealand stated that Option 3 and its alternative were very similar. Alternative text of Option 3 was put forward by the Delegation of New Zealand at the last session of IGC. The alternative simplified Option 3, which is why it promoted the alternative.
267. The representative of CAPAJ believed that Option 2 contained some notions which should be kept, such as “to prevent any unauthorized disclosure, use, or other exploitation and in particular any acquisitions, appropriation, or use that fails to meet the prior and informed consent of the traditional knowledge holders”. That was the core of Option 2 and should be retained. He wondered how those ideas could be included in Option 3, where there were different categories, *i.e.* secret TK and previously disclosed TK.
268. The Delegation of the Plurinational State of Bolivia proposed to include “maintain, control, develop, preserve and protect their traditional knowledge” in Article 3.1 of Option 1 in order to align it with Article 31 of the UNDRIP.
269. The Delegation of Niger supported the proposal made by the Delegation of Indonesia.
270. The Delegation of Thailand supported the proposal made by the Delegation of Indonesia. It also supported the suggestion made by the Delegation of the Islamic Republic of Iran on bracketing the word “collective”.
271. The Delegation of the EU preferred Option 2 of Article 3. It suggested excluding the reference to PIC and mutually agreed terms (MAT) and proposed the deletion of the words in brackets in Article 3.1 of Option 2. Regarding Article 3.2(b), it supported the underlined wording because it reflected the wording currently proposed in the TCEs text. It also proposed to delete Article 3.1(e) in Option 1 because it had concerns on linking mandatory disclosure to the granting of IP rights. It also proposed to delete Article 3.2 of Option 1, since it duplicated the purpose of Article 4.1.
272. The representative of the MNC supported the comments made by the Delegation of Japan. She believed that the inclusion of principles provided flexibility and ensured protection for a broader range of practices.
273. The Delegation of Canada proposed to add “unauthorized disclosure” after “prevent the” in the alternative text of Option 3. It also proposed to bracket “secret”. With respect to point 3, it reaffirmed its preference for the alternative text.
274. The Delegation of the United States of America supported Article 3.1 of Option 3. It proposed to insert “protected” before “traditional knowledge” in the second line of Article 3.2 of Option 3. It suggested an additional Article 3.4: “There should be no right to exclude others from using knowledge that (1) has been independently created, (2) has been derived from sources other than the beneficiary, or (3) is known outside of the beneficiary’s community.”

275. The Delegation of India clarified the word “collective”. The IGC had discussed it in detail and it was very clear that the beneficiaries were communities and groups. The rights were also grouped, not individual. The word “collective” had been used to make a distinction between the collective rights and the normal exclusive rights which always remained as an individual right.
276. The Delegation of Angola endorsed the statement made by the Delegation of South Africa, on behalf of the African Group, agreeing with the proposal made by the Delegation of Indonesia.
277. The Delegation of Kenya supported the proposal made by the Delegation of Indonesia and supported by the Delegation of South Africa, on behalf of the African Group.
278. The Delegation of the Republic of Korea supported to keep Option 2 as it was. It also supported the comments made by the Delegation of the USA.
279. The Delegation of Mongolia associated itself with the Asian Group and, in principle, supported the proposal made by the Delegation of Indonesia.
280. The Delegation of India responded to the new text proposed by the Delegation of the United States of America. It believed that the new Article 3.4 should be covered under limitations and exceptions, but was currently proposed in the scope of protection. The Delegation had raised serious objections at IGC 18 with the reference to independently created work, which was not derived from sources other than beneficiaries and also was known outside of the beneficiary communities. The proposed text created serious concerns because of potentially negating the scope of protection. It suggested bracketing Article 3.4.
281. The representative of IPCB supported the proposal made by the Delegation of the Plurinational State of Bolivia. She had concerns about the new text proposed by the Delegation of the United States of America. It seemed to be a new exception and should therefore be dealt with in the relevant section.
282. The Delegation of Sri Lanka supported the proposal made by the Delegation of Indonesia. It agreed with the Delegation of India on bracketing the words “collective rights”.
283. The representative of the Tulalip Tribes had concerns about the proposal made by the Delegation of the United States of America. He did not believe that rights could be circumscribed geographically. He gave the example of the Native American Graves Protection and Repatriation Act. If objects and human remains were found off tribal territories, they could still claim rights to those artifacts and remains.
284. The representative of Tupaj Amaru also disagreed with the proposal made by the Delegation of the United States of America. He supported the proposal made by the Delegation of the Plurinational State of Bolivia. He proposed alternative text: “For purposes of this instrument, the Parties recognize the holders or owners in future referred to as beneficiaries of traditional knowledge in accordance with Article 2 have the exclusive right to: (a) control, preserve, develop, revitalize, exploit and practice traditional knowledge and its cultural expressions; (b) use, authorize subsequent to prior informed consent of the use of traditional knowledge or to reject any requests for outside use of such traditional knowledge; (c) enjoy the benefits of the use of such traditional knowledge in accordance with mutually agreed conventions, in order to impede the illicit use or abuse of such traditional knowledge acquired by fraudulent means without their informed consent and in violation of the customary laws and usage; (d) prohibit the use of traditional knowledge to those requesting the use of traditional knowledge outside their traditional scope and without having specified the origin of such knowledge to the prejudice of its holders. The Contracting States will establish appropriate mechanisms and effective measures in order to guarantee the implementation or the recognition of the rights of the holders of traditional knowledge as established in this article.”

285. The Chair introduced Article 6, which dealt with exceptions and limitations. He said that the same language on secret and sacred TK appeared in the text twice. One was between the two options of Article 6.1, which he suggested being deleted, since Article 6.3 remained in the text. There were two options of Article 6.1. Option 1 came from the TCEs text, which embodied the principle according to which the measures did not affect use within and among communities and only applied to uses outside the traditional or customary context. Option 2 contained more general wording to ensure that protection did not adversely affect the continued availability of TK for the customary practice, exchange, use and transmission of TK by TK holders. Since the IGC might wish to keep the TK and TCEs texts consistent with each other, he suggested dropping Option 2 of Article 6.1. There were also two options of Article 6.2. Option 1 was the same as the one included in the TCEs text. It called for appropriate limitations or exceptions, compatible with fair practice, with acknowledgement where possible and if not offensive. Option 2 was based on the three step test. His understanding was that the two options attempted to do the same thing. He wondered whether the IGC could keep only one option. Article 6.3 provided that secret and sacred TK was not be subjected to exceptions and limitations. He suggested not discussing it at that stage since there was only one option. Two new paragraphs on the independent discovery or the independent invention had been proposed at IGC 18. He had two specific questions about those two paragraphs: (1) should those two paragraphs stay in the text? and (2) if yes, whether they might rather belong in Article 3 on the scope of protection.

286. The Delegation of the United States of America considered, as a preliminary matter that a full parallelism between the text on TCEs and TK was unnecessary, as they addressed very different types of subject matter. With respect to the two paragraphs on the independent discovery or the *independent invention*, it was in favor of retaining them but also moving them to the scope of protection. Regarding Option 2 of Article 6.2, it proposed alternative text: "It shall be a matter of national law in accordance with the Paris Convention that parties may provide exceptions to the exclusive rights conferred to traditional knowledge, provided that such exceptions do not unreasonably conflict with the normal exploitation of the traditional knowledge and do not unreasonably prejudice the legitimate interests of the traditional knowledge beneficiary taking account of the legitimate interest of third parties." That that proposal followed closely the three step test in Article 30 of the TRIPS Agreement.

287. The Delegation of India believed that the new text which had been inserted by the Delegation of the United States of America required more consultation, because it was directly linked with the Paris Convention and the obligations on Member States to comply with the requirements of the Paris Convention. It suggested putting it in square brackets.

288. The representative of CISA complained that language proposed that would provide protection to indigenous peoples did not survive because they were not supported by States. He therefore reserved the right to make proposals, in the event that indigenous participants got higher level of participation after the WIPO General Assembly.

289. The Delegation of Sudan proposed to add "in certain special cases" before "provided" in Option 2 of Article 6, to be in conformity with Article 13 of the TRIPS Agreement.

290. The representative of Tupaj Amaru stated that the proposal made by the Delegation of the United States of America was not new. It had been proposed to defend the interests of third parties such as companies and businesses that used or took their TK and TCEs. He could not accept that proposal until he had seen an in-depth analysis on the same.

291. The Delegation of the EU continued to support Option 2 of Article 6.1. However, it believed that the term "holder" rather than "owner" should consistently appear in the whole text. The term "owner" was associated with the legal confirmation of the ownership. It also continued to support Option 2 of Article 6.2. It proposed to delete the brackets around "taking into account the legitimate interests of third parties", since that text added an extra degree of balance to the Article. It believed that it was necessary to keep a balanced approach between the interests of

TK holders and TK users to maintain legal certainty. It also suggested deleting Article 6.3, unless the definition of secret TK was clarified.

292. The representative of INBRAPI was concerned that the IGC was not making progress since the text was not cleaner and consensus had not been reached. The proposal by the Delegation of the United States of America was unacceptable. If reference was being made to the different international treaties, then the ILO Convention No. 169 and the UNDRIP, in particular Article 31, as proposed by the Delegation of the Plurinational State of Bolivia, should also be included. She preferred a *sui generis* system, which would essentially protect TK. Regarding secret and sacred TK, the definition varied from country to country and people to people. She believed that the proposal eradicated rights that already existed and enshrined in indigenous peoples and their knowledge. She emphasized the importance of recognizing the rights of indigenous peoples, excluding new limitations which would harm the rights that indigenous peoples already had over their knowledge.

293. The Delegation of China noted that the definition of TK also included protected secret TK. That meant that some secret TK could not be protected. It therefore proposed to delete the article relating to secret TK.

294. [Note from the Secretariat: This took place at a later stage in the session] The Chair later invited the facilitators, Mr. Nicolas Lesieur (Canada) and Ms. Andrea Bonnet López (Colombia), to present the text that they had prepared.

295. Mr. Nicolas Lesieur thanked those that had participated in the process and provided very constructive comments. He stated that the primary intent of the facilitators during the course of that exercise had been to streamline the text with a view to clearly identify stand-alone options under each article, with variations if applicable, that would represent the two fundamentally different policy approaches: the first one was based on a circumscribed definition of TK with limited scope of protection and responsibilities for Member States; and the second one was rights-based, which was more expansive and prescriptive, notably in terms of Member States' obligations. Article 3, which related to the scope of protection, had proved to be particularly challenging to untangle. The facilitators had approached that by isolating, on the one hand, the rights of the holders of TK, and on the other, the measures to be taken in relation to the protection of TK such as misappropriation. Informal consultations had confirmed that although the facilitators' text would be helpful to the IGC, if only because it eliminated overlap and repetition, it still fell short in drawing clear linkages between the problems related to the protection of TK, and the possible measures to be taken to address those problems. One suggestion put forward was to restructure the text further by clustering the current provisions under four broad approaches: (1) a rights-based approach; (2) a broad and flexible framework; (3) targeted provisions for the protection of secret TK; and (4) a mixed approach. The facilitators considered that suggestion to be interesting and encouraged the IGC to consider it as it moved forward. They also recommended keeping in the text the definition of "utilization", recognizing that a later stage in the discussion, the IGC might wish to create a separate section in the body of the text containing all definitions. Finally, during informal consultations, some delegations had questioned whether secret and/or sacred TK should be included within the scope of that future instrument. Further discussion on this was required. In the meantime, the facilitators had chosen to keep the language related to secret and/or sacred TK in the text. The two options in Article 6 were generally very similar and added substantive differences hinging on the addition or removal a few words here and there.

296. Ms. Andrea Bonnet López added that there were two major policy approaches reflected in the text of Article 1. That was a very useful way forward as the Chair had already highlighted. The IGC was encouraged to base its work on those two-pronged policy approaches. Regarding Article 2, the facilitators felt that some issues in Article 2 had strong linkages to the TCEs discussion. The work could be done in a more efficient way if those linkages were recognized.

297. The Delegation of India congratulated the facilitators for presenting to the IGC a text which was much clearer with reference to options and the respective policy positions. The TK document seemed to be as mature as that of TCEs. There was clarity of reference in the policy options in Article 1 of the TK document, a position it subscribed to. It noted that the beneficiaries of protection in the TK and TCEs document were the same. To that extent, it was extremely happy to note that the IGC had made substantial progress. It believed that there was a slight mix-up in Article 3 and suggested revisiting the structure of Article 3.

298. The Delegation of South Africa, on behalf of the African Group, expressed its gratitude to the facilitators for their patience in working on the issues and for eventually producing a clear document. It concurred with the observation made by the Delegation of India on Article 3 that some text could have been misplaced. For example, Article 3.3, which dealt with issues related to copyright, was not appropriate in the section in which it appeared. Regarding Article 6, it believed that Article 6.3 of Option 2 had been transposed in the wrong place and that it came from some other source, other than document WIPO/GRTKF/IC/19/5. It suggested that that be noted when finalizing the document.

299. The Delegation of the Plurinational State of Bolivia wondered what the status of that document was for future work.

300. The Chair in response, said that as the IGC had treated the TCEs text, the document, including the discussed articles would be transmitted to the next session of the IGC as a working document.

301. [Note from the Secretariat: The facilitators' report is annexed to this report as Annex III]

*Decision on Agenda Item 7:*

*302. The Committee requested that document WIPO/GRTKF/IC/19/5 ("The Protection of Traditional Knowledge: Draft Articles") be transmitted as a working document to the next session of the Committee. Articles 1, 2, 3 and 6 of the document should be replaced by the options for those articles, together with their associated comments and policy considerations, as presented to the Committee during the session by the facilitators on traditional knowledge, Ms. Andrea Bonnet López (Colombia) and Mr. Nicolas Lesieur (Canada). In addition, the "Policy Objectives" and "General Guiding Principles" appearing in document WIPO/GRTKF/IC/18/5 ("The Protection of Traditional Knowledge: Revised Objectives and Principles") should be added to this document, in the same manner that corresponding "Policy Objectives" and "General Guiding Principles" appear in document WIPO/GRTKF/IC/19/4 ("The Protection of Traditional Cultural Expressions: Draft Articles").*

303. *The Committee also requested that document WIPO/GRTKF/IC/19/5, as so amended, be included as part of the Committee's report to the WIPO General Assembly taking place from September 26, 2011 to October 5, 2011.*

304. *The Committee requested that document WIPO/GRTKF/IC/19/10 ("Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Knowledge") be transmitted as a working document to the next session of the Committee.*

## **AGENDA ITEM 8: GENETIC RESOURCES**

305. The Chair introduced documents WIPO/GRTKF/IC/19/6 ("Draft Objectives and Principles Relating to IP and GRs") and WIPO/GRTKF/IC/19/7 ("Options for Future Work on IP and GRs"). He proposed to discuss each document one by one, starting with WIPO/GRTKF/IC/19/6 and then WIPO/GRTKF/IC/19/7, and to spend more time on that item, as there were two documents on GRs for discussion. He suggested following the same methodology as had been used for TCEs and TK. He requested Mr. Ian Goss (Australia) and Mr. Hem Pande (India) to be facilitators. On WIPO/GRTKF/IC/19/6, he referred to the progress previously made, noting that some questions still remained unresolved. Some of those questions were thorny, for example, whether or not to include derivatives. He suggested not dealing with that issue at that stage. He proposed to deal with each of the five objectives and their associated principles one by one. Objective 1 dealt with ensuring compliance with laws and GRs, and associated TK in two different options. Options 3 and 4 additionally specified the content of those laws including customary norms. Unless the IGC could decide to dispense with one option, it was not necessary to discuss that objective further at that stage. As regards the five options for principles of objective 1, options 1 and 2 dealt with recognition of ownership arrangements. The only difference between them was the inclusion of derivatives. The issue of derivatives was complex and the IGC could discuss it at a later stage. He suggested deleting option 2 and putting "their derivatives" in option 1 in brackets, essentially merging options 1 and 2. Options 3 and 4 provided that States had the authority to determine access to GRs. The differences between those two options were that option 3 included the phrase "in their jurisdiction" in the first paragraph and included a reference to "subject to national legislation" in its second paragraph. He suggested deleting option 4, and putting the difference in brackets. He proposed keeping option 5, which ensured respect for the principle of self-determination of the indigenous peoples and local communities, as it was. He invited comments on objective 1 and suggested, in particular, deleting option 2 of the principles of objective 1 and putting "derivatives" in brackets.

306. The Delegation of the United States of America supported the proposal made by the Chair.

307. The Delegation of Ecuador also supported the proposal. In addition, it wanted to include, at least in the Spanish version of the text, the term "and" (in Spanish "y") in the sense of "and/or" (in Spanish "y/o") in option 1, which recognized the "variety of ownership arrangements pertaining to genetic resources, their derivatives and/or associated traditional knowledge."



308. The Delegation of India did not support putting brackets on “derivatives”, at that stage, because the entire text would be reduced to a bracketed text, hence becoming burdensome.

309. The Delegation of the United States of America clarified that it would support option 2, and not option 1, if the brackets were to be removed from option 1.

310. The Delegation of Canada said that should the brackets be removed from option 1, it would support option 2, as the Delegation of the United States of America had proposed. However, if the brackets were to remain in option 1, it would agree with the Chair’s suggestion of deleting option 2.

311. The Delegation of Thailand aligned itself with the statement made by the Delegation of India.

312. The Delegation of South Africa, speaking on behalf of the African Group, supported eliminating the brackets from “derivatives”, as stated by the Delegation of India. It supported option 1 and the proposal to delete option 2.

313. The Chair considered leaving that to the facilitators. He observed that there was some agreement to delete option 2 and thought that the issue was keeping “derivatives” in brackets.

314. The Delegation of Canada stressed that, if the brackets were deleted from “derivatives”, it could not support option 2. However, it could accept keeping option 2 as it was.

315. The Delegation of Namibia sought to know whether the proponents for the removal of the term “derivatives” disputed the existence of a wide variety of ownership arrangements pertaining to the derivatives or to GRs. Further discussion was required and consensus had to be found. In its view, there was clearly a wide variety of ownership arrangements.

316. The Delegation of Sri Lanka agreed with the suggestion by the Chair to delete option 2 and wished to keep option 1 as it was.

317. The Chair proposed to leave the options 1 and 2 as they were at that stage, since there was no agreement. Regarding options 3 and 4, he asked whether option 4 could be deleted; option 3 could be retained and the words “in their jurisdiction” and “subject to national legislation” could be placed in brackets.

318. The Delegation of the EU preferred to keep option 3 as it stood. That option would cover the content of option 4.

319. The Chair wondered whether option 4 could be deleted and option 3 refined. That proposal was previously adopted by the IGC without objection.

320. The Delegation of Namibia did not object to deleting option 4 as long as “in their jurisdiction” and “subject to national legislation” would be bracketed in option 3. If the brackets were to be removed, it would seek to retain option 4.

321. The Chair clarified that the IGC had decided to retain and make further improvements on option 3 and that option 4 would be deleted.

322. The representative of Tupaj Amaru recalled, regarding options 1 and 2, that the indigenous peoples in the previous meeting had rejected the inclusion of sovereign rights of States to GRs. He recalled UN Resolution 1803, which referred to the permanent sovereignty of peoples, and stated that peoples had legitimate rights over their natural resources and States had the obligation of administering those rights. Therefore, he opposed two aspects of property rights *i.e.* sovereign rights of States and private property rights. He urged States to delete those two concepts.

323. The representative of CISA stated that he did not agree with the consolidated text and the process. He pointed out that language proposed by indigenous peoples had been taken out because it was not supported by States. He reserved the right to object in the event that the rules of procedure were amended to give indigenous participants a higher level of participation after the WIPO General Assembly.

324. The Delegation of Argentina raised a procedural question with regard to the comment from the Delegation of the EU. It had understood that there was agreement to continue with option 3 as it stood. However, option 3 contained two sentences in square brackets. It was its understanding that option 3 would remain as a basis for discussions, but without the brackets.

325. In response, the Chair stated that the issue would be subject to further consultations with the facilitators.

326. The Delegation of Namibia was prepared to work on option 3, on the basis that “in their jurisdiction” and “subject to national legislation” would remain in brackets, until the issue was resolved. Having deleted option 4, it would be inappropriate to remove the brackets. For an accurate reflection of the discussions, it was advisable to retain the brackets.

327. The Chair proposed retaining the brackets to indicate that further discussion was required under that item.

328. For purposes of clarity, the Delegation of Argentina proposed deleting the square brackets in the first sentence of option 1, as regards “in their jurisdiction”. It questioned how sovereign States would not have authority over their own jurisdiction. In its opinion, they did have that authority.

329. The Chair agreed with the Delegation of Argentina that some brackets should be removed. He proposed removing the brackets around “in their jurisdiction”.

330. The Delegation of Namibia disagreed with the Delegation of Argentina for the simple reason that sovereign States who were Parties to the CBD had an obligation to control activities under their jurisdiction when effects occurred outside of their jurisdiction. That would include an obligation to restrict access to GRs in areas beyond national jurisdiction when they had a detrimental effect on biodiversity. The proposal that a State had the authority to determine access to GRs in its jurisdiction, it could be read as limiting that authority only to its jurisdiction. It considered that those issues remain within brackets, which signaled that they had not been resolved.

331. The Chair welcomed the explanation and suggested retaining the brackets for further consideration by the facilitators. He introduced objective 2, which dealt with preventing patents and/or IP rights being granted in error. There were five options. Options 2 and 6 dealt with preventing IP rights from being granted where PIC, MAT, fair and equitable benefit-sharing, and disclosure of origin had not been complied with. Options 3 and 4 dealt with preventing IP rights from being granted where patentability requirements had not been met. The major difference between options 3 and 4 was the inclusion of the term “bad faith” in option 4. He suggested that those three options be merged. Option 5 excluded life and life forms from patentability and stood alone. He asked whether that option should be kept or deleted. Option 7 addressed transparency in access and benefit-sharing (ABS) and also stood alone. He asked whether that option should be kept.

332. The Delegation of the United States of America did not believe that IP should be used as a legal means to achieve ends that were not necessarily related to IP. It did not support the combined options 2 and 6 listed under objective 2. It expressed its receptiveness to option 3, but with the following changes. Rather than using the word “prevent”, it preferred using the word “avoid”. Further, after the words “traditional knowledge” the words “in the prior art” should be added. It was not appropriate or possible for an instrument like the one being discussed to

modify patent law. In option 4, it was concerned about the phrase “and/or bad faith”. It was not clear how bad faith related to the examination of patents. It wished to remove the term “and/or bad faith”. It preferred to have “their derivatives” in square brackets. Option 5 was unacceptable and should be deleted, because the present document could not change the requirements of novelty and inventive step.

333. The Delegation of Japan referred to the Chair’s key issues and to the question on the possibility of merging the three options, namely the new text from options 2 and 6, option 3 and option 4. It preferred option 3 to the merging of the three options. It was not reasonable to link patent protection with the mandatory disclosure requirement by simply targeting the requirement as an objective. A new option which was composite text of the original options 2 and 6 of objective 2 was inappropriate. Option 4 contained the ambiguous expression of “bad faith”, whose meaning would differ depending on the context of its use. Option 3 was appropriate because it provided a concise and proper context. It supported the proposal made by the EU on option 3 and the deletion of option 5.

334. The Delegation of the EU supported the intervention by the Delegation of Japan on option 3. It preferred to have option 3 as a stand-alone text. It could not agree with merging option 4 with option 3, as option 4 extended the scope of option 3. Like the delegations of Japan and the United States of America, it wished to have the notions of “bad faith” and “derivatives” bracketed. It could also accept the deletion of option 5.

335. The Delegation of the Plurinational State of Bolivia stated that allowing patentability of life was unacceptable and wished to keep option 5. That subject had to be addressed, not only in the patent system, but in particular in a *sui generis* system on IP, GRs and TK. It invited the IGC to look at the *Myriad* case in the United States of America, and other cases, including Bolivia's submission to the WTO TRIPS Council (IP/C/W/554) of March 28, 2011, which included a list of cases where patents were granted on the basis of the isolation or description of genes or GRs. That was unacceptable. A substantive and lengthy discussion of that subject was necessary at an appropriate time.

336. The Delegation of Canada endorsed the comments made by the Delegations of the United States of America and Japan. It stressed that the new consolidated text of options 2 and 6, and options 3 and 4 were different and merging them would be confusing, in particular because of the concept of bad faith in option 4. It could accept to delete option 5 and could also accept the amendments to option 3 proposed by the Delegation of the United States of America. Option 3 was its preferred option.

337. The Delegation of Namibia supported retaining the new consolidated text of options 2 and 6, since it was the major policy objective to be achieved by the work of the IGC on GRs. It also supported retaining option 3, because that option basically reflected the current situation in IP law. It saw some merit in combining options 3 and 4, because not just novelty or inventive step, as currently stated in option 3, were relevant, but also the patentable subject matter. Eligibility conditions in option 4 might help to flesh out option 3. It was prepared to work with all the interested parties in trying to shorten the text or combine options 3 and 4. Its understanding of option 5 was that it attempted to ensure that patents over life and life forms were not granted when they failed to comply with the requirements of novelty and inventive step. Regarding patentable material, it felt encouraged by the recent opinion from the US Attorney General's Office that if something occurred in nature, it was not patentable because of lack of inventive step, regardless of how much time and money was spent purifying and describing it. If scientists were creating artificial life, there might be some merit in protecting such artificial life by IP, though it was debatable. In cases of artificial life, patents on life and life forms could marginally be acceptable. However, it was certainly not acceptable, even under US law, to patent something that already existed in nature. Therefore, it favored retaining option 5, and invited everyone who had an interest in that particular topic to clarify the language at some stage.

338. The Delegation of the Russian Federation endorsed the statements by the Delegations of the United States of America and Japan on option 3. Although it had noted the concerns by the Plurinational State of Bolivia, it said that option 5 should be deleted. It agreed to some extent for the need of a separate study on that issue. However, retaining the option in its current formulation was not the appropriate way to resolve the issue.

339. The Delegation of Ecuador considered that not only patents were at stake but also other IP rights, such as plant variety protection. Therefore, it was important not to restrict the text to only patents. It wished that reference be made to “GRs, their derivatives and/or TK” and not just “or TK” or “and TK”. It agreed with some delegations that the phrase “and/or bad faith” in option 4 was an abstract legal concept and its removal could be considered.

340. The Delegation of Monaco indicated its preference for option 3.

341. In response to the issues raised by the Delegation of Namibia, the Delegation of Australia referred to the ongoing discussions on that issue in many jurisdictions, including in Australia. However, at a practical level and in terms of simplification, the formulation of option 3 appeared to encompass the issues of novelty and inventive step for any subject matter, including subject matter covered by option 5.

342. The representative of CAPAJ stated that the main objective of objective 2 was to take care of the human genome. Therefore, option 5 was the crux of the text. It could not be deleted, as that would lead to the endangerment of the life and sequence of life of indigenous peoples. If indigenous peoples were not protected from those companies that sought the human genome from ancestral peoples for pharmaceutical profit or in order to generate new species, that would be disastrous to mankind. That had already happened in a certain way with the *Mapuche* people through the “Vampire project” and with other peoples in Brazil and the Andes.

343. The Delegation of the Holy See supported option 5 and shared the position expressed by the Delegation of the Plurinational State of Bolivia.

344. The Delegation of India did not wish to have the phrases “their derivatives” and “and/or bad faith” in option 4 in brackets. If the brackets were to be retained around those phrases, the whole option 3 would also need to be bracketed.

345. The Delegation of South Africa, speaking on behalf of the African Group, supported the new consolidated text of options 2 and 6, since it was the core of the work of the IGC, as indicated by the Delegation of Namibia. It also supported combining options 3 and 4. Like the Delegation of India, it could not accept the bracketing of the phrase “bad faith”, because of the historical record of cases that had been taken to courts on that ground. In order to improve the quality, he emphasized the need to focus on the aspect of bad faith as an integral part of the consolidated options.

346. The Delegation of Thailand aligned itself with the Delegation of India which did not want the term “derivatives” bracketed. Further, it expressed its preference for the new consolidated text of options 2 and 6.

347. The representative of CISA supported the new consolidated text of options 2 and 6. In option 3, it proposed that the term “avoid” be replaced with “prevent”. The term “avoid” would seem to imply that it allowed patents to be granted in error. Regarding the proposal by the Delegation of the United States of America, it wished to have “in the prior art” in brackets, based on the proposal he had made on the occupation and violation of the right to self-determination. It did not mind the consolidation of options 3 and 4. In order to add clarity to option 4, he proposed to add after the phrase “IP rights from being granted in error”, taking out “and/or bad faith”, the language “or that was granted in violation of the inherent rights of the original owners”. He agreed with the delegation that had said that bad faith was abstract. He wished to

keep “their derivatives” and supported the position of the Delegation of the Plurinational State of Bolivia as regards to option 5.

348. The Delegation of Sri Lanka believed that there was consensus on the new consolidated text of options 2 and 6, noting that the Delegation of the United States of America favored the term “avoid” in option 3. It suggested keeping options 2 and 6 and, if possible, to combine them with option 4 while deleting “bad faith”. The facilitators could take note of that and combine options 2 and 6 with 4.

349. The representative of IPCB remarked that the text in option 2 seemed to refer to the PIC of the country or the State, without mention of the FPIC of the affected indigenous peoples. She believed that the phrase “free prior informed consent of any affected indigenous peoples and local communities” should be added to any of those objectives, particularly objective 2, if that language was to be kept. She could not agree to the addition of the phrase “in the prior art”, in option 3, because it added a difficult and unnecessary requirement while putting the onus on the peoples, who had had their associated TK or GRs taken from them, to having previously published or to otherwise demonstrate prior art. She supported the Delegation of the Plurinational State of Bolivia in keeping option 5.

350. The representative of Tupaj Amaru considered that rich countries wished to push that option through in order to patent knowledge and of GRs, which belonged to indigenous peoples. In previous proposals, he had advocated use of the legal term “prohibit” instead of “prevent”, in all the options where the word “prevent” was used. In option 3, the term “prohibit” should be used and the phrase “omission and in observance of certain rules” should be added after “in error”. In option 4, likewise, the word “prevent” should be replaced by “prohibit”, and the phrase “omission and in observance” should be added after “and/or bad faith”. He wished to keep option 5 and to include “prohibit”, instead of “ensure that no”, so that life, human genomes or human blood were not patented. He favored keeping option 7.

351. The representative of INBRAPI supported the comments made by the delegations of Namibia, Thailand, India and other delegations with reference to the new consolidated text of options 2 and 6. She also requested Member States to support the proposals by CISA, IPCB and Tupaj Amaru. It was not possible to discuss the protection of GRs without mention of the international instruments such as the CBD and the Nagoya Protocol. Options 2 and 6 were compatible with the CDB and the Nagoya Protocol, but reference to the PIC of indigenous peoples and local communities had to be added. Regarding option 4, as said by the representative of Tupaj Amaru, the “omission and in observance” had to be included in the text. She also supported the proposal by the Delegation of the Plurinational State of Bolivia to keep option 5.

352. The Delegation of the Bolivarian Republic of Venezuela supported option 5, as proposed by the Delegation of the Plurinational State of Bolivia. Together with other countries, it also had reservations on the Nagoya Protocol on that point. Venezuela’s Constitution prohibited any possibility of patenting life. That was also subject of a battle at the WTO related to Article 27.3 (b) of the TRIPS Agreement. The idea of patenting life and life forms did not comply with the necessary conditions for patentability. The Delegation supported the proposal by CISA on option 4 to add the phrase “or that was granted in violation of the inherent rights of the original owners”. It had doubts regarding the term “good faith”, which could create problems because of its subjectivity.

353. The Delegation of Algeria endorsed the proposal put forward by the Delegation of South Africa, on behalf of the African Group. It entirely supported the new consolidated text of options 2 and 6 and also the merging options 3 and 4. It stressed that the term “derivatives” should not be bracketed, as the origin of a product and its derivatives were intrinsically linked. It wished to retain references to “error” and “bad faith”, because they were very important concepts. It did not object to retaining option 5.

354. The representative of MNC supported the position of the Delegation of Namibia pertaining to the new consolidated text under options 2 and 6. She recalled that the original text had talked about legal certainty, including legitimate uses and the obligation to gain PIC and MAT from the affected indigenous peoples and local communities. The original spirit of that text had been lost.

355. The Chair stated that the facilitators would address the issues raised and moved on to the principles of objective 2. There were four options: Option 1 stated that patent applicants should not receive exclusive rights on inventions that were not new and inventive. It mirrored option 3 of objective 2. He asked whether or not that option should be kept. Option 6 indicated that IP applicants should not receive exclusive rights where requirements related to PIC and fair and equitable benefit-sharing had not been complied with. It mirrored options 2 and 6 of objective 2. He asked whether that option should be kept. Further, as both, options 1 and 2, included the provision of certainty of rights, he asked whether those two options could be merged. Option 2 additionally included mandatory disclosure requirements. Option 7 referred to the duty of good faith and candor to disclose information.

356. The Delegation of the United States of America sought clarification as to what was meant by the phrase “certainty of rights for legitimate users of GRs”. In the absence of any clarity on that point, it was not able to support the second sentence of option 1, but it could support its first sentence. It was not able to support options 2, 6 or 7.

357. The Delegation of Japan stated that it was difficult to merge options 1 and 2. Option 1 was very appropriate, not only because information on the origin of GRs or other ABS-related facts could never be useful for decisions on novelty or inventive step, but also because there was no connection between self-determination of indigenous peoples and patent eligibility. Option 1 should be kept for further discussion.

358. The representative of CAPAJ stated that it was not appropriate to separate the two sentences of option 1, because they were complementary. Indigenous peoples wished to protect their inventive activity, which was collective and was transmitted from generation to generation. Indigenous peoples were creating constantly in their permanent relationship with nature and mother earth. Therefore, inventive activity should not be deleted from that option and should be kept as it stood.

359. The Delegation of Namibia believed that the support from the Delegation of the United States of America of the first sentence of option 1 was some form of progress. To address the question on certainty of rights, it recalled that the language came from the original proposal by the Delegation of Australia. There seemed to be a very large degree of consensus that inventions and the protection of the rights of inventors were one of the fundamental reasons for the existence of the IP system. Investment in such inventions and further investment in the development of those inventions required legal certainty. “Certainty of rights for legitimate users” was a way of trying to clarify that. The Delegation invited the IGC to improve that language but considered that there was not much argument about the principle involved. Regarding option 2, it thought that it was badly drafted, because it included several different policy objectives. A smaller group could be requested to review and split it up. In order to make substantial text-based progress, it requested that restraint be exercised where possible in the repetition of terms such as “indigenous peoples’ rights” on every paragraph. It raised serious concerns about the process, since it seemed that a treaty text was being drafted; though it was not clear that that was the expected outcome with regard to GRs. It therefore welcomed discussions on the expected outcome from the negotiations. It was the view of the African Group, as previously proposed at IGC 17, that the mandate on GRs could be achieved by addressing the issue of mandatory disclosure of origin in IP applications. The work done thus far, could only lead to the development of guidelines that might be considered by the General Assembly and probably would never have enough clarity and substance to form a legally-binding instrument. An amendment to the Patent Cooperation Treaty, the Patent Law

Treaty and the TRIPS Agreement was vital. At the end of the mandate, the IGC should reflect on whether continuing that process was viable.

360. The Chair thought that those were very fundamental questions that had been dealt with and continued to be dealt with, some of them within the framework of the “Friends of the Chair” on the “Future Work” Agenda item.

361. The Delegation of the EU supported the comments made by the Delegation of Japan. It did not see any possibility to merge options 1 and 2. Option 2 contained many general rules and policy objectives, while option 1 was much clearer and straightforward. It preferred to have option 1 left for further consideration.

362. The Delegation of the Bolivarian Republic of Venezuela supported comments by the representative of CAPAJ and, sought clarification from the Delegation of the United States of America on the rationale for supporting only the first sentence of option 1.

363. The Delegation of Australia responded to the question raised by the Delegation of the United States of America. The intent of the second sentence related to the importance of providing legal certainty in the patent system to the owners of rights. It believed that it was a valuable principle to be kept in mind as the IGC proceeded in its work. However, it had no objections to working on some language that would clarify that point.

364. The Delegation of Morocco favored keeping both sentences in option 1. However, to further clarify the second sentence in option 1, it suggested amending it by adding after “should” the wording “foresee appropriate measures to”.

365. The Delegation of the Russian Federation supported option 1. Option 2 appeared to be extremely complex, even with the amendments that had just been put forward. It dealt with control of the administrative bodies that would have to be involved, which was very complicated and should be looked at very carefully.

366. Although the Delegation of Sri Lanka favored option 2, it stated that some adjustment of the language was required.

367. The Delegation of Canada supported option 1 and the comments made by the delegations of the EU and Japan. It had noted the issues raised by the United States of America on the second sentence, and thanked the Delegation of Australia for the explanation provided. A merger of options 1 and 2 would be difficult and therefore option 1 should be kept as it stood.

368. The Delegation of the United States of America responded to comments by the delegations of the Bolivarian Republic of Venezuela, Namibia and Australia. With respect to the second sentence of option 1, clarification had been given along the lines that the patent system needed to provide legal certainty to owners of rights. If the patent system had only to provide certainty of patent rights for legitimate users of GRs concerning the entitlements to patents, that was perfectly alright. However, if the patent system had to provide certainty of rights for legitimate users of GRs under a TK scheme, in spite of patent rights held by others, the Delegation could not support that. Not knowing which alternative was addressed, it could not support it. With respect to options 2, 6 and 7, it had difficulties with mandatory disclosure requirements, PIC, and candor of disclosure.

369. The Delegation of South Africa, speaking on behalf of the African Group, acknowledged that the question posed by the Delegation of Namibia needed to be addressed. Further, it hoped that equal time would be dedicated to discussion of the options, because they gave direction to the discussions. The IGC was putting the cart before the horse by limiting discussions to objectives and principles. The IGC would otherwise be engaging in issues that

might not lead to a treaty on GRs or further discussions on the mandatory disclosure requirement.

370. The representative of INBRAPI aligned herself with the Delegation of South Africa, speaking on behalf of the African Group, in emphasizing the need for objectivity in the discussions. In option 1, she sought clarification from the Delegation of the United States of America on how the discussions could proceed on a system which did not provide legal certainty for the users of GRs. The main objective of an international treaty on the protection of GRs was rather to provide legal certainty. She therefore supported options 1 and 2. The mandatory disclosure requirements in option 2 were based on Article 17 of the Nagoya Protocol. She also supported option 6, which was based on Articles 6 and 7 of the Nagoya Protocol. However, in order to make it consistent with Articles 6 and 7 of the Nagoya Protocol, she proposed adding at the end of option 6 “ensuring free prior and informed consent and fair and equitable benefit-sharing for indigenous peoples and local communities”. She agreed with option 7 as it stood, which was based on Article 17 of the Nagoya Protocol.

371. The Delegation of the Islamic Republic of Iran expressed support for option 2. It could also support option 6, if the phrase “and their derivatives and associated TK” could be inserted at the end of the paragraph before “have not”. It did not appreciate how the first sentence of option 1 could improve the protection of GRs.

372. The representative of CISA commented on option 2. Regarding the reference to Article 32 of the TRIPS Agreement, he considered that it was inappropriate to cite the TRIPS Agreement. As in many of his previous interventions, he reverted to the international monitoring or arbitration body that needed to be developed and used for administrative or judicial review, in order to appropriately address indigenous peoples’ rights.

373. The representative of CAPAJ noted that option 1 clearly referred to patents, which were already protected. However, the IGC was currently focused on protecting the collective inventive activity of indigenous peoples. Options 1 and 2 could be complementary. Reference should be made to the IP system in general, which was a broader concept than the patent system. He said that the two sentences of option 1 should be kept, as stated by the Delegation of the Bolivarian Republic of Venezuela. He also believed that option 1 should be merged with option 2.

374. The Delegation of Indonesia, speaking on behalf of the LMCs, introduced the draft articles on GRs as presented in WIPO/GRTKF/IC/19/11. Those draft articles had resulted from the second LMCs meeting in Bali, Indonesia that aimed to facilitate and expedite the process of text-based negotiation in the IGC, particularly related to the issues on GRs, which had been lagging far behind. In drafting those articles, the LMCs had carefully taken into considerations relevant instruments related to the protection of GRs, including the CBD and the Nagoya Protocol. It also had considered various proposals of Member States on this issue, namely, WIPO/GRTKF/IC/19/6 and WIPO/GRTKF/IC/19/7. The Group had looked at some proposals submitted and tabled by Member States, in particular WIPO/GRTKF/IC/8/11 of the EU, WIPO/GRTKF/IC/9/13 of Japan, WIPO/GRTKF/IC/11/10 of Switzerland, as well as WIPO/GRTKF/IC/17/10 of the African Group. The preliminary draft consisted of nine articles related to the protection of GRs under the IP system. Article 1 dealt with the subject matter of protection. The LMCs considered that the protection of GRs should comprise three elements of protection: the utilization of GRs, derivatives, and TK associated with GRs. Those three elements were deeply recognized in the CBD and the Nagoya Protocol. In Article 2 on beneficiaries, the LMCs considered that the protection of GRs should benefit countries of origin. In Article 3 on scope of protection, the LMCs strongly supported option B.1 on mandatory disclosure, as contained in WIPO/GRTKF/IC/19/7. That article contained various concepts related to mandatory disclosure requirements which had been put forward by several Member States. Article 4 dealt with the complementary measures to be taken by countries. Article 5 dealt with the relationship with international agreements. It was dedicated to ensuring



consistency between the draft articles and relevant instruments, in particular, the CBD and the Nagoya Protocol. Article 6 recommended relevant WIPO bodies to encourage countries to develop a set of guidelines for international search and examination. Article 7 dealt with trans-boundary cooperation. In Article 8, which dealt with sanctions, remedies and exercise of rights, the LMCs put forward several options related to compliance measures. The last article dealt with technical assistance, cooperation and capacity building and aimed to encourage relevant WIPO bodies to develop modalities particularly for developing and least-developed countries for the effective application of that instrument. It believed that those draft articles were important to assist, facilitate and expedite the text-based negotiations on GRs. It requested Member States to consider, reflect and improve those draft articles accordingly through the facilitators. It officially requested Member States to look at WIPO/GRTKF/IC/19/11.

375. The Delegation of the Bolivarian Republic of Venezuela supported option 1 as a whole. It also supported option 6, since it was consistent with Article 120 of the Constitution of Venezuela, which recognized indigenous communities' right to PIC.

376. The Chair introduced objective 3. Objective 3 stated that patent offices and/or IP offices should have available the information required to make informed decisions in granting patents and/or IP rights. The objective contained two options. Option 1 was more general and subtle. Option 2 was more descriptive and included the type of information relevant to decisions to grant patent and/or IP rights, such as PIC, MAT, or mandatory disclosure requirements. He said that unless the IGC could decide and dispense with one option, there was no need for further discussion at that stage. Proposals, that would help to delete one option, were welcomed. The principles of objective 3 contained two options. The second sentence in option 1 stated that the applicant needed only to indicate background art, as far as known to the applicant. Option 1 referred to background art which could be regarded as useful for the understanding and examination of an invention. Option 2 did not have those caveats. Additionally, option 1 had a third principle which related to TK and conditions under which it could be documented. Unless the IGC could decide to dispense with one option, the discussion under that point did not need to be exhaustive. The Chair introduced objective 4, which dealt with the relationship between international agreements and international legal standards related to collective rights of indigenous peoples. Option 1, 2 and 3 referred to promoting a mutually supportive relationship with international agreements. He suggested merging those options. Option 4 dealt with a different issue, namely, ensuring consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples. Unless the IGC could decide to dispense with that option, there was no need to discuss that in great detail. The principles of objective 4 had five options. Options 1 and 2, related to promoting respect for and seeking consistency and cooperation with international and regional instruments. The difference was that option 2 stated that the work of the IGC should not prejudice the work pursued in other fora. He suggested the deletion of option 1, while putting the difference in option 2 in brackets. Option 6 related to that point, as it dealt with promotion of awareness raising and information sharing to support those options. He proposed to merge option 2 and option 6. Option 3 stood alone and related to decisions adopted by the UN pertaining to cases submitted by indigenous peoples. Option 4 specifically related to the support of the implementation of the CBD and the Nagoya Protocol. That could be kept at that stage, unless there was any objection.

377. The Delegation of the United States of America said that, as it was not a member of all international agreements, particularly the CBD and the Nagoya Protocol, some language referring to the actual members of those agreements, and to the fact that those provisions would only apply to them and not to States that were not members, was necessary.

378. With regard to objective 4, the Delegation of Japan thought it was impossible to merge option 1 and the consolidated options 2 and 3. If there was any relation between the IP system and the relevant international agreements and processes, that should be a mutual complementary relationship. It would not be appropriate, however, to relate them to each other

beyond such reasonable extent. Furthermore, the aim should not be to merely establish a coherent system, including a new mechanism for oversight and dispute resolution between IP systems and the relevant international agreements and processes. Therefore, the new consolidated options of objective 4 were inappropriate. Option 1 was appropriate, as it provided the most general objective. As for the principles of objective 4, it preferred option 6. Information-sharing would lead to awareness-raising and promotion of mutual supportiveness. Additionally, it did not think that options 2 and 6 should be merged. It strongly believed that the IP must be independent from other international agreements and processes, even if there was a mutual complementary relationship. On the other hand, option 2 of the principles of objective 4 emphasized the importance of respect for, and consistency with international and regional instruments and processes.

379. The Delegation of Namibia supported merging option 1 and option 2 or deleting option 1. In disagreeing with the Delegation of Japan, it stressed that a coherent system was actually required. The main problem exactly was that the IP system was isolated and increasingly irrelevant to the needs and development aspirations of developing countries. It understood the WIPO Development Agenda as an attempt to reform the “ivory tower” relationship between the IP world and the real world. It further said that in its experience at the CBD, the United States of America had acted completely, and very honorably, in accordance with its obligations as a signatory, which signaled its intent to ratify it at some stage. This also signaled its intention not to frustrate the objectives of that Treaty. It wondered whether that could be extended to a mutually supportive relationship which was necessary for the implementation of the CBD and the Nagoya Protocol.

380. For the Delegation of the EU, it was not possible to merge option 1 and options 2 and 3 of objective 4. As the Delegation of Japan, it considered option 1 as broad enough and flexible. It supported option 1 without merging it with other options. As regards the principles of objective 4, it could accept merging options 1 and 2, although it recognized that the first sentence was almost the same in both options. However, the last sentence stating that “the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should not prejudice the work pursued in other fora” was a strange formulation for an international instrument. It supposed that, if the new instrument were accepted, work had to be pursued in other fora, for example, the PCT or PLT.

381. The Chair agreed with the Delegation of the EU that the particular sentence would eventually be dropped, as the IGC was impermanent.

382. The Delegation of Canada supported option 1 of objective 4. It was difficult to merge option 1 with the consolidated options 2 and 3. In terms of the principles of objective 4, like the Delegation of the EU, it believed that it was difficult to merge options 1 and 2. It supported the Chair in stating that the IGC would not exist eternally.

383. The representative of CISA stated, on option 4, that the CBD was adopted prior to the UNDRIP or without consideration of the rights of indigenous peoples and other international fora. The Nagoya Protocol itself needed to be accepted by indigenous peoples via their right to self-determination. The Nagoya Protocol still had to be ratified by States and ABS related to the utilization of GRs needed to be reviewed in view of the existing rights of indigenous peoples. Therefore, the respect for the decisions adopted by UN treaty bodies would remain as a caveat.

384. The Chair introduced Objective 5. It had five options, among which, options 1 and 10, and option 4 stood alone. Options 1 and 10 provided for the prevention of adverse effects of the IP system on customs, beliefs and rights of indigenous peoples, “with the aim of recognize and protect their rights to use, develop, create and protect their knowledge and innovation in relation to genetic resources”. Option 4 recognized the role of the IP system in the protection of TK, TCEs and GRs. He asked the IGC whether those options should be kept. Options 2, 3 and 6 referred to the role of the IP system in promoting innovation. Options 3 and 6 also recognized

the role of the IP system such as transfer and dissemination of technology. However, options 2, 3 and 6 deferred in their scope. Option 2 did not refer to GRs, option 3 noted that there was a relationship between the IP system and GRs, derivatives and associated TK and option 6 aimed for the IP system to contribute to the protection of GRs, their derivatives and associated TK. In addition, option 6 specified beneficiaries of the IP system. Option 3 aimed for mutual advantage of producers and users of technical knowledge. Option 6 aimed for mutual advantage of holders and users of GRs, their derivatives and associated TK. After identifying the differences among options 2, 3 and 6, the Chair suggested a merger of those options. With regard to the principles of objective 5, there were five options. Options 1, 2 and 3 generally dealt with the same principles, such as promoting certainty and clarity, protecting creativity and rewarding investments. Options 2 and 3 noted the relationship between the IP system, GRs and associated TK. Option 3 further included the concepts of fair and equitable benefit-sharing, PIC and disclosure of the country of origin. The Chair suggested merging the three options. Option 5 included a specific reference to a mandatory disclosure requirement to increase legal certainty and trust between users and providers of GRs and TK. He proposed to discuss that at a later stage. Option 12 related to the dissemination of information, public morality and *ordre public*.

385. The Delegation of Japan stated that it was difficult to merge options 2, 3 and 6 of objective 5. However, it proposed to put brackets in option 3 around the words “and transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare noting with genetic resources, their derivatives and/or associated traditional knowledge”. It was similar to option 2 with the only difference being in the use of the term “recognize” in the first part of option 3. But, it highlighted that, by “maintaining” the role of the IP system, it was naturally “recognized”. With regards to option 6, its fundamental concept of the relationship between the IP system and the protection of GRs was different from the two other options. In that sense, it was reluctant to merge it with the others. As for the possibility of merging options 1, 2 and 3 in the principles of objective 5, it stated that those principles should be based on objective 5 and on correctly reflecting the role of the IP system. The most important role of the IP system was the incentive for innovation. In that regard, option 1 was fundamentally different from the others, and should therefore be merged with the others.

386. The Delegation of the Holy See commented on option 12 of the principles of objective 5, which concerned the transparency of dissemination of information regarding the use of inventions and how to prevent their misuse. A possibility would be to introduce a new formulation for the protection of ethics. Some already accepted expressions could be used, such as “where appropriate and publicly available” and “not in contrast with public morality and *ordre public*”. It proposed reformulating option 12 as follows: “Promoting transparency and dissemination of information by disclosing the country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available and where not in contrast with public morality and *ordre public*, so as to enrich the total body of technical knowledge accessible to the public.”

387. The Delegation of the EU was reluctant to merge options 2, 3 and 6 of objective 5. As regards option 6, it had similar concerns as the Delegation of Japan. As regards option 3, it preferred taking the words “transfer and dissemination of technology” out of the instrument. Therefore, option 2 could only be retained with the replacement of “maintain” by “recognize”. As regards principles of objective 5, it was also reluctant to merge options 1 and 2. It preferred option 1 with the addition of the words “where appropriate and when publicly available,” before the words “so as to enrich the total body of technical knowledge accessible to the public”.

388. The Delegation of the Plurinational State of Bolivia understood the problem of merging options 2 and 3, as option 3 in the first paragraph clearly repeated option 2 almost word for word. It urged to find convergence on that point. The same applied to option 6. As regards option 1 of objective 5, innovation in agriculture was fundamentally dependant on the use of existing genetic material for improvement. That was essential for the agricultural diversity and

the farming season systems. It had often witnessed how patentability of plants and seeds had affected the traditional customs and the rights of very many indigenous peoples and small-scale farmers with regard to the exchange and production of plants and seeds which they had been used for generations. This option was looking to resolve that type of concern and the text should be maintained.

389. The Delegation of the United States of America understood the appeal of merging options 2 and 3. However, it felt that option 2 set forth such a critical principle of the IGC's activity that it should be kept separate. It supported the amendments provided by the Delegation of Japan to objective 5, option 3, and its support of option 1 of the principles of objective 5.

390. The Delegation of Namibia welcomed attempts by the Delegation of Japan to merge options 2 and 3 of objective 5. In the event that that proposal was not accepted, it would ask that the brackets be removed in option 3. It disagreed with the comments by the Delegation of the EU, stating that it believed that licenses and royalties were an inherent and valuable part of the IP system.

391. The Delegation of Argentina had a similar concern to that expressed by the Delegation of Namibia. Option 3 of objective 5 almost exactly reflected the objective in Article 7 of the TRIPS Agreement. Some of the Members that had objected to the language in option 3 were parties to it. Therefore, it proposed to either maintain option 3 as it was, or to put option 2 and the first sentence of option 3 in brackets. The facilitators could look at that in more detail.

392. The Delegation of Canada supported option 2 in objective 5. However, it thanked the Delegation of Japan for their attempt to promote a merger. As for the principles of objective 5, it supported option 1, as the Delegation of the United States of America and other delegations.

393. The Delegation of Sri Lanka expressed the view that options 1 and 10 of objective 5 should remain as they were. Options 2 and 6 should be deleted, while options 3 and 4 should remain.

394. The Delegation of the Russian Federation preferred option 2, because it retained the role of the IP system in the promotion of innovation. As for the principles, it thought that it would be more appropriate to work on option 1, as it supported incentives for innovation provided by the IP system.

395. The Delegation of India sought clarification on the way forward. It stated that mandatory disclosure, the issue of country of origin and the CBD process had not been discussed. To sustain life on earth, it was important to supplement the IP system with those elements. However, if the IGC kept on debating on the objectives and principles, it would not get to those issues. The Delegation urged the IGC to begin negotiations on text immediately. To facilitate that process, it referred to LMCs' text, which was an attempt to supplement what had been done at the CBD and the Nagoya Protocol. The IGC had two options, either, to continue discussions on general principles of patenting and the IP system, or to try to supplement the CBD and the Nagoya Protocol. The Delegation emphasized the Chair had to make an immediate decision.

396. In response, the Chair stated that he wanted to first look at the options for future work on IP and GRs.

397. The Delegation of Namibia strongly supported the statement made by the Delegation of India. Even if it could agree on some of the very basic principles of the value of the IP system, it did not want to discuss the present text, which it considered to be a dead end. Members of WIPO believed in the value of the IP system in promoting innovation and in rewarding innovators. The Delegation questioned how those basic cornerstones of the IP system could protect GRs from misappropriation. In order to carry out the mandate of the IGC, which was to have text-based negotiations on an effective system for the protection of GRs from misappropriation, the IGC should discontinue discussions on objectives and principles.

398. The Chair referred to the call for equal treatment and the feeling that GRs had not received as much attention as the other items. He said that the need for further progress was apparent.

399. The Delegation of Brazil shared the same view as the Delegations of India and Namibia. It wanted to make concrete progress on a text. However, it was not sure if the discussion on principles or the clusters would get the IGC there. It reiterated its interest in discussing the disclosure requirement in the patent system.

400. The Delegation of Colombia, as part of the LMCs group, endorsed the proposals made by the Delegations of India and Brazil. The text from the LMCs would facilitate progress in that area, and should therefore be taken into account as GRs lagged behind.

401. The Delegation of South Africa, speaking on behalf of the African Group, stated that the issue of the objective of the IGC's discussions had been addressed earlier. It reminded the IGC that a document on mandatory disclosure had been tabled to facilitate the discussions. It felt disappointed that the IGC was spending so much time on objectives and principles of which the ultimate goal was not clear. As the Delegation of Brazil, it was unhappy that mandatory disclosure, in terms of the amendments to the PCT and PLT, had not received attention. For the African Group that subject was core.

402. The Delegation of the United States of America sought clarification on the status of the LMCs' text. It believed that at the beginning of the meeting the Chair had indicated that the said text was not tabled for discussion, but simply as an informational document. If that opinion had changed, the Delegation was happy to look at the said text. It congratulated the LMCs for the hard work done and the good faith effort in getting the text to the meeting. However, it said that delegations needed to discuss and consult with their respective governments back in capital.

403. The Delegation of the EU reiterated its earlier remarks on the need for additional time to review the LMCs' text. The text was part of a broader universe of texts and documents in the IGC. Those texts also included a proposal from the EU on mandatory disclosure. It noted that the work program of the present session was as a result of lengthy consultations, during which there had been no mention of the said text. It was ready to have further discussion on the options for future work, as had already been alluded to by the Chair, and to spend more time on that issue.

404. The Chair introduced the options for future work on IP and GRs in WIPO/GRTKF/IC/19/7. He recalled that IGC 10 had requested the Secretariat to prepare a document listing options for continuing further work, including work in the areas of: (1) disclosure requirements; (2) alternative proposals for dealing with the relationship between IP and GRs the interface between the patent system and GRs; and (3) the IP aspects of ABS contracts. At that time, document WIPO/GRTKF/IC/11/8(a) ("Genetic Resources: List of Options") had been prepared. He said that those options were derived exclusively from proposals put to the IGC by Member States and other IGC participants, including national and regional submissions, proposals by other participants and the existing IGC working documents. At IGC 15, the Secretariat had been requested to prepare a revised version of WIPO/GRTKF/IC/11/8(a). WIPO/GRTKF/IC/16/6 had introduced some structural changes to WIPO/GRTKF/IC/11/8(a). The structure had been simplified and streamlined, without making any substantive changes to the content. He said that those changes were intended to facilitate discussion by the IGC on the three clusters of options for future work that had been identified. The document had comprised three clusters: cluster A, options on defensive protection of GRs, cluster B, options on disclosure requirements, and cluster C, options on IP issues in MAT for fair and equitable benefit-sharing. In the current mandate of the IGC, a specific reference was made to WIPO/GRTKF/IC/11/8(a) as one of the documents that should constitute the basis of IGC's work on text-based negotiations. These options for future work had been discussed in the IGC 11, IGC 12, IGC 13, IGC 15, IGC 16, IGC 17 and IGC 18, the Chair observed. Moreover,

IWG 3, which had met from February 8 to March 4, 2011, had extensively discussed the options for future work related to IP and GRs. He then suggested a further discussion on the options in WIPO/GRTKF/IC/19/7, which contained a summary of that excellent and technical discussion. He reminded the IGC that at both IWG 3 and IGC 18, some delegations had pointed out that options in cluster C, on IP and MATs for fair and equitable benefits-sharing, were practical tasks that had either been completed or were in the process of being completed. He agreed with that observation. The activities referred to in cluster C were not normative, in the sense that they required the IGC to agree on them. They were practical resources that could complement and inform normative activity. Further, they existed already. For example, the WIPO on-line Database on Biodiversity-related ABS Agreements, which was continuously being updated, and the updated version of the Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing (WIPO/GRTKF/IC/17/INF/12). Therefore, he proposed dispensing with cluster C at that stage. He admitted that the study on licensing practices on GRs in cluster C had not been undertaken, but the IGC could instruct the Secretariat to undertake that exercise, if considered an important activity. As that was not a normative exercise, he suggested recognizing the usefulness of cluster C, which had already largely been carried out, and proposed to focus the discussion at the IGC on clusters A and B. He noted that at IWG 3 some experts had suggested that the Secretariat finalize, subject to a need for continued updating where applicable, its work on the practical mechanisms and activities referred to in options C.1, C.2 and C.3.

405. The Delegation of New Zealand supported the proposals made on cluster C and said that the IGC should instruct the Secretariat to complete that work. On the project on licensing, the Delegation suggested that perhaps the Secretariat could give the IGC a scoping note to allow Members to determine if it was a worthwhile task.

406. The Delegation of the United States of America was not convinced that the IGC was fully done with cluster C even if it recognized that much of its work had been done. It was still particularly interested in the guidelines for contractual practices as a constructive contribution. This would provide additional stakeholder input and other guidance for the development of effective contractual practices. It proposed that the Secretariat should proceed, as pointed out by the Delegation of New Zealand, with the study on licensing practices and report to the IGC at the next meeting. Cluster C could perhaps be seen as the younger brother of the three clusters which could be folded in within cluster A. It did not want to simply put them all aside at the present time.

407. The Delegation of South Africa agreed with the Chair that the work on Cluster C was clearly not normative, and, therefore, would not hinder progress on clusters A and B.

408. The Chair proposed to focus on clusters A and B, mandating the Secretariat to proceed with the study on licensing.

409. The Delegation of the United States of America supported continued discussion on cluster A as very practical procedures that could be used to more effectively identify relevant prior art. There was nothing more important to the relations between GRs and patents than identifying prior art, because that was what provided the greatest security within the existing system under all jurisdictions in the world. Every jurisdiction in the world used prior art with respect to examining patents. An inventory of databases and information resources on GRs was a very constructive contribution and could help patent examiners to more effectively identify relevant prior art, examine patents and to ensure that patents were not issued in error. With respect to defensive protection, the on-line portal for registries and databases established by the IGC could be extended, for example, by including existing databases and information systems for access to information on GRs. Likewise, guidelines and recommendations on defensive protection would help all jurisdictions examine their patent applications and improve the relations between the patent system and GRs.

410. The Delegation of Namibia agreed with the Delegation of the United States of America. The misunderstanding was the idea that clusters A, B and C represented different choices. The view of the Delegation and the African Group was that those were mutually complementary. Focus on one or the other should not prevent all of these clusters from moving ahead. The Delegation supported continued discussions, starting with cluster A and moving on to cluster B.

411. The Delegation of Canada, as the Delegation of the United States of America, wanted to continue with the discussion on the cluster A which was fundamental to the core objectives of the patent system, namely, to prevent erroneous granting of patents.

412. The Delegation of Japan stressed the importance of protection against misappropriation of GRs. This could be divided into two issues, namely, erroneously granted patents, and CBD compliance regarding benefit-sharing and PIC. On cluster A, it had previously proposed the establishment of the one-click database. Having obtained broad support from Member States in the preceding sessions, it continuously held discussions towards the implementation of that system. In that regard, cluster A, especially option A.2, was essential and almost sufficient, not only because it would make a significant contribution towards that end, but also because it did not diminish the essential function of the patent regime to support and promote innovation. In that sense, option A.2 properly reflected the various objectives discussed so far, such as option 3 of objective 2, option 1 of objective 3, and options 2 and 3 of objective 5, relating to IP and GRs. The IGC had to bear in mind, that option B.1 of the cluster B might harm industry's motivation for innovation which was guaranteed by the current patent regime.

413. The representative of the Tulalip Tribes pointed out that the terms of reference for such a study should be broader than simply patent issues. He reminded Members that in terms of disclosure and databases, indigenous peoples were not only interested in defeating bad patents but also wanted to ensure that no publication of information interfered with indigenous rights and indigenous cultural transmission of their knowledge. Those potential spill-over effects should be considered for any kind of database system that revealed any TK or any GRs associated with TK. An often used example was that, in defeating a bad patent, one might give information on prior art on the use of a certain berry. Once the public found out the use, it would come and pick every single berry off the berry bush, leaving nothing behind for healers and traditional practices to continue on. Therefore, a patent problem could lead to a cultural problem. Any analysis had to look at the issue holistically.

414. The Delegation of the EU stated that the Delegation of Namibia had raised an important point earlier in its intervention. The options in cluster A and in other clusters were not mutually exclusive. In the previous IGC sessions, it was evident that some delegations were only for one option, and considered the options as being mutually exclusive. The options could work in a mutually reinforcing manner. The IGC needed to consider also the other options instead of focusing on one. It emphasized, like others, the importance of clusters A and also C. It supported the earlier conclusion of the Chair on cluster C.

415. The Delegation of the Russian Federation supported the work on cluster A, and on all options A.1, A.2, A.3. That work would give pragmatic results and achieve the aims of preventing the erroneous grant of patents based on GRs. The options would complement each other and could exist in parallel.

416. The Delegation of Brazil agreed with the Delegation of the EU regarding the need to focus on all three issues, but the main issue was cluster B and B.1. It would not leave the table until B.1 had been discussed. Cluster A could be discussed at the beginning and cluster C at the end, but the IGC needed to focus on what was important.

417. The representative of the IPCB expressed her frustration with the limited options that had been identified. Glaring omissions from that list were *sui generis* protection, local

community-based protocols and customary law as defensive protection. That needed to be considered and explored.

418. The Delegation of China agreed with the Delegation of Brazil that the IGC's work had to be focused. In terms of protecting GRs, it supported the establishment of databases, but had its reservations. A clear link between GRs and the CBD had to be established in order to prevent the misuse of GRs. If there were no comprehensive measures, databases might lead to misuse of GRs. Therefore, it supported option B as a focus of discussion.

419. The Delegation of South Africa, on behalf of the African Group reiterated that the African Group had consistently called for addressing the main issue as set at in document WIPO/GRTKF/IC/17/10, which provided the links in terms of the norm setting with other treaties and with other WIPO documents, especially the submissions by the Delegation of Switzerland in document WIPO/GRTKF/IC/11/10, the revised list of options and factual updates in document WIPO/GRTKF/IC/17/6, the EU submission in document WIPO/GRTKF/IC/8/11 and the contribution of Australia, Canada, New Zealand, Norway and the United States of America in document WIPO/GRTKF/IC/17/7. That was the objective of the negotiations on GRs, TK and TCEs. To that end, the Delegation welcomed opening discussions on the technical requirements and identifying where amendments to the PCT or PLT would apply. Therefore, it wished that the WIPO General Assembly 2011 would proceed with making recommendations on mandatory disclosure requirements. The African Group had been very consistent in stating that all three issues were important and did not want to look at them in isolation. The South African initiative on databases and national recording systems had been presented as part of the contribution to that request.

420. The Delegation of Namibia highlighted that those clusters were a very good summary of what was needed to make a disclosure provision work in practice. Therefore, it fully supported all of the work under cluster B, from B.1 through to B.4, but the ultimate aim was B.1. In its understanding, the disagreement was not about the mandatory disclosure requirement *per se*, but about the consequences of a failure to disclose. That should be acknowledged as a major point of divergence, and be put expressly on the agenda for the continuation of the work of the IGC. As a useful and constructive sign of good faith, the renewed mandate of the IGC should explicitly instruct the IGC to carry on with the work in cluster B with the aim to establish a mandatory disclosure requirement through appropriate legal amendments to the instruments.

421. The Delegation of Norway supported further work on all the options under clusters A and B. There was a need to consider several measures with regard to GRs. The different options under clusters A and B did not exclude each other and were supplementary. Norway was in favor of introducing a mandatory disclosure requirement and had proposed an obligation under the TRIPS Agreement to disclose the origin of GRs used in an invention when applying for patent protection in the WTO TRIPS Council. A mandatory disclosure requirement would make it easier for Parties to enforce their rights to GRs when those were subject of a patent application. That would make the CBD provisions on PIC and benefit-sharing more effective. Furthermore, such a disclosure obligation would be a significant step towards giving effect to Article 16 paragraph 5 of the CBD, which provided that the Contracting Parties should cooperate to ensure that IP rights were supportive of and did not run counter to the objectives of the CBD. In its view the main achievement of a disclosure requirement was to increase transparency, to support national regulations on PIC and the provisions on compliance and monitoring in the Nagoya Protocol. Failure to disclose at the application stage should be treated as a formal error. That implied that the application should not be processed until the required information had been submitted and where appropriate, eventually be rejected. If, however, the breach of the disclosure obligation was discovered only after the patent had been granted, it should not affect the validity of the patent, but rather be subject to appropriate and effective sanctions outside the patent system. That could be, for example, criminal or administrative penalties or remedies that secured benefit-sharing according to national regulations on PIC and benefit-sharing. Upholding post-grant patent protection despite



non-compliance with the disclosure obligation was important to avoid creating unnecessary uncertainty in the patent system. Moreover, revoking a patent as a consequence of non-compliance with the disclosure obligation would not benefit those who considered themselves to be entitled to a share of the benefits of the invention. Once a patent was revoked, no exclusive rights were left, from which benefits could be derived. Further discussion of mandatory disclosure should be a main task of the IGC. To advance the so far very general discussion, the topic had to be discussed in more detail and based on the different proposals on the table. Those proposals showed that there were many options on how a disclosure requirement could be shaped. It should be explored whether it was possible to work out a disclosure requirement that took into account at least some of the concerns many delegations had with mandatory disclosure. A more text-based discussion would, at least, make the different issues of disagreement visible.

422. The Delegation of Australia it remained to be convinced that a disclosure regime in the patent system was an effective means of achieving some of the goals of the objectives and principles. However, it was interested in a much more in-depth technical discussion of the elements of the disclosure requirement as noted by the Delegation of Norway. It agreed with the Delegation of Namibia to address the consequences of mandatory disclosure as one of the key issues in a technical discussion. There were also other issues that arose in many of the disclosure proposals including the proposals from the Delegation of the EU, Switzerland and Norway and from the preliminary reading of the document tabled by Indonesia. The following issues should be addressed in a technical discussion: (1) The implications for WIPO administered treaties, and how such a requirement would interact with the PCT and other administrative treaties. Switzerland had done some work on that which was worth revisiting. (2) The trigger for a disclosure requirement as regards to the relationship between the GRs and/or associated TK with the invention. (3) The terminology and definitions of GRs and TK. (4) The nature of the disclosure requirement: What would it mean, and how would it work in practical terms? (5) The consequences of failure to disclose the required information, as mentioned by the Delegation of Namibia. (6) The use of that information by a receiving office. That touched on many of the issues that were raised in relation to the provision of the information in databases as well. The delegations with proposals on the table should explain how those proposals would work.

423. The Delegation of Japan repeated that there were two points as regards the issue of misappropriation of GRs. As regards to CBD compliance, it hoped that the Nagoya Protocol would be successfully implemented. Further, it said that ABS issues should be continuously considered as issues of implementation of the Nagoya Protocol in the context of the CBD. Additionally, a grave concern was that mandatory disclosure could potentially have a chilling effect on industries' motivation for applying for patents, due to the legal uncertainty related to patentability, patent applications, validity of patents or the prospect of patent prosecution procedure. That could harm industries' motivation for innovation and its ceaseless R&D efforts that were driven by the incentive of the patent regime. Therefore, option B.1 of the cluster B was contrary to the objectives and principles on IP and GRs, such as option 3 of objective 2, option 1 of objective 3, and options 2 and 3 of objective 5. It was not an appropriate measure for addressing the problem of misappropriation of GRs.

424. The Delegation of Indonesia, speaking on behalf of the LMCs, wondered to what extent the clusters in document WIPO/GRTKF/IC/19/7 would play a role in fulfilling the IGC's mandate. It proposed document WIPO/GRTKF/IC/19/11 ("Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources") as a breakthrough approach to address some of the issues raised by the delegations of the EU and Brazil. In its understanding, the said document was a comprehensive text that could assist discussions under cluster B and an approach to complete the negotiations of the IGC.

425. The Delegation of India urged the IGC to address the main issues in B.1, particularly as 300 million people in India were directly dependent on natural resources. It said that the Bali document on GRs could be made the principal document for the entire discussion, noting that the IGC was still discussing objectives and principles. It advised the IGC that the next Conference of Parties (COP) of the CBD would be held in India, in Hyderabad, with the slogan "Nature Protects if She is Protected". As mentioned by the Delegation of Japan, the coming into force of the Nagoya Protocol would bring hope to people converging in Hyderabad. It talked of the difficulties of protecting nature and stressed that patenting GRs was one area in which an agreement could be reached. The patent system and the three pillars of CBD could be complementary. Therefore, tackling the main issue in B.1 was indispensable. The Nagoya Protocol had an unfinished agenda on the mobilization of resources for biodiversity, the sustainable use of its components and ABS. Obtaining patents on GRs could be one way to mobilize money would flow back to people engaged in the protection of life on earth. The Delegation was ready to participate in discussions on that issue, but not on the objectives and principles.

426. The Delegation of the EU could certainly see mandatory disclosure as part of the menu, however proportionality was key. It raised its concern with the view that mandatory disclosure was considered as being the magic solution. It appreciated that some delegations were interested in looking at the effectiveness more than the likely challenges of the proposals, emphasizing the importance of addressing the likely challenges. The previous proposal of the EU was a transparency type of proposal, which could make a contribution in that regard. The proposal did not pretend to be the solution, but it took into account the possible challenges. It noted that the Delegation of Australia had raised a number of interesting and useful questions. The price of going straight to mandatory disclosure, though attractive, was probably too high. The important role and value of the patent system, which was accepted by maybe all delegations of the IGC, had to be kept in mind in order to work on an effective solution to the problem.

427. The Delegation of Namibia commented on the intervention made by the Delegation of Japan on how compliance with the Nagoya Protocol should be seen in the context of the CBD. While negotiating the Nagoya Protocol, the negotiating partners, including Japan, the EU, Canada, New Zealand and Australia, preferred to discuss mandatory disclosure at the WIPO IGC as the correct forum. For the sake of consistency, it should then be discussed in the IGC. For the last twelve years, the Delegation's daily job had been to encourage companies in the developed world to invest in R&D related to biodiversity and TK in order to create products and benefit-sharing with the custodians of biodiversity. It disputed the remarks made by the Delegation of Japan that a disclosure requirement might have a chilling effect on R&D, saying that the opposite was true. What had a chilling effect on R&D, especially in the last few years, had been the uncertainties of the respective obligations that had been attached to the negotiations around the Nagoya Protocol. Legal certainty would level the playing field and a disclosure requirement would become a simple matter of compliance for companies, as part of a due diligence exercise. It said that the disclosure requirement would only have a chilling effect on those companies that did not care about compliance. It agreed with the Delegation of the EU that proportionality was important and that the burden should be balanced with the effectiveness. It emphasized that it had explained before at length how the system would work. It did not see a burden either on the IP system, on industry or the IP applicant. Having a constructive discussion about the practicalities of mandatory disclosure could easily lead to a well-balanced and effective solution. That could produce legal certainty and lead to the R&D necessary for innovation while creating benefits which could be shared with the custodians of biodiversity. That would help to save life on earth, as the Delegation of India had stated earlier.

428. The Delegation of the Russian Federation stated that it represented the Russian Patent Office. A disclosure requirement was an open issue, and it had proposed in the past that those countries who had experiences with disclosure requirements should share them. It posed the following questions: What documentation was needed when applying to a patent office and

how would patent offices check those documents, if at all? If the application mentioned several GRs: Would all of them need to be supported by documentation? How did one deal with GRs which were received from a botanical garden or so called *ex situ* sources, when the country of origin was known but the properties of the plant might have changed? Was there a need for instructions for experts and existing guidelines for applicants and, if so, could they be shared? Those matters were raised by the Delegation already at IGC 10. That information was necessary for patent offices. A study to assess those issues and the matter of effectiveness was necessary.

429. The Delegation of Angola considered the position of the African Group as very realistic and clear. It preferred having simple provisions and submitting a recommendation to the General Assembly to amend the PCT and the PLT treaties, in the administrative part and not in the substantive part. That had already been discussed in many forums, including at the WTO. During the discussion at the WTO it was made clear that when people applied for patents there should be a box in the application form to disclose the origin of the GRs. Another question was whether the applicant had complied with the laws of that country. Stating the origin would not endanger the whole system. Like the Delegation of Norway had said, it was intended to restore transparency to the patent system. The IGC should negotiate a new treaty, like the Nagoya Protocol.

430. The Delegation of Kenya aligned itself with the views expressed by the delegations of South Africa and Namibia in commencing with B.1. Therefore, it hoped that the IGC would be able to discuss the issue of mandatory disclosure in more detail in its future work. While it understood the gravity of the issues of mandatory disclosure, it was possible to include mandatory disclosure, both, at formal and substantive stages of patent prosecution. It supported the Delegation of Indonesia, speaking on behalf of LMCs, to use document WIPO/GRTKF/IC/19/11 as an inclusive basis and starting point of discussion.

431. The Delegation of Brazil noted that many delegations had shown interest in discussing text proposals on mandatory disclosure requirements and how they would work in practice, and, especially to see if that would not be too burdensome on the patent system. Those suggestions were very constructive and it suggested developing a work program. The IGC could have another group of the "Friends of the Chair" or the Chair himself proposing how to address the text and other suggestions on the table in order to have substantive discussions at the next session.

432. The representative of CISA stated that, reviewing the statements of the indigenous representatives, it seemed that indigenous peoples were left with "crumbs" while the current patent system was taking the main part. He said that indigenous peoples would have their own meeting to develop guidelines or some requirements, which would be brought to the IGC for consideration. What was being developed at present was discriminating historically against indigenous peoples. The outcomes of the Nagoya Protocol had also to be weighed in order to have equitable benefits.

433. The representative of the MNC considered the extensive considerations for future technical work on the issues, many of which focused on the need not to overburden the existing IP and patent system. She requested Member States to consider as well a technical study on the specific impact of the patent system on indigenous peoples and indigenous local communities. The study could focus on a number of things including remedies for breaches of PIC and MATs, and look at the direct or indirect adverse effects of the patent system. The concerns of a burdensome and in-effective process were imposed on those communities or peoples who had the least capacity to defend themselves.

434. The Delegation of Colombia was interested in working on cluster B, and particularly on the development of a mandatory disclosure requirement as that was the only way to achieve an international legal instrument which ensured the effective protection of GRs within the mandate

of the IGC. It recognized the different views and concerns thereon and was open to discuss them in an effective manner. Therefore, the suggestions made by the Delegations of Indonesia, India and Brazil, to use the LMCs' text as a reference, was the appropriate way of proceeding with the work. It requested the Chair to consider using methodology that would allow for progress in those discussions, either with the use of facilitators, small discussion groups, or plenary discussions.

435. The representative of the International Federation of Pharmaceutical Manufacturers Associations (IFPMA) responded to comments made by the Delegation of Namibia. IFPMA represented the R&D based pharmaceutical industry. It was important for any new requirement to clearly state how it would achieve its objectives and not result in any undue burdens or adverse consequences. The discussion within the IGC was to provide more clarity as to the different objectives the disclosure requirement could ultimately achieve. If the ultimate objective was benefit-sharing, then the Members still firmly needed to be convinced that the patent system was the appropriate way of achieving that goal. Very important considerations needed to be made, when using an existing system for a new objective for which it had not been designed or intended. He highlighted the risk that companies faced in given R&D projects on GRs for a patent application which would trigger such a disclosure obligation. In the vast majority of cases the patent application was made distant from the access to the GRs in both, geographical location and time. It seemed as an attack at the wrong source, at the end of the process of a considerable number of actors or intermediaries and time between bio-prospecting and the commercial entity. Generally, GRs might have been sold from a wholesaler to academic institutions, which might have kept it for a number of years or shared with other academic institutions, and might finally have come to the interest of a pharmaceutical company who might then have wanted to explore its commercialization. As mentioned before, the vast majority of companies, and certainly IFPMA's members, wished to fully comply with all the requirements of the CBD, but disclosure requirements created a massive amount of legal uncertainty. For a CEO of a company presented with different research projects, legal certainty certainly came into play. Both Lilly and Merck as members of IFPMA, entered into agreements with INBIO in Costa Rica to investigate whether or not certain GRs had commercial application in certain disease categories. Transfer of technology and knowledge, and considerable amounts of investment in those projects had taken place, but no actual products came out of the end of the process. That highlighted how difficult natural product R&D was. The main four risk categories were: (1) initial investment in investigating GRs or not and by entering into agreements to determine reliability of supply; (2) test for pharmacological activity; (3) clinical trials, which were particularly difficult in the area of natural products, because of unknown reaction of elements connected to natural products when ingested in the human body; and (4) market willingness to purchase those products. Natural product research was an inherently risky space. Injecting a new system into the patent system at the point of commercialization of the product, undermined that investment and served to disincentive R&D. He was worried that the ultimate objective of conservation, benefit-sharing and benefits for society from the commercialization of products in the medical field might be undermined by implementation into patent law and might disincentive an incentive.

436. The Delegation of Switzerland was of the view that the IGC should carry out work on all options of clusters A through to C. It largely shared the opinions expressed by the delegations of the EU and Norway in that regard. In addition, it supported the suggestion by the Delegations of the Russian Federation and Australia, as well as observers, to conduct a study on the issue of the disclosure requirement. It was prepared to provide further details on the Swiss proposal on the disclosure requirement.

437. The Delegation of South Africa, speaking on behalf of the African Group, was impressed by the intervention made by the Delegation of Norway. It said that the IGC could not have any constructive engagement without textual discussions. To move forward, a clear understanding of where the IGC was going was needed. To that extent, all the three clusters were relevant, but the main cluster was B, and B.1. It agreed with the Delegation of Brazil that there was some

convergence as some delegations were willing to consider the proposals on the table. It said that the issue should be discussed with a clear work plan on GRs. The recommendation to the General Assembly on future work should include language on undertaking text-based work on mandatory disclosure.

438. The Delegation of Chile preferred working on all the clusters and said that the clusters were actively being examined by Chilean agencies. As to cluster B, it supported the Delegations of Australia and the Russian Federation. Like the Delegation of Brazil had said, it believed that many delegations had expressed the need for a study on how new systems could be implemented without interfering with the existing ones. The IGC should bear in mind the work in other fora as it advanced in its work in order to reach consensus.

439. The representative of CAPAJ noted that indigenous people had different views on access to GRs and benefit-sharing. Instead of benefit-sharing, the IGC had to think about the participation and sharing of the production processes of GRs. It was very easy to go to a community, pick up the seeds, make them sign a paper seeking access to the seeds and finally file patents thereon. The patent applicant had not contributed to those seeds, while the indigenous peoples had pointed to the knowledge. States would take from communities' water while polluting, destroying mountains and rivers without benefits and pharmaceutical industries wished to receive everything without restriction and free of charge. That medicine was already produced and customized by Indigenous peoples. He said that indigenous peoples were not interested in a seed which was going to cure diseases and to make profit, like the pharmaceutical companies. Therefore, he wanted to know how indigenous peoples would profit from that. He aligned himself with the statement by the representative of MNC that the adverse effects on indigenous peoples and destruction of nature had to be taken into account.

440. The Delegation of the United States of America stated that it had consulted with stakeholders and listened to the groups and all the other delegations and looked forward to a lively discussion. It called for proportionality and balance, meaning that benefit-sharing was not dependent solely on mandatory disclosure. It was not sure that mandatory disclosure would lead to benefit-sharing if not to a reduction of benefits. Curing of millions of people was important. It appreciated the interventions by a number of delegations, such as Australia, which put forward a number of important questions that needed to be asked and discussed. It appreciated the views of the delegations of the EU, Japan, Switzerland, Norway, and others. It also appreciated the suggestion of a study of existing disclosure requirements as a baseline. The IGC could not go forward unless there was a baseline of what the existing provisions in countries were and how they had worked. If they had worked, it might go forward. It appreciated the suggestion by the Delegation by Brazil and supported by the Delegation of South Africa for a work plan. It was dedicated to life on earth, and, even if focusing technically on patents at the patent office, it believed that the patent system was one of the greatest benefits to humankind in the history of the earth. It looked forward to progressing in a balanced way as stated in the mandate from the General Assembly, to look at all issues on an equal footing.

441. The Chair noted that the challenge was how to carry forward that discussion, considering that that was the last session of the IGC under the current mandate. A number of speakers had suggested, in particular, the delegations of Namibia, Brazil, Colombia, South Africa, Norway among others to continue discussions on the disclosure requirement in the next mandate of the IGC. He proposed to continue with informal consultations in that regard.

442. [Note from the Secretariat: This took place at a later stage in the session]: The Chair invited one of the co-facilitators on GRs, Mr. Hem Pande (India), to report on their work accomplished by the facilitators.

443. Mr. Pande thanked the Chair for the opportunity of being a facilitator along with Mr. Ian Goss (Australia). Despite the limited time, they had received some solid inputs. The

mandate of the facilitators had been to work on the objectives and principles as contained in WIPO/GRTKF/IC/19/6. They had renumbered the options, both in the objectives and in the principles, as some of the options had been previously deleted. Thereafter, they had tried to combine the options in both, objectives and principles. As a result, two documents had been produced and were available to the IGC. One document reproduced the original and the revised text in a table (annexed to this report as Annex IV), in order to give an overview. The second document was a short version of the revised document (annexed to this report as Annex V). He apologized that the footnote, as part of the text, had been omitted on the first page of that revised draft of the objectives and principles. That should be reinserted. With regard to the objectives, he stated that the original two options of objective 1 had been merged. The facilitators had taken into consideration option 2 and bracketed it in the combined text of objective 1. He however preferred the objective to be unbracketed. With regard to the principles of objective 1, the revised text contained two principles. As regards to objective 2, the text of the original options had been merged and put into brackets. As a facilitator, he would prefer to remove the brackets and to keep the text as it was. Objective 2 had four principles. Objective 3 had been collated and contained then 3 principles. Objective 4 contained one objective followed by two principles. Objective 5 had one objective and five options four principles. Those two texts tried to reflect the positions of all delegations at that stage.

444. The Delegation of the Plurinational State of Bolivia recognized that the subject was very complex and obviously a challenge to any facilitator or working group. However, in comparison with the two other working groups on TK and TCEs, the format used was not the most appropriate. Following the example of the facilitators of the two previous groups, the work should reflect all of the positions and provide a more detailed analysis of the proposals on the table. On the content, the IGC had to take into account the issues of interest not only to the Plurinational State of Bolivia, but also to other developing countries and indigenous peoples, namely option 5 of objective 2, which it had repeated in plenary and which had not been withdrawn. It recalled the mandate of the facilitators to produce a more consolidated and shorter text without removing proposals that were still supported by States. Therefore, the document was not valid. In a multilateral context, it was important to respect the standards of multilateralism. Unless States decided to withdraw their proposals, they would remain on the table until consensus could be found. If the proposal was not reintroduced it preferred to continue working on WIPO/GRTKF/IC/19/6.

445. The Delegation of Bangladesh noted that there was no text as such and only objectives and principles which made the matter more difficult. At page 1 of the revised text, requirements of the country providing for PIC were mentioned. Countries were the primary sources and not all of the countries were part of the Nagoya Protocol. Therefore, while mentioning “country providing”, it should also be mentioned in text and not in the footnote “country of origin” or in the alternative, the wording “as in the Nagoya Protocol, Article 5” or “country providing is the country of origin or that has acquired the genetic resources / traditional knowledge in accordance with the CBD” should be inserted.

446. The Delegation of Angola wished to improve the revised text on objective 1. Following up on what the Delegation of Bangladesh had proposed, it suggested inserting “country of origin / providing”. Regarding the footnote, it requested the deletion of “or”, because, according to the Nagoya Protocol, the country providing was the country of origin that had acquired the GRs. The IGC should try to reflect what was said in the Nagoya Protocol.

447. The Chair thanked the Delegation of Angola but urged the speakers to confine their interventions to general comments, and not to go into drafting proposals.

448. The Delegation of the United Republic of Tanzania sought to reinforce the statements made by the delegations of Bangladesh and Angola. Although some of the Members had argued that the country providing was the same as the country of origin, as an LDC, it preferred to have “country of origin” inserted in the text of objective 1, in both documents. If the two

words were synonymous then the IGC should not hesitate to replace the words “country of origin” with “country providing”. The sovereign rights of States over their natural resources had to be recognized.

449. The Delegation of the Bolivarian Republic of Venezuela supported the comments made by the Delegation of the Plurinational State of Bolivia, stating that it was a serious issue that needed to be addressed. Otherwise, the Delegation would not endorse the final outcomes. The facilitators had no mandate to delete options. Where there were areas of convergence, the proposals were to be consolidated, and, where there divergences, the proposal would remain as they were. It further said that Article 120 of the Constitution of Venezuela prohibited patenting of life forms. The Delegation reminded the IGC that it was small delegation and lacked the capacity to attend all meetings including that of the “Friends of the Chair”. Therefore, it requested that option 5 of objective 2 be reinserted in the document. In a multilateral context, an option should only be deleted by the delegation that had made it. It supported the Delegation of the United Republic of Tanzania on the statement made regarding the country of origin. It was quite clear that “country of origin” and the “country providing” were distinct. This was also discussed at the WTO.

450. The Chair assured the Delegation of the Bolivarian Republic of Venezuela that its concerns would be taken care of.

451. The representative of Tupaj Amaru stated that it supported the proposal by the Plurinational State of Bolivia. Indigenous peoples could not allow the patenting of human beings, life or human blood by large international pharmaceutical companies. He requested that the said proposal be reinserted in the text. In addition, he sought clarification on status of the documents prepared by the facilitators.

452. The Chair advised that the document did not have any legal status and was simply a working document for the next session of the IGC.

453. The Delegation of Poland, speaking on behalf of the EU, welcomed the very clear and concise document on GRs and also the document on TK as a very good and valuable basis for consideration at the next session of the IGC. Since it had not had sufficient time discuss and consult on the document with its members, it reserved the right to come back with comments at a later stage. At a first glimpse, not all of its proposals had been taken into account in both documents.

454. The Chair assured that the Delegation could do so.

455. The Delegation of the Holy See congratulated the Delegations of Australia and India for producing such a valuable document. On the methodology adopted during the co-facilitators’ session, it shared the position already expressed by the delegations of the Plurinational State of Bolivia, the Bolivarian Republic of Venezuela and others. It addressed the issue of transparency. It wished that all points already expressed in the previous plenary session were included. On the new principle 4 of objective 5, during the plenary and the co-facilitators’ session, the Delegation had proposed a clear reference to the definition of morality and *ordre public*. Those concepts were cited together in Article 27 (2) of the TRIPS Agreement. The term *ordre public* derived from French law and was not an easy term to translate into English. Therefore, the original French term was used in the TRIPS Agreement. That term expressed concerns about matters threatening the social structures which tied a society together, matters that threatened the structure of civil society as such. As defined in the Oxford Dictionary, morality expressed the degree of conformity to moral principles, especially good ones. In the implementation of those principles, the differences in cultures and countries, and changes over time, would be taken into account. Some important decisions relating to patentability might depend upon the judgment about morality. It would be inadmissible that patent offices grant patents to any kind of invention without any consideration of morality.

456. The Delegation of Sri Lanka aligned itself with the statements made by the delegations of Bangladesh and Angola, saying that it recognized the various practical difficulties the facilitator's faced and expressed its appreciation for the cleaner texts.

457. The Delegation of the Sudan commented on objective 2 of the revised text which prevented patents involving the access and utilization of GRs, their derivatives and associated TK from being granted. The term "in bad faith" after "patents from being granted", was practically not applicable, because bad faith was not a requirement for granting patents.

458. The representative of INBRAPI supported the comments made by the delegations of the Bolivarian Republic of Venezuela, the United Republic of Tanzania and Plurinational State of Bolivia. She welcomed the text on self-determination of indigenous peoples and local communities in objective 1, principle 2 and asked it to be included discussion by the IGC.

459. The Delegation of Colombia appreciated the challenges and difficulties the facilitators faced in drafting those documents and thanked them for their best efforts to make a contribution to the work of the IGC. Compared to the two other subjects, GRs was under developed. Therefore, the challenge faced was how to make progress on the three subjects and at the same time achieve a degree of maturity on that subject matter. The drafting of objectives and principles was and would continue to be very important but it encouraged all members to find a way of moving to the next stage to enable the IGC engage in true negotiations.

460. The Delegation of Japan stated that although the text was much easier to read and reflected the different views, not everybody was happy with the texts. In its understanding, no drafting would take place at that stage, but there would be opportunity to hold further discussions at the upcoming IGC sessions.

461. The Delegation of the United States of America wanted to echo the statements of the Delegations of Colombia, Japan and the EU earlier. It welcomed the very significant work on GRs made by the co-facilitators. It did not see many of its positions reflected in that final text. It encouraged all Member States to support that process and recognize that, if a position had not been reflected in the text, it might have been because it was not gathering enough support. The Delegation needed to go back and think that it might not have articulated clearly enough, that maybe its position was not going to get enough support, and that it should consider a different approach.

462. The Delegation of El Salvador was pleased to have the documents on GRs. Although they did not contain all objectives and principles, they were excellent documents on the basis of which the IGC could conclude its work following the renewed mandate.

463. Mr. Pande, on behalf of the facilitators, noted the difficulties with amalgamating the text. During that process some omissions and editorial mistakes had taken place inadvertently. He felt humbled by the statements of the delegations of the Plurinational State of Bolivia, with respect to objective 2, option 5 and of Sudan, mentioning the bracketed term "in bad faith". It had not been the facilitators' intentions and job to delete text. As regards to the comment by the Delegation of the Holy See, that text would equally remain. The facilitator was grateful to delegations who appreciated the text as a beginning. As previously stated in the last IGC, the Delegation of India was satisfied with the objectives and principles and was ready proceed with discussions on a text. The facilitators had made attempts to bringing the objectives and principles to a level where further discussions could take place, if the IGC so wished. The footnotes were included in one of the texts and omitted in the other. The issue of the "country providing" or "country of origin" could be discussed further in the next session.

464. The Delegation of the Bolivarian Republic of Venezuela was grateful to hear from the facilitators that its proposal was left out unintentionally and that it would be restored.



465. The Delegation of the Plurinational State of Bolivia supported the Delegation of the Bolivarian Republic of Venezuela and commended the way in which the Chair was leading the meeting. It thanked the facilitators for their extremely complex work and hence omissions and errors were inevitable. It waited to see a revised version of the text which contained both the concerns it had expressed in respect of objective 2, principles 5 and the mention of the term “*ordre public*”, as stated by the Delegation of the Holy See.

466. The Chair thanked the facilitators for a very good attempt in coming up with a neat text. The text on GRs had been untidy and complicated, which, explained the unintended omissions or errors by the facilitators. He assured that that was not the final, and all comments, in particular, those of the delegations of the Plurinational State of Bolivia, the Bolivarian Republic of Venezuela and the United Republic of Tanzania on the issue of “country of origin” and “country providing” and the representative of Tupaj Amaru would be reflected. He invited the facilitators to work with the Secretariat to incorporate those comments and those articles that were inadvertently omitted, so that they could appear in the next round of discussions.

467. The Delegation of the Plurinational State of Bolivia insisted on seeing the corrected text in the document before it could agree to adopt the decision under that agenda item. Having the amendment reflected in decision only and not the respective document was not sufficient, as that was a very important issue to them. It sought the Chair’s indulgence to make a brief drafting proposal for inclusion in the GRs document.

468. The Chair read out the draft decision on the GRs explaining that the draft decision clearly stated that amendments to the text presented by the facilitators would be incorporated into the document WIPO/GRTKF/IC/19/6 on the draft objectives and principles on GRs which would be transmitted to the next session of the IGC. He believed that the IGC was working in good faith and requested the facilitators to confirm that the proposal by the Delegation of the Plurinational State of Bolivia had been inserted in the text.

469. Mr. Ian Goss, one of the co-facilitators, said that he recognized the concerns raised by the Delegation of the Plurinational State of Bolivia, and reassured the Delegation that its text proposal would be added in to the electronic version of the text.

470. The Delegation of the Plurinational State of Bolivia argued that its request was not unreasonable, and it never took the floor unless it was absolutely necessary.

471. The Delegations of Brazil and the Bolivarian Republic of Venezuela supported the comments made by the Delegation of the Plurinational State of Bolivia.

472. On the Chair’s invitation to provide the language for the proposed text, the Delegation of the Plurinational State of Bolivia read out the following text: “ensure that no patent on life and life forms are granted for genetic resources, associated traditional knowledge”.

473. Mr. Ian Goss confirmed that the proposed text had been incorporated into the electronic version of the document.

474. At their request, the session was briefly suspended while hard copies of the revised document were made available to the Delegations of the Bolivarian Republic of Venezuela and the Plurinational State of Bolivia, who confirmed that the required additions has in fact been made.

475. The Delegation of the EU said that it reserved its right to make comments on the presented text on GRs.

*Decision on Item 8:*

476. *The Committee requested that document WIPO/GRTKF/IC/19/6 (“Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources”) be transmitted as a working document to the next session of the Committee, as amended by the text presented to the Committee by the facilitators on genetic resources, Mr. Ian Goss (Australia) and Mr. Hem Pande (India) and incorporating the amendments thereto made by the Committee in plenary. The Committee also requested that document WIPO/GRTKF/IC/19/6, as so amended, be included as part of the Committee’s report to the WIPO General Assembly taking place from September 26, 2011 to October 5, 2011.*

477. *With reference to document WIPO/GRTKF/IC/19/7 (“Options for Future Work on Intellectual Property and Genetic Resources”), the Committee requested the Secretariat to finalize, and update regularly as required, the activities referred to in Cluster C (“Options on Mutually-Agreed Terms for Fair and Equitable Benefit-Sharing”) and to provide information thereon to the Committee at each session. The Secretariat was requested to re-issue document WIPO/GRTKF/IC/19/7, including Clusters A (“Options on defensive protection of genetic resources”) and B (“Options on disclosure requirement”), as a working document for the next session of the Committee.*

478. *The Committee also requested that document WIPO/GRTKF/IC/19/11 (“Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources”), be transmitted as a working document to the next session of the Committee.*

**AGENDA ITEM 9: CONTRIBUTION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS**

479. The Delegation of South Africa, on behalf of the African Group, stated that the implementation of the monitoring and reporting mechanism of the WIPO Development Agenda was an important tool. It recalled that the 2010 General Assembly approved this mechanism with a view that all relevant WIPO bodies should report on their contribution towards the implementation of the Development Agenda Recommendations. It referred in particular to Recommendation 18 that urged the IGC “to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.” It added that other relevant Recommendations included Recommendations 15, 21 and 40. It underlined that the IGC was one of the most important Committees in WIPO to the African Group, as it sought to develop an appropriate *sui generis* system for the protection of GRs, TK and TCEs. It was pleased that the IGC was currently undertaking text-based negotiations with the objective of concluding an appropriate international legal instrument(s) for the protection of TK, TCEs and GRs. It said that the three IWG meetings assisted immensely in guiding the work of the IGC. As a result of these preparations, the 17th and 18th sessions of the IGC had been able to make significant progress on texts relating to TK and TCEs. It was, therefore, of the view that the current negotiation process was to a certain extent in line with the Development Agenda Recommendation 18. It nevertheless recalled that the IGC had not accelerated negotiations on GRs and emphasized that the IGC had spent significant time addressing objectives and principles on GRs without deciding on the eventual outcome. It requested from the IGC to decide on the appropriate mechanism for the protection of GRs. It welcomed the efforts of the WIPO Secretariat to facilitate the registration and digitization of TK of interested Member States and took note of two recent WIPO events related to the issues, held in India and Oman respectively. It said that these events demonstrated the usefulness of registering TK and TCEs as well as the digitization of TK, adding that the development of databases and digital repositories would go a long way in complementing norm-setting on the protection of GRs, TK and TCEs. It recognized the role that WIPO played in providing IP information and advice in order to advance the negotiations of the CBD Nagoya Protocol on ABS. It encouraged WIPO to continue interacting with the CBD Secretariat on the implementation of the Nagoya Protocol and also collaborate with other intergovernmental organizations in the areas of TK, TCEs and GRs. It was pleased with the participation of representatives of indigenous and local communities in the IGC's work and stated that their perspectives and contributions had enriched the negotiations. It expressed appreciation for the contributions that had been made to the Voluntary Fund for representatives of accredited indigenous and local communities as it enabled the participation of indigenous peoples and local communities in the IGC's work. It reminded the IGC that the Voluntary Fund was running out of funds and welcomed some of the suggestions made by some representatives of the indigenous peoples that the Member States and observers should consider contributing to the fund on a voluntary basis. It found the exercise of linking the work of the IGC with the Development Agenda through the Coordination Mechanism fruitful and an effective way of monitoring progress.

480. The Delegation of Brazil was pleased to state its views under a specific agenda item on how the IGC had contributed to the implementation of the Development Agenda Recommendations. It expected that the same format of reporting be adopted in all relevant WIPO bodies. It recalled that the work of the IGC should be guided by the Development Agenda Recommendations, as in all relevant WIPO bodies. It added that special attention should be given to Recommendation 18 which urged the IGC to accelerate the process regarding the protection of TK, TCEs and GRs. It said that since the approval of the Development Agenda in 2007, the IGC had indeed accelerated its work, noting that the 2009 General Assembly had approved an even more ambitious mandate that instructed the IGC

to undertake text-based negotiations with the view of reaching agreement on a text of an international legal instrument(s) to ensure the effective protection of TK, TCEs and GRs. It recalled that three IWG meetings had been convened to achieve this goal and that that fifteen experts from capital from GRULAC had been financed for each IWG meeting. It nevertheless reminded that in spite of this new mandate, progress had been slow, noting that the IGC was not in a position to recommend at this meeting the convening of a Diplomatic Conference. It emphasized that in order to fulfill the recommendations of the Development Agenda it was essential not losing the 2009 ambition in the process of extending the mandate for an additional period of two years. It believed that at least the same number of meetings should be held and the same level of financing should be kept in order to show Member States' commitment to the cause of protection. It suggested that IWG be replaced by extraordinary sessions of the IGC, should the Member States find it useful. It said that it was in any event important to maintain the work between the sessions in order to keep the necessary momentum. It agreed with the Delegation of South Africa that spoke on behalf of the African Group that GRs had lagged behind. It added that special attention must be given to developing an effective work program in relation to that specific issue while renewing the mandate of the IGC.

481. The Delegation of the United States of America, on behalf of Group B, was pleased to contribute to the discussion on the IGC's implementation of the respective Development Agenda recommendations, specifically those in cluster B on norm-setting, flexibilities, public policy and public domain. It recognized the work with respect to WIPO Development Agenda Recommendations 16 as well as 17, and, in particular, Recommendation 18 which directly related to the IGC. The Delegation stated that the IGC had made good progress towards fulfilling the 2009 WIPO General Assembly mandate to reach agreement on a text of an international legal instrument(s) which would ensure the effective protection of TK, TCEs and GRs. It added that this discussion on TK, TCEs and GRs greatly contributed to the mainstreaming of the development considerations in WIPO's work. It recalled that over the past two years, options for substantive articles for TK and TCE and options for principles and objectives for GR had emerged. It said that, despite this progress, further policy reflection and consensus were required in order to provide texts which were sufficiently mature to warrant consideration by the General Assembly.

482. The Delegation of the EU recognized the relevance of the work of the IGC to the implementation of the Development Agenda Recommendations. It recalled that the most recent mandate of the IGC directly corresponded with Recommendation 18, which referred to accelerating the process on the protection of TK, TCEs and GRs, without prejudice to any outcome, including the possible development of an international instrument(s). It believed that further and fuller assessment of the IGC's contribution to the implementation of the Development Agenda would only be possible at a later stage. It recalled that the IGC had recently seen considerable progress in the negotiations, including through the work of the IWGs in which the participation of experts had proved to be very useful. It added, however, that much substantive work still remained to be done. It was of the view that various IGC-related activities and initiatives were guided by the relevant Development Agenda Recommendations. It noted that the norm-setting activities within the IGC were member-driven and ensured a participatory process, which took into consideration the interests and priorities of all Committee's Member States as well as the viewpoints of other stakeholders, including accredited intergovernmental organizations and NGOs. That was in line with Recommendation 15. It noted as well that the norm-setting process duly considered the boundaries, role and contours of public domain in line with Recommendations 16 and 20 and was taking into account flexibilities in international IP agreements in line with Recommendation 17. It stated as well that the IGC's negotiations were based upon open and balanced consultations in line with Recommendations 21 and 42 and were supportive of the UN development goals in line with Recommendation 22. It added that the work on the protection of TK, TCEs and GRs had a potential to contribute to the mainstreaming of development considerations in WIPO's work and the understanding and use of flexibilities in line with Recommendations 12 and 14. It emphasized that the contributions to the Voluntary Fund for

Accredited Indigenous and Local Communities, which facilitated participation of the observers in the IWG and the IGC's sessions, as well as activities of the Indigenous Consultative Forum and the Indigenous Panel, should be mentioned in the context of Recommendation 42 referring to wide participation of civil societies at large in WIPO activities. It concluded by appreciating the contribution made by the IGC to the implementation of the Development Agenda and looked forward to cooperating further within the IGC on the realization of the goals set out in the Development Agenda.

483. The Delegation of Japan supported the statement made by the USA on behalf of Group B. It noted that the IGC had made progress. It believed, therefore, that the IGC had been contributing to the implementation of the Development Agenda Recommendations, especially Recommendation 18. It noted that further work was needed in order to carry on the process on the protection of TK, TCEs and GRs, without prejudice to any outcome, including the possible development of an international instrument(s), as Development Agenda Recommendation 18 stated.

484. The Delegation of the Islamic Republic of Iran expressed its satisfaction with the inclusion of this agenda item, as it provided an opportunity for Member States to raise their points on the issue of development, with the hope of mainstreaming it through all the activities of WIPO. It was of the view that development objectives lay at the heart of the IGC and said that the 45 Recommendations of the WIPO Development Agenda were immediately relevant to its ongoing work. It stated that the IGC had reached a critical moment in its text-based negotiations and recalled that since 2000, the IGC had invested a lot of time and energy in its process. It requested that the IGC keep the momentum and try to solve the remaining divergences in order to be able to fulfill the long-pending aspirations of developing countries. It welcomed, therefore, the progress being made as a result of text-based negotiations and it was optimistic about the positive outcomes, that is, the enhancement of the effective use of IP principles for the legal protection of TK and TCEs, as well as equitable benefit sharing of GRs. Such a trend could move IP rights towards a more balanced direction, would increase the interests of the developing countries in the IP system and, therefore, promote the legitimacy of WIPO as a UN specialized agency, which should be bound by UN development objectives. It said that the only avenue to realize these objectives was the establishment of international binding instruments to protect TK, TCEs and GRs. It expected that such an important paradigm shift in the IP regime would bring about sustainable grounds for the management of collective and individual rights in order to commercialize TK, TCEs and GRs for the benefit of its holders. It highlighted that that process could improve the enabling environment for development in developing countries and would enhance knowledge economy through the use of IP as well as increase the contribution of the developing countries in the global knowledge and global cultural partnership. It invited the Secretariat to provide technical assistance to countries in order to enable them to formulate robust national protection systems, as well as new methods for the commercialization of TK and TCEs, for the benefit of their holders, in parallel with the on-going negotiations that were taking place in the IGC. It suggested that these activities be designed in the future as a project of the Committee on Development and Intellectual Property (CDIP).

485. The Delegation of Ecuador referred to the Annex of WIPO document WO/PBC/17/4 that contained the Draft Proposed Program and Budget for the 2012/13 Biennium, in particular to Program 11 which related to the WIPO Academy. It expressed its support for the creation of a new specialized course on TK in the framework of the Distance Learning Program of the WIPO Academy as foreseen in the draft. It said that this course would help the users, including civil society, to follow the developments of this issue in line with the Development Agenda.

486. The representative of Tupaj Amaru referred to the development issue as it had been addressed by the UN for the last 25 years. He considered that the Millennium Development Goals (MDGs) had not been met and had failed entirely. He said that the form of development that indigenous peoples were confronted with was neo-liberal in nature and destructive of their

GRs and TK. Indigenous peoples wished for a different type of development in accordance with their collective interests.

*Decision on Agenda Item 9:*

*487. The Committee held a discussion on this item. The Committee decided that all statements made on this item would be recorded in the report of the Committee and that they would be transmitted to the WIPO General Assembly taking place from September 26, 2011 to October 5, 2011, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

**AGENDA ITEM 10: FUTURE WORK**

488. [Note from the Secretariat: These interventions took place on the first two days of the session]: The Chair informed the Committee that, following consultations with the regional groups, an informal group of the “Friends of the Chair” would be convened at his initiative under the guidance of Mr. José Ramón López de León Ibarra, the Vice-Chair of the IGC, with the mandate to draft a decision, in due consultation with all interested parties, regarding the recommendation that the IGC would submit to the upcoming General Assembly on its future work. He then opened the floor for initial statements on this agenda item.

489. The Delegation of South Africa, on behalf of the African Group, expressed confidence that the present IGC’s session would yield positive results under the Chair’s leadership. It recalled the mandate given to the IGC by the 2009 General Assembly, and expressed its appreciation to the IGC’s commitment in implementing this mandate. It recalled that it was through political will that the IGC would achieve its overall objectives of an international legal instrument(s) for the protection of GRs, TK and TCEs. It recognized that the IGC had made significant progress in advancing work in the areas of TCEs and TK in the past two years. Although the mandate posited that norm-setting must be advanced equally on all three substantive issues, the text-based negotiations focused significantly on TK and TCEs, with GRs lagging behind. It reinstated its position that all three issues should be accorded equal treatment. Given this view, it recalled that the African Group had submitted a proposal in document WIPO/GRTKF/IC/17/10 to direct the IGC’s work on GRs which the IGC failed, in its view, to take into consideration in its negotiations. It reminded that its proposal called for text-based negotiations on the mandatory disclosure requirement and further identified other options pertaining to defensive protection and MATs as supplementary work that the IGC could undertake regarding GRs. In addition, it said that its proposal identified a number of documents that should form the basis for negotiations, including submissions made by the Delegations of Switzerland and the EU on disclosure requirement. It said that the adoption of the Nagoya Protocol reinforced the important role that WIPO could play towards its implementation. It therefore believed that there was an urgent need to make progress on mandatory disclosure and that the proposal by the African Group should guide the work towards developing a text on GRs, focusing mainly on mandatory disclosure requirement. It welcomed the initiative of the LMCs meeting held in Bali, Indonesia late June 2011, which produced documents aimed at streamlining the IGC’s text-based negotiations. It expressed its readiness to work on those documents. Although the IGC was requested to submit to the 2011 General Assembly the text(s) of an international legal

instrument(s) which would ensure the effective protection of GRs, TK and TCEs, given the current state of negotiations, it recognized that the texts in all three issues needed further development before they could be submitted to the General Assembly and a diplomatic conference. It stated that this implied first and foremost that the mandate of the IGC should be renewed, with a view to conclude the objectives not realized in the current biennium. It said that the new mandate should emphasize on concluding text-based negotiations on all substantive areas in the nearest possible time. It expressed support for the renewal of the mandate of the IGC for the biennium 2012-2013 and for the inclusion of the following four elements: first, a clear commitment for completing text-based negotiations aimed at the conclusion of an international legal instrument(s) for the protection of GRs, TK and TCEs; second, a commitment to undertake text-based negotiations on mandatory disclosure requirement for GRs with the view to amend the WIPO patent treaties, namely the PCT and the PLT; third, the adoption of a clear work program with specific time lines leading towards a diplomatic conference. To this end, it proposed four sessions of the IGC in the biennium 2012/2013 and three special sessions in January, March, and June 2012 respectively. It added that each special session should be dedicated to one substantive issue and that the purpose of the special session would be to negotiate outstanding articles that require finalization. A fourth element to be included in the new mandate, was a clear recommendation to the 2012 General Assembly for deciding a date for a diplomatic conference to be held in 2013. It reinstated its commitment to fulfilling its mandate and to presenting a comprehensive negotiated text to the WIPO General Assemblies in 2012. It remained positive and expected the IGC to conclude negotiations of an international legally binding instrument(s) without any further delays. It said that the African Group was ready and willing to engage constructively to provide its contribution in developing a future work program with specific time lines leading towards a diplomatic conference and a clear recommendation to the 2012 General Assembly for deciding a date for a diplomatic conference to be held in 2013.

490. The Delegation of the United States of America, speaking on behalf of Group B, thanked the Chair for his leadership and supported his proposal to improve the efficiency of IGC's sessions by: starting promptly, eliminating coffee breaks, restricting general statements to groups, without precluding the submission of written statements which would be included in the report, and finally setting a time limit for speakers. It thanked the Secretariat for the timely production of documents and for the information sessions held throughout the year. The IGC was at a crucial point in complying with the mandate given by the 2009 General Assembly. It recalled that the IGC had followed the ambitious schedule of intersessional and regular sessions set forth in the 2009 General Assembly decision. It emphasized that the members of Group B had worked together positively with members of other groups, as well as, experts and observers toward making progress in all areas. It was important that the IGC had identified key policy issues in the three areas and resulting divergent views. It stated though, that the TCE and TK texts as well as the GRs objectives and principles were still burdened with brackets revealing these divergent views, even on basic issues. The IGC needed to resolve these policy issues as it moved forward at the present crucial stage. It concluded therefore, that despite all the IGC's best efforts, the three texts had not reached a point of maturity for the General Assembly to decide on convening a diplomatic conference. It added that it supported the Chair's idea to hold on the margins of this session a "Friends of the Chair" group to look at how best to proceed. It reiterated the two principles that should guide the IGC in this process: first, that all three issues, TCE, TK, and GRs, shall proceed on equal footing; and second, that the IGC should not prejudge the outcome on the form or nature of the texts. It added that the IGC should develop a schedule of sessions in the upcoming biennium within existing budgetary resources and with improved efficiency, bearing in mind that more meetings did not necessarily produce better results. Recalling what other groups had said in previous sessions concerning the slow rate of progress and the need to address significant divergent policy views, it highlighted that the schedule of regular IGC sessions should seek to resolve the key policy issues that had emerged from the discussions on the existing draft text, and could include, for example, thematic IGC sessions. It expressed its readiness to constructively engage with all

interested parties in the spirit of open-mindedness and cooperation on the important issue of the renewal of the mandate of the IGC at the 2011 General Assembly.

491. The Delegation of Pakistan, speaking on behalf of the Asian Group, attached great importance to the issues at the heart of the IGC which reflected a desire on the part of the international community to respect the rights related to GRs, TK and TCEs. It added that those issues were of importance to all countries, whether developed or developing, and that the IGC had to continue its work to ensure that GRs, TK and TCEs were well protected in a manner that balanced the rights of creators and holders of GRs, TK and TCEs on one hand and the interest of users on the other. It recalled that the IGC had done much work and achieved significant progress and was confident that with the intensive, constructive, and continuous dialogue among Member States, a final conclusion could be reached in a timely manner. All the members of the IGC had indicated the desire to see substantive progress on all the three issues before the IGC. It believed that in order to achieve the desired outcome, the IGC needed to expedite its works. It was however of the view that it was crucial to secure the renewal of the IGC's mandate in order to move confidently towards this conclusion. It recalled the mandate of the 2009 General Assembly, noting that the IGC was still far from that objective. It nevertheless felt encouraged by the progress made in the IGC's work during the last two years and looked forward to timely progress in the same direction during the next biennium. In this context, it called for the renewal of the IGC's mandate, based on the following broad parameters: first, the IGC should, during the next budgetary biennium and without prejudice to the work pursued in other fora, continue its work and expedite text-based negotiations with the objective of reaching agreement on a text of an international legal instrument(s) which would ensure the effective protection of GRs, TK and TCEs; second, the IGC should follow a clearly defined work program for the next biennium that should make provision, in addition to the four regular sessions of the IGC, for an appropriate number of other extraordinary arrangements in the next biennium, to make timely progress; third, the focus of the IGC's work in the next biennium should build on the existing work carried out by the IGC and use all WIPO working documents which constituted the basis of the IGC's work on text-based negotiations along with any other textual contributions submitted by the Member States; fourth, the IGC should submit to the 2013 General Assembly, the text(s) of an international legal instrument(s) which would ensure the effective protection of GRs, TK and TCEs and the decision on convening a diplomatic conference should be taken by mutual consensus at the 2013 General Assembly; fifth, the International Bureau should continue to assist the IGC by providing Member States with necessary expertise and funding for the participation of experts and indigenous communities' representatives from developing countries and LDCs according to the usual formula. It believed that around these parameters, the future path of the IGC would be a triumphant one. It emphasized that all Member States needed to combine their energies to foster collective efforts towards the effective and balanced protection of GRs, TK and TCEs. It assured the Chair of the continued support of the Asian Group in the IGC's deliberations to successfully deal with the future path that should be adopted by the IGC and stood committed to constructively engaging in all such discussions.

492. The Delegation of Slovenia, speaking on behalf of the Central European and Baltic States (CEBS), looked forward to a constructive and efficient meeting. It noted with satisfaction that an important step forward was made at the previous session of the IGC supplemented with the work done by the IWGs. It was without doubt that the IGC was heading in the right direction. However, the IGC had to be realistic on the desired goals. It seemed that the current versions of the draft texts on all three issues still needed further discussions and negotiations in order to reach necessary consensus on a text of an international legal instrument(s). At this stage the documents before the IGC had not reached the level of maturity which would lead to convening a diplomatic conference. In order to successfully continue with the work of the IGC, the forthcoming WIPO General Assemblies should renew the mandate for the next biennium 2012-2013. It emphasized that the IGC should pay special attention to the fact that all three issues had to advance at the same pace. Regarding the methodology of work at the present session, the Delegation remained open to suggestions. It would support proposals which would



ensure effective and efficient work with focus on substantive issues. It was committed to participating actively and advancing work on all issues before the IGC.

493. The Delegation of Panama, on behalf of GRULAC, commended the Chair's leadership and the submission of documents as well as the organization of informal information sessions by the Secretariat. It recognized the commitment and willingness by all Member States to continue actively participating in the work of the IGC noting that progress had been made. It was however of the view that it was necessary to continue the IGC's work to achieve greater consensus on criteria and positions on all the subjects. It therefore supported the renewal of the IGC's mandate in order to achieve tangible results that would ensure the effective protection of TK, TCEs and GRs. It emphasized that its group enjoyed vast cultural and biological diversity and therefore had a deep interest in ensuring protection. In light of the above, it expressed support for the General Assembly convening a diplomatic conference at the most appropriate time. It urged all Member States to step up their efforts to achieving a strengthened mandate, since the negotiations and eventual results were and would be a clear sign of WIPO's efforts to accommodate the interests of all its Member States.

494. The Delegation of China hoped that the parties involved would achieve consensus as soon as possible on the effective protection of GRs, TK and TCEs. It proposed the renewal of the mandate in order to iron out the differences of opinion. It added that it supported the suggestion made by the Delegation of South Africa, speaking on behalf of the African Group, regarding the mandatory disclosure requirement. This was in its view a very important issue.

495. The Delegation of Indonesia, on behalf of the LMCs, said that the second meeting of the LMCs on GRs, TK and TCEs was held in Bali, Indonesia from June 27 to 30, 2011. The Bali meeting had been attended by representatives of the LMCs, in particular, Algeria, Angola, Bangladesh, Colombia, Egypt, India, Indonesia, Malaysia, Myanmar, Namibia, Pakistan, Peru, South Africa, Tanzania, Thailand and Zimbabwe. The objective of the meeting was to build a common perspective among LMCs and to generate further recommendations designed to advance the IGC's negotiating process. It submitted the draft texts that had emerged from the Bali meeting, which covered the issues of GRs, TK and TCEs to facilitate and expedite the work of the IGC, with the view to reaching a common agreement on the text of an international legal instrument(s) designed to ensure the effective protection of GRs, TK and TCEs. Driven by the desire to have the three issues progress on an equal footing, it also submitted a preliminary draft text on GRs. It hoped that the texts would be acceptable as the LMCs group's contribution to the text-based negotiations and that they would help the facilitators in their work. It welcomed comments and inputs adding that a high level of flexibility was required to arrive at a solid agreement. The IGC had done much work and achieved significant progress. It was confident that in the not too distant future, and with intensive, constructive, and continuous dialogue, a final conclusion could be reached. However, in order to achieve this, the renewal of the IGC's mandate was crucial. On this basis, it informed the IGC that the Bali meeting had also adopted joint recommendations on how to advance the work of the IGC. The recommendations, presented in document WIPO/GRTKF/IC/19/8, recommended as follows: first, to convene a diplomatic conference in 2013; second, to renew the mandate of the IGC to continue its work and undertake text-based negotiations with the objective of reaching agreement on the text or texts of an international legal instrument(s), which will be submitted to the diplomatic conference in 2013; third, to convene an adequate number of special sessions of the IGC during the biennium in addition to the four regular session of the IGC to facilitate timely finalization of the text or texts; fourth, to set up a detailed work program including a schedule of special sessions of the IGC that should be adopted by the General Assembly. It called upon all Member States to consider positively the recommendations made by LMCs. It strongly believed that the only way to avoid exploitative methods from being used was to have legal instrument(s) which would protect GRs, TK and TCEs effectively.

496. The Delegation of Yemen supported the statement made by the Delegation of Indonesia on behalf of the LMCs. The recommendations and documents constituted a great contribution

to reaching solutions that could be acceptable to all parties. It also supported the statement made by the Delegation of Pakistan on behalf of the Asian group. It acknowledged that IGC 19 had to discuss important matters both for developing and developed countries and that a constructive dialogue and transparency was therefore necessary. It emphasized the need to make progress and reach agreement on an international legally binding mechanism to protect TK and TCEs. Given the progress that the IGC had achieved so far, it was confident that success was achievable. It was of the view that the IGC could recommend renewal of its mandate and that special sessions be held to enable the IGC complete its work before a diplomatic conference could be held at the latest in 2013. It stated that reaching an international and legally binding mechanism to protect TK and TCEs would serve the interests of the whole humanity. It expressed support for the consultations being held by the Chair.

497. The Delegation of Thailand supported the statement made by the Delegation of Pakistan on behalf of the Asian group. It acknowledged that the IGC had made considerable progress over the past eighteen months. While all the key issues were now tabled, there were a number of substantive issues that still needed to be tackled. It stated that the IGC was moving, as it must so, from the stage of restating well-known positions to finding possible compromises and common grounds. It felt therefore that the issue was not whether Member States should extend the IGC's mandate, but how to extend it in a way that would ensure the achievement of further substantive progress. It was crucial for the IGC to build on the present progress and inject more momentum into the negotiations. The new mandate needed to be more focused, with specific time frames which would allow the IGC to intensify its work, engage in policy discussions, and bring the IGC closer to an outcome acceptable to all sides. In this regard, the IGC needed to consolidate the various options on the table, in order to advance towards consolidated texts, as suggested by the Chair. It welcomed the LMCs group's recommendations. It considered that it was essential to engage all WIPO developing and developed Member States, as well as all stakeholders in an inclusive manner in advancing discussion on future work. The most important consideration for all was to move on the basis of greater consensus, develop areas of common ground, while narrowing divergences. It wished to see more active participation from Member States, cross regional policy dialogue and, most importantly, political will. It was confident that the Chair's leadership would bring up another successful session of the IGC and expressed readiness to support his efforts.

498. The Delegation of India looked forward to working with the Chair and other delegations towards a successful and productive outcome of the present session. It associated itself with the statements made respectively by the Delegation of Pakistan on behalf of Asian Group and the Delegation of Indonesia on behalf of the LMCs. Recalling that the two-year mandate of the IGC was coming up for renewal, it stated that it was a good time to take stock of the progress achieved and the future work. It was of the view that the IGC had made good use of its mandate and made considerable progress on the TCEs and TK texts. It acknowledged that there was now a broad, emerging agreement on several provisions that were common to both texts, such as the draft articles on Formalities, Term of Protection, National Treatment, Trans-border Protection, Consistency with Existing International Obligations, Management of Rights, Sanctions and Remedies. On the other hand, it emphasized that there were continuing differences on some key articles, which set the foundation of these legal texts and were of paramount importance, namely, Subject Matter of Protection, Scope of Protection and Beneficiaries. Reaching agreement on them was crucial. On GRs, the IGC had initiated a starting point by identifying concrete options for defining the objectives and principles of a potential legal instrument. It added though, that considerable work needed still to be done, in terms of evolving a text that would be based on these agreed objectives and principles. It recalled that the Bali meeting was convened with the objective of consolidating their common positions on the three issues under negotiation by reducing diverging options wherever possible, with a view to helping to clean up the text and expediting the text-based negotiations, bearing in mind the critical stage of the negotiations in the IGC. It emphasized that the Bali meeting was noteworthy for two reasons: first and foremost, it resulted in the development of a text on GRs, which was the first such draft text to be presented to the IGC for consideration;

and second, it sought to narrow the options on TK and TCEs which would hopefully lead to a more expeditious consideration of these articles in the negotiations during the present session of the IGC. It looked forward to constructive engagement by all Member States and observers on these substantive contributions by the LMCs. With regard to the future work of the IGC, it extended its full support to the Bali recommendations on the way forward. It was of the view that it was imperative that the mandate of the IGC be extended with a view to convening a diplomatic conference in 2013 and that the IGC be allowed to continue its work with an adequate number of special sessions in addition to the four regular sessions in the next biennium, so as to enable the IGC to finalize the texts in a timely manner. It hoped therefore that the upcoming session of the General Assembly would adopt a detailed work program, consisting of both the regular and special sessions of the IGC for the next biennium, as necessary. Describing India as one of the countries most affected by misappropriation of TK and bio-piracy, it said that its country had been at the forefront of the developing countries' demand for a legally-binding instrument(s) for the protection of GRs, TK and TCEs. It looked forward to frank and focused discussions on these and other issues.

499. The Delegation of the EU noted that as the IGC approached the end of its mandate, the progress that had been made could be observed as moving towards the goals set out in the mandate. This was a considerable achievement, showing that the determination and cooperation displayed in previous sessions of the IGC and IWGs, had delivered noteworthy results. However, the variety of options and alternatives that still remained in the three latest draft texts was a clear indication that more time and work was necessary to complete the challenging and ambitious task of reaching agreement on a text of an international legal instrument(s) for the efficient protection of TCEs, TK and GRs. It recalled that the 2009 mandate for the IGC included submitting a text to the 2011 General Assembly in order to consider a decision on convening a Diplomatic Conference. However, it was important that the IGC did not attempt to accelerate work on these issues before they were sufficiently mature. That would result in failure to reach agreement, and in doing so might undo the positive work achieved to this point. The Delegation therefore considered that the IGC was not yet ready to submit texts to the General Assembly that could serve as a basis for considering convening a Diplomatic Conference. In view of the above, the present IGC should recommend the renewal of its mandate for the next biennium 2012-2013, in order to continue and finalize discussions on the draft texts. In its understanding, further negotiations concerning TK, GRs, and TCEs issues should be based on the entire work carried out by the IGC, not excluding any particular document(s), and that the work of the IGC should ensure coherence with, and support the work of, the CBD, FAO and WTO. With respect to suggestions for "fast-tracking" discussions on TK and TCEs, it was concerned that discussions on GRs had already fallen behind the others in terms of progress; concentrating on the two which had progressed, with the aim of getting some "easy wins" could result in a lack of focus on GRs and it falling even further behind. Therefore, work on all three issues should continue on an equal footing. In this regard, it felt that the most productive recommendation for the renewed mandate would be a further four IGC meetings, to be spread over the biennium. If other delegations felt that it might improve efficiency, it would be willing to consider focusing on thematic IGC sessions (*i.e.* one IGC for GRs, one for TK and one for TCEs, before a final one to bring together the work streams). The IWGs, held in the last biennium, were a useful tool to enable discussions focused on the technical issues relating to IP and GRs, TK, and TCEs. However, these meetings had served their purpose, and unless there were specific technical issues which Member States could identify for discussion in future IWGs, there was no justification for including them in the renewed mandate. With respect to the procedure to be followed during the present session, it believed that conducting drafting work via informal drafting groups and in plenary sessions with respect to the issues of TCEs and TK remained the most efficient and effective method of proceeding under any renewed mandate. It was committed to contributing constructively at the session and looked forward to cooperating with other Member States in a result-oriented spirit to achieve real progress.

500. The Delegation of Trinidad and Tobago associated itself with the statement made by the Delegation of Panama on behalf of GRULAC. It noted that a lot of work had been undertaken by the IGC in both the plenary and the informal drafting groups. These meetings and discussions had generated avenues and solutions on issues which over the years had been contentious. It anticipated such discussions would continue in the spirit of compromise and that active consideration would be given to new and innovative areas of the IGC's work. Referring to its country's developmental and historical needs, it said that there was a tremendous amount of TCEs, TK and GRs which needed to be protected. It believed that Member States must continue to expedite the process, with the aim that the diplomatic conference be convened within the not too distant future. It wished to see the mandate of the IGC renewed at the upcoming General Assembly. The IGC was trying to create a legal framework to protect what was not protected before and there was also an element of the-unknown regarding aspects of TCEs not yet widely known. It called therefore for an instrument on TCEs that ought to be flexible and inclusive, and one which should not replicate the constraints of the conventional IP system.

501. The Delegation of Peru strongly supported the Chair's decision to set up a "Friends of the Chair" group and the appointment of facilitators on each of the three substantive topics. This way, the IGC would be able to accelerate its progress during the present session. Considering some of the issues in which there were still differences of opinion, it expressed its support for this very important task. It associated itself with the statement made by the Delegation of Panama on behalf of GRULAC. It recalled that the renewed mandate by the 2009 General Assembly, adding that for Peru, as well as for many other developing countries, GRs, TK and TCEs were an important source of biological and cultural source of knowledge. The renewal of the mandate was therefore important in enhancing the protection of the cultural heritage and national heritage of those countries, their communities and indigenous peoples, so as to prevent misappropriation or misuse and to draw benefits of their commercial use. It acknowledged that the IGC had been able to make important progress, but much work was still required. Consequently, the IGC should be given a strengthened mandate that would focus on specific results, with specific and realistic dates, both for the IWGs and the ordinary sessions. It suggested that there should be at least four meetings of the IGC, as their usefulness had been demonstrated. A diplomatic conference should be held in the year 2013 at the latest. Referring to the meeting in Bali, it fully supported the statement made by the Delegation of Indonesia on behalf of the LMCs. It encouraged the IGC to make good use of the time available.

502. The Delegation of the Philippines stated that the IGC had conscientiously followed the work program set out in its present mandate, however the issues attendant to TCEs, TK and GRs were far from being resolved. It acknowledged that the IGC's progress was encouraging, but that more work was still required. It therefore called for the renewal of the IGC's mandate. It added that the establishment of a legally binding international framework was essential to address the misappropriation of TCEs, TK, and GRs. It was prepared to engage in a multilateral solution to guarantee the recognition of TCE, TK, and GRs rights for the benefit of the respective countries of origin as well as local and indigenous communities, who possessed the knowledge associated with, and were the custodians of these resources.

503. The Delegation of the Plurinational State of Bolivia expressed support for the statements made respectively by the Delegation of Panama on behalf of GRULAC and the Delegation of Indonesia on behalf of the LMCs. Important progress had been achieved relating to TCEs, TK, and GRs, but more work was necessary, in particular regarding issues related to the protection of TK and GRs. It therefore called for the extension of the IGC's mandate. However that mandate should be strengthened and focused in order to obtain tangible results, for the benefit of diverse countries like Bolivia, as well as the international community as a whole. The renewal of the IGC's mandate should accelerate its work with the view to convening a diplomatic conference as soon as possible.

504. While recalling the mandate of the IGC, the Delegation of Namibia expressed support for the statement made by the Delegation of South Africa, on behalf of the African Group especially on the urgent need for progress on mandatory disclosure regarding GRs. It also endorsed the statement made by the Delegation of Indonesia on behalf of the LMCs. It stated that the recommendations adopted in Bali should be seriously considered. It recognized that not many countries provided input to the Bali recommendation, but nonetheless urged others to consider the text. It reiterated that the IGC's mandate had been ongoing for about a decade, and was yet to produce an international legal instrument. It emphasized the value of such an instrument which would ensure protection of and prevent illicit access to GRs, TK and TCEs, as well as create welfare for rights holders by providing legal certainty. Its country had witnessed illicit access, and such protection would encourage countries to do more research on their heritage and reflect on their past and future. It believed that GRs, TK and TCEs were a product of human intellect as well as a rich source of innovation for human progress. It endorsed all articles in line with mandatory disclosure requirements and with the protection and prevention from illicit access of GRs, TK and TCEs. It urged WIPO to capture the interests of all nations, and not only the interests of selective groups.

505. The Delegation of Malaysia endorsed the statement made by the Delegation of Indonesia on behalf of the LMCs. It expressed concerns regarding misappropriation of TCEs and TK, as well as biopiracy of GRs, recalling that Malaysia was one of the twelve mega-diverse countries. The Bali meeting had been important in supporting a process that would facilitate the effective protection of TCEs, TK and GRs, with the objective of adopting legally binding instruments. It fully endorsed the advanced texts on TK and TCEs, as well as the preliminary text on GRs submitted by the Delegation of Indonesia on behalf of the LMCs. Endorsing the recommendations from the LMCs, it called upon IGC 19 to recommend to the upcoming General Assembly to convene a diplomatic conference in 2013; to renew the IGC's mandate to continue its work and undertake text-based negotiations with the objective of reaching agreement on a text(s) of international legal instrument(s) which would be submitted to the diplomatic conference in 2013; to convene an adequate number of special sessions of the IGC during the next biennium, in addition to the four regular sessions of the IGC and to facilitate timely finalization of the text(s). It believed that the IGC should be able to focus on the existing work carried out using the documents WIPO/GRTKF/IC/19/4, WIPO/GRTKF/IC/19/5 and WIPO/GRTKF/IC/19/6 and the proposals formulated by the LMCs. It hoped that the present session would conclude with a positive outcome.

506. The representative of Tupaj Amaru said that the delaying tactics by the Delegation of the EU was confusing. Delay in negotiations threatened the protection of indigenous peoples' knowledge, cultural values and GRs. He stressed that many Member States refused to realize the underlying issue before the IGC *i.e.* the protection of TK, GRs and TCEs at an international level. He proposed that the active participation of the indigenous peoples in the meetings of the General Assembly be included in the IGC's recommendation to the 2011 General Assembly.

507. The Delegation of Colombia endorsed the statements made respectively by the Delegation of Indonesia on behalf of the LMCs and by the Delegation of Panama on behalf of GRULAC. It reminded the IGC that GRs, TK, and TCEs were assets of immense value for countries, indigenous and local communities alike and should be protected by a legal framework, as that would meet the growing demand of their population. It welcomed the positive spirit demonstrated by Member States in making progress towards concrete results and the participative and inclusive character of the process. With regards to GRs and GRs-related TK, it reiterated its view that a legally binding instrument would be the solution that would ensure their fair and sustainable use in the long run. It added that this instrument should recognize Member States' sovereignty on GRs and ensure in a clear and unambiguous way that compliance with the national mandatory special regimes on ABS are respected by all parties. The said instrument should oblige users of GRs to comply with legal formalities and should provide that the countries of origin of the GRs as well as the communities that were holders of TK associated with GRs participate in a fair and equitable way as relates to the

benefits that would arise from their use. The Delegation reiterated that the instruments must be legally binding on all Member States. A legally binding instrument should foresee fair use and distribution of benefits drawn from the use of GRs in a way that would be beneficial for the countries of origin. It urged for the inclusion of particular provisions that would subject the research, development and use of those resources to a disclosure of origin requirement and the PIC of the relevant communities that were holders of TK. It insisted on the importance of making headway in the negotiations which should result in the ratification and coming into force of texts which would guarantee international protection of TK, GRs and TCEs. It requested therefore that any further discussions be closed as soon as the IGC reached consensus on the content of three texts.

508. The Delegation of Egypt endorsed the statements made respectively by the Delegation of South Africa on behalf of the African group, and by the Delegation of Indonesia on behalf of the LMCs. It was important in its view to renew the IGC's mandate to enable it continue with the text-based negotiations in order to finalize the proposed text(s) in the nearest possible time. It believed also that the IGC should recommend to the upcoming General Assembly to convene a diplomatic conference in 2013. It said that though the draft texts were not ready, it was confident that during the next biennium further progress would be realized in developing mature texts, based on the constructive engagement and the strong political will of the Member States, both during regular and special sessions of the IGC. After eleven years, time had come for the IGC to approach the final phase of the text-based negotiations on all substantive areas. It added that the benefits that would accrue from this process could not be overstated.

509. The Delegation of Ecuador aligned itself with the statement made by the Delegation of Panama on behalf of GRULAC as well as the statement made by the Delegation of Indonesia on behalf of LMCs. The proposed recommendations would provide greater and better results within the IGC. It stated that it was of paramount importance that the texts on TCEs, TK and GRs provide effective means for all countries to preserve and regulate the use of their own resources such as biodiversity, TK and TCEs. It emphasized that this process was part of the national plan of its country. It was therefore worthwhile to allocate more time in order to iron out differences of view among Member States. It stated though, that the work schedule of the IGC should be well-defined in order to ensure that it made progress. It was confident that the IGC could achieve its objectives with the support of all Member States and observers.

510. The Delegation of Brazil supported the statements made by the Delegation of Panama on behalf of GRULAC and by the Delegation of Indonesia on behalf of the LMCs. It shared the same objectives as the LMCs and was pleased with the consensus that had emerged from the Bali meeting. It agreed that further work needed to be accomplished before the convening of a diplomatic conference. It therefore supported the renewal of the mandate of the IGC along the lines suggested by the Delegation of India. It expressed its commitment to contributing constructively in the discussions.

511. The Delegation of Angola expressed support for the statement made by the Delegation of South Africa on behalf of the African group. It also supported the initiative undertaken by the LMCs. It reiterated that work relating to GRs should be accelerated, particularly the mandatory disclosure requirement. It supported the renewal of the IGC's mandate and supported the establishment of a framework focused on completing text-based negotiations with the view to adopting a legally binding international instrument, in accordance with a clearly defined timeline that would lead to a diplomatic conference. The work program would comprise four sessions of IGC and three special sessions, one in January 2012, the second in March 2012, and the third in June 2012, and finally a clear recommendation to the General Assembly to convene a diplomatic conference in 2012. It expressed readiness to engage with all Member States to reach a recommendation that would be acceptable.

512. The Delegation of Nigeria supported the statement made by the Delegation of South Africa on behalf of the African Group. It thanked the WIPO Director General for his

constant efforts and interest in the affairs of the IGC as expressed in his opening remarks. It believed that the IGC had achieved substantial progress so far and had reached a stage that a diplomatic conference could be convened for the adoption of an instrument for the protection of GRs, TK and TCEs.

513. The representative of the IPCB reiterated that indigenous peoples were the owners and rights holders of much of the subject matter at issue, namely indigenous peoples' knowledge, cultural expressions, and GRs derived from their peoples and territories. She called for equal participation in any process that affected indigenous peoples' rights and interests. She stated that none of the indigenous people's inputs made during IGC 18 had been reflected and that it could not be inferred that indigenous peoples had given any consent to the outcomes of the meeting. As a result, she added that future text negotiations would require extraordinary efforts by the IGC to ensure the meaningful participation and input of indigenous peoples. As the IGC was moving toward future work, the intent should be to increase, rather than decrease indigenous peoples' participation in the process. She emphasized that the starting point for any future work must be based on and should facilitate the exercise of the right to self-determination of indigenous peoples and that this required the recognition that indigenous peoples had inherent and distinct rights that set them apart of States and civil organizations.

514. The Delegation of Mexico supported the renewal of the IGC mandate for two years following a work plan that would enable the IGC to make progress in its work, within the stipulated biennial budget. It considered that the two texts, on TK and TCEs, had made sufficient progress to conclude the negotiations in the next biennium. It added that the IGC should deliver and concentrate on the tabled options, in view of a draft treaty on TK and TCEs and should be given a mandate to continue the negotiations, towards the adoption of international treaties. Regarding GRs, it acknowledged that little progress had been made. It emphasized that the new mandate should provide for the setting up of IWGs on GRs, so that the experts could once again discuss the issue, concentrating mainly on the issue of disclosure of origin. Further, the IGC should hold two sessions per year, as well as intersessional meetings on GRs lasting a week, so that the General Assembly could at the end of that mandate convene a diplomatic conference.

515. The representative of CISA aligned himself with the statement by the representative of IPCB. He reiterated the statement he had previously made in the framework of the 4<sup>th</sup> session of the United Nations Expert Mechanism on the Rights of Indigenous Peoples that was held from July 11 to 14, 2011 (EMPRIP), which was a reflection of the position of the indigenous caucus. He said that the indigenous peoples and nations could not be denied effective participation as nations and peoples recognized and vested with the right to self-determination, including within WIPO. This recognition was reflected as the "equal right and self-determination of peoples" in Article 1.2 of the UN Charter and other international instruments. Indigenous peoples possessed therefore a right to full and equal participation in WIPO processes; to submit proposals; and to agree to the final text, because these proposals and the potential treaty emanating from them intimately and irreversibly would affect them. The qualification that at least one Member State must agree to proposals presented by indigenous peoples to remain in the drafting texts was unreasonable and contrary to the emerging norms of international law. Indigenous peoples must be allowed FPIC at all phases and levels of deliberation, including the final consent process at the General Assembly and at the final diplomatic conference. He added that the principle of FPIC should be reflected in the preamble and operative paragraphs. The right to self-determination was indivisible, interdependent and interrelated to all other rights, including indigenous peoples' right to develop their economic, social and cultural rights. He therefore called upon WIPO to include in the preamble and the operative paragraphs the phrase: "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development". He stated that indigenous peoples' permanent sovereignty over natural resources was a necessary component of the right to TK, GRs and TCEs, and should also be expressed in the preamble and operative paragraphs. He was of the view that indigenous

peoples must be recognized as nations who had the collective right to their territory and all aspects of their economic, social and cultural development. This should also be included in the preamble and operative paragraphs. Indigenous peoples and nations requested to participate at the 2011 General Assembly to present their concerns in all matters relating to the development of the international treaty, as peoples and nations in their own right. He called for an international monitoring and arbitration body, as part of the dispute resolution mechanism on TK, GRs and TCEs recommended by Professor Miguel Alfonso Martínez in the final report of the study on treaties, agreements and constructive arrangements. He also called upon Member States to provide justification for proposals or texts that would affect the scope of rights of Indigenous peoples in any way.

516. The representative of CAPAJ recognized the good will displayed by some Member States in endorsing the proposals made by indigenous representatives and experts and the fact that as a result, they had been incorporated into the draft texts. The IGC was getting into a new negotiating stage and it was more necessary than ever before that those proposals were included in the draft texts, particularly, GRs, being the most crucial. He also recognized as well that over the last few years since 2009, indigenous peoples in the IGC have had a *sui generis* status, with the indigenous consultative forum, held on Sundays before each IGC session, being recognized as part of the IGC program. As the IGC moved forward, he proposed that the Chair examine the possibility of recommending to the WIPO General Assembly new rules for participation. He requested that any proposal which would enjoy the consensual support of the indigenous caucus should be inserted and considered in the IGC just like any Member State proposal.

517. The Delegation of Bangladesh aligned itself with the statements made respectively by the Delegation of Pakistan on behalf of the Asian Group and by the Delegation of Indonesia on behalf of the LMCs. The issues under the IGC's consideration were important for all countries, irrespective of their level of development. It proposed that the IGC recommend to the upcoming WIPO General Assembly the renewal of its mandate for two more years and agree upon convening a diplomatic conference in 2013. It hoped that the IGC would have reached an agreement by that time. It also suggested that a number of special sessions should be convened, in addition to the four regular sessions. It expressed concerns relating to funding for developing countries and in particular to LDCs. Such funding would enable them to attend future sessions. It hoped that adequate funding would be provided. Member States were called upon to consider the recommendations and substantive texts put forward by the LMCs and to reach a common understanding on GRs, TK and TCEs. It thanked the Government of Indonesia for its effort and initiative to facilitate and expedite the progress of the work of the IGC.

518. The Delegation of the United States of America was gratified that a number of countries had met and discussed the texts that were under consideration by the present session of the IGC. It noted that there had been some kind of consensus among a subgroup of delegations which tried to move the discussions forward. Aside from the WIPO/GRTKF/IC/19/8, it sought to know when the other additional texts would be made available to the IGC. It was not clear whether those additional texts would become the basis of discussions during the present session, or if they were intended to be texts replacing those that were under consideration. It also sought clarification on how the IGC would proceed with discussions that would involve the new texts. It raised a question regarding the nature of the instrument(s) that was presently being negotiated. It noted that there had been many statements that mentioned a diplomatic conference, some that mentioned a legally binding instrument, and others that mentioned an international legal instrument. It recalled that there had been a hard-won consensus two years ago regarding the mandate that was given to the IGC and that this mandate referred to an international legal instrument. It was unsure if that consensus was intended to be reopened for discussion. But it wondered whether the WIPO Secretariat could inform the IGC whether a Diplomatic Conference would necessarily be discussing a legally binding instrument, or whether a Diplomatic Conference could, in a more flexible way, discuss other types of instruments that



would fall within the category of an international legal instrument as set forth in the mandate of the General Assembly.

519. The Delegation of Japan fully supported the statement made by the Delegation of the United States of America on behalf of Group B. It recognized the importance of the three issues before the IGC, namely, TCEs, TK and GRs. It appreciated the significant development that the IGC had achieved under the current mandate and recalled that during the present biennium, the IGC had advanced focused discussion based on draft articles and draft objectives and principles in the backdrop of an enormous amount of existing WIPO working documents. It emphasized though, that Member States should not lose sight of the technical and policy issues before the IGC. It stated that ambition was necessary to achieve a great result, but, at the same time, a pragmatic and cautious strategy was also essential to reach the IGC's common goal. It urged Member States to solve problems one by one in a constructive and mutually satisfactory manner without rushing to achieve results. It reiterated its commitment to engaging in discussions in a faithful and constructive manner to reach good results which all Member States could be satisfied with. From this viewpoint, it underlined the following points for future work. Taking into account its observation about the state of play of the negotiations, it felt that further work would be needed even if the IGC could use the time during that session in the most efficient manner. It supported the renewal of the mandate of IGC, adding that such renewal should reflect the reality of the negotiations and lead the IGC to the goal which all members could agree on. In order to realize appropriate and satisfactory achievements for all Member States, every knowledge and insight should be collected from Member States. It added that the IGC should not stick to reducing the number of options at this stage and should be open to all new ideas that contribute to the discussions on these important issues. It reiterated its intention to actively engage in the present session on both substantive issues and future work.

520. The Delegation of Australia thanked the Chair for his significant efforts to build consensus. It saw the current process towards developing an international instrument(s) as being a 3 stage process: stage 1 - discussion. That was the development of text, and critically within that text, reflected in the different options, the identification of the key policy issues and divergences; stage 2 - negotiation. This was the critical stage in which the IGC would attempt to negotiate through the key policy differences and come up with a text(s), which would accommodate those divergent views; and stage 3 - commitment. This was the final stage when the IGC had a strong consensus to commit to an agreement, reflecting success in stage 2 (negotiation). This would then provide the political authority required to commit to a Diplomatic Conference. Importantly, it believed good progress had been made, particularly through the IWGs, and stage 1 (discussion) had been completed and was moving into stage 2. The key policy issues in all three areas, including the divergent positions, were now clear. These needed to be addressed at the onset. From its perspective stage 2 (negotiation) was the critical stage and where the real work begun, particularly in developing positions which met all Member States' needs. To date the participants had been essentially negotiating from their own policy positions, now they needed to understand the divergent views and try to accommodate policy positions, cross regional groupings and development status. They reflected more fundamental differences in the policy environments of individual Member States. Some countries had strong domestic legislation relating to these issues, including legal agreements and treaties with their indigenous communities; others also had extant legislation relating to access and benefit sharing; some had limited domestic legislation relating to protection of TK, TCEs and GRs, while in some countries their indigenous communities were national communities. Transnational issues between communities also arose such as countries which were importers of intellectual property and others exporters; countries which were bio-diverse and others with limited bio-diversity; countries who were emerging and becoming more critically reliant on intellectual property to support their continued development through access to knowledge and technology transfer and also direct foreign investment. Countries that had specific cultural issues they wanted to protect and countries that were looking to access this knowledge to support their economic development, or both. They were all essentially a mix of these policy environments, and importantly this means that an agreement(s) needs to have flexibility as one size clearly will not

fit all. In moving forward, it believed the next biennium would be critical to resolve these divergent policy positions, which reflected the environment previously mentioned. As such, it strongly supported the renewal of the mandate across all three issues with equal weight given to each issue. Of importance, as the IGC progressed on its work, was that the modalities established for the renewed mandate address how the IGC could work together and develop a shared understanding of those issues that divide it. This would need to be done through open dialogue and in particular Member States clearly articulating their policy interests, so the IGC could attempt to accommodate them all. In relation to this issue, it remained flexible with regard to the form and number of sessions, noting as stated in the Group B statement more did not imply quality. In relation to a diplomatic conference, it had no issue with the intent; the timing was the key issue - going too early risked failure. It was necessary to ensure that the IGC could actually resolve the divergent views on key policy issues first and also determine the best form of the agreement based on the resolution of these issues. In this respect, it associated itself with the Group B statement. It remained fully committed to delivering an outcome on all three issues. It had significant policy interests as an IP importer, reliant on knowledge and technology transfer, bio-diversity with a mature bio-tech industry, strong domestic legislative base, including supporting access and benefit sharing and PIC, and vibrant indigenous communities. It noted the positive comments from many delegations across all groups to come together to resolve policy differences, directed at developing an instrument(s) which took account of all Member States' interests, reflecting the complex policy issues, social, moral and economic.

521. The Delegation of Morocco supported the statements made respectively by the Delegation of South Africa on behalf of the African Group and by the Delegation of Indonesia on behalf of the LMCs. It welcomed the progress made over the past two years. It said though, that the texts had not yet reached a state of maturity, so as to recommend the convening of a diplomatic conference. It therefore supported the renewal of the IGC's mandate under the conditions and terms indicated by the African Group. It however expressed the wish that the renewed mandate be the last. It argued that the objective which had been sought for so long, *i.e.* the protection of GRs, TK, and TCEs, deserved to have the eventual texts legally binding.

522. The Delegation of Chile supported the statement made by the Delegation of Panama on behalf of GRULAC. It welcomed the work that had been done by the IGC so far. This was an important basis that enabled the IGC to continue its discussions and achieve results in order to ensure proper protection of TCEs, TK and GRs. With regard to the mandate, it supported holding a diplomatic conference in principle, however before that could be achieved, progress in drafting texts agreeable to all was necessary. It believed that past experience in WIPO demonstrated, regarding, for example, the protection of audiovisual works, that convening a diplomatic conference without a sufficient degree of maturity was not progressive. It therefore expressed its support for the renewal of the IGC's mandate, and considered it a good proposal to have thematic sessions, as it would ensure substantive progress.

523. The Delegation of Zimbabwe aligned itself with the statements made respectively by the Delegation of South Africa on behalf of the African Group and by the Delegation of Indonesia on behalf of the LMCs. It reiterated the statement made by the African Group and highlighted the four elements emphasized in the said statement regarding the work program: first, a clear commitment for completing text-based negotiations, aimed at the conclusion of an international legal instrument or instruments for the protection of GRs, TK and TCEs; second, a commitment to undertake text-based negotiations on mandatory disclosure requirement for GRs with a view to amend the WIPO relevant treaties, namely the PCT and PLT; third, the adoption of a clear work program with specific time lines leading towards a diplomatic conference. It believed that these four elements were very clear in nature. It was ready to discuss or negotiate the specificity of the work program, but was of the view that the broader perspective as laid down by the African Group proposal was very clear for all to comprehend.

524. The representative of the MNC supported the renewal of the IGC's mandate in order to finalize the development of a legally binding instrument which would ensure the protection of

indigenous TK, TCEs and GRs. Member States were urged to recognize the importance of effectively engaging with representatives of the indigenous peoples as well as indigenous and local communities of both developing and developed countries in any future work of the IGC, including in any special technical or working group meeting. She said that the MNC participated in the present negotiations with the support of the WIPO Voluntary Fund and thanked the Member States that had made a contribution to the Fund.

525. The representative of GRTKF International noted that as the work of the IGC advanced, the IGC needed to address the need for indigenous and local communities to fully and effectively participate in the process. He requested that mechanisms be put in place for the achievement of their full and effective participation.

526. The representative of FAIRA brought the IGC's attention to the report of the 2011 session of the UN Permanent Forum on Indigenous Issues ("UNPFII") that met in New York from May 16 to 27, 2011. He particularly referred to paragraphs 25 to 28 and paragraph 31 that addressed matters regarding the CBD and WIPO. Paragraph 28 the UNPFII welcomed WIPO facilitating a process in accordance with the UNDRIP regarding the protection of TK, TCEs and GRs. He added though, that the report of the UNPFII emphasized as well in its paragraph 31, the right for indigenous peoples to participate in decision-making and the importance of mechanisms that would ensure the full and effective participation of indigenous peoples in accordance with Article 18 of the UNDRIP. He stated that the UNPFII's report went on to call upon WIPO to facilitate indigenous peoples' participation in its process. He wondered whether the IGC could consider engaging with indigenous peoples on a regional basis. He also referred to the statement made by the representative of CAPAJ regarding the status of indigenous peoples in the IGC and in the General Assembly and asked that this status be revisited. There were a number of indigenous peoples groups which were self-governing groups, and which had a status that went beyond the one attached to non-governmental organizations or observer organizations. He stated that the next General Assembly should be asked to consider a form of accreditation for indigenous peoples' organizations that would meet their specific status, particularly in relation to procedural issues. This question particularly related to their ability to participate in the drafting of texts.

527. The Delegation of Zambia supported the statements made respectively by the Delegation of South Africa on behalf of the African Group and by the Delegation of Indonesia on behalf of the LMCs. It said that its country, like many other countries in Southern Africa, possessed vast amounts of GRs, alongside TK and TCEs. Incidentally, TCEs contributed very significantly to the development of tourism in its country and therefore it was essential for these resources to be jealously protected. It fully supported the extension of the mandate of the IGC as framed by the African Group, and in particular that a diplomatic conference be held in 2013, after successful completion of all the necessary work. The IGC should not rush into concluding legally binding instruments to protect TK, TCEs and GRs without fully embracing the views of all concerned stakeholders. It emphasized that the IGC should strive to come up with legally binding instruments that would benefit all stakeholders of TK, TCEs and GRs, including the indigenous peoples themselves as they were the ultimate beneficiaries of these resources.

528. The Chair gave the floor to the WIPO Legal Counsel to respond to the question asked by the Delegation of the United States of America regarding the status of the international instrument that a Diplomatic Conference would consider in principle.

529. The WIPO Legal Counsel said that the traditional method for negotiating treaties and binding instruments was through a Diplomatic Conference. In WIPO terms, a Diplomatic Conference would specifically be convened for purposes of negotiating and adopting a treaty. Normally, the recommendation for a Diplomatic Conference would come from the subsidiary body, in this case the IGC, to the General Assembly, and it was up to the General Assembly to decide on whether or not to convene a Diplomatic Conference. He had no record of a WIPO Diplomatic Conference having met to discuss a non-binding treaty. He added that, for WIPO

purposes, Member States would not need a Diplomatic Conference to discuss a non-binding treaty and that it would suffice for the General Assembly to adopt, in those cases, a declaration or a resolution, as it has done before. He said that the purpose of adopting resolutions was to encourage subsequent implementation within national legislation, which would eventually render them binding. He reiterated that, for such purpose, the General Assembly would not need a Diplomatic Conference *per se*. He reminded the IGC that, in any event if there was a Diplomatic Conference and that Conference were to adopt a legally binding instrument, that instrument would only be binding on those States that would subsequently ratify or accede to that instrument.

530. The Delegation of Australia said that it understood the answer from the Legal Counsel as stating that, in principle, Member States could convene a Diplomatic Conference in order to finalize instruments which were less than treaties, but that WIPO practice so far had been to use Diplomatic Conferences to finalize legally binding instruments, leaving to the General Assembly the possibility to adopt less binding instruments, like resolutions or declarations. It asked whether its interpretation was correct.

531. The Delegation of the EU understood from the answer by the Legal Counsel that the General Assembly would not need a Diplomatic Conference to work out a non-binding instrument. It sought to know whether the interpretation by the Delegation of Australia was correct.

532. The Delegation of Zimbabwe emphasized that the Legal Counsel had said that any treaty would only be binding on those countries which would ratify it. It was therefore of the view that the on-going discussion was misplaced.

533. The Delegation of South Africa reminded the IGC that the present mandate foresaw a legal instrument. It thought, therefore, that it was premature to raise the question of the status of the text(s) at that stage, noting that that discussion could undermine the momentum that had been achieved so far. It said that the IGC should continue to focus on negotiating a legal instrument in accordance with its mandate.

534. The Delegation of Australia supported the statement made by the Delegation of South Africa that the IGC should not prejudge the eventual status of the instrument(s) it was negotiating.

535. The Chair said that the discussion had helped to clarify that aspect.

536. The Delegation of Indonesia referred to the question raised by the Delegation of the United States of America with regard to the status of the texts it had submitted on behalf of the LMCs. It requested that they be presented alongside documents WIPO/GRTKF/IC/19/4 and 19/5 and that the text regarding GRs be presented as a stand-alone document. It reiterated that those texts were based on the existing WIPO documents and had been submitted with the intention to narrow down the divergences and to highlight the pending issues that needed to be reflected as part of the text-based negotiations. It informed the IGC that three facilitators had been instrumental in drafting the three texts, namely India on TK, Thailand on TCEs and South Africa on GRs. It requested that those texts be part of the on-going informal discussions by the facilitators designated by the Chair.

537. The Delegation of India said that the Bali meeting had not created texts but had instead consolidated the positions that were already on the table, as reflected in WIPO/GRTKF/IC/19/4 (Draft Articles on the Protection of TCEs) and WIPO/GRTKF/IC/19/5 (Draft Articles on the Protection of TK). It remained open to ideas on how the LMCs' texts could be integrated into the process to help narrow down options. It added that supporting delegations would update their positions in accordance with those texts while the plenary could address the substantive issues.

538. The Delegation of the EU thanked the Delegation of Indonesia for the submission of the texts on behalf of the LMCs. It reminded the IGC that the Chair had requested Member States to refrain from submitting new text and instead to try to narrow down the divergences and reduce the number of options. It was appreciative of the efforts made by the LMCs to identify the areas of convergence on certain issues. But it had just received the documents and had not had time to read them. It sought clarification from the Chair on how the documents would be dealt with, noting that the text on GRs submitted by the Delegation of Indonesia on behalf of the LMCs was entirely new.

539. The Delegation of the United States of America, speaking on behalf of Group B, was surprised at the introduction of the so-called Bali text. It was, however, open to using the text in order to support the IGC's decision-making process, should Group B as a whole be willing to consider the document.

540. The Delegation of Thailand emphasized that the texts proposed by the LMCs should not be viewed as new texts. It suggested that the LMCs texts be considered as a set of proposed texts by a group of seventeen countries.

541. The Delegation of Trinidad and Tobago supported the statement made by the Delegation of the EU. It considered that the LMCs texts affected certain positions of its country and said that it needed time to review them.

542. The representative of CAPAJ said that it was extremely important for the IGC to define the status of the LMCs texts. He wondered how delegations that were part of GRULAC and, at the same time, endorsed the LMCs, would reconcile their respective positions within both groups.

543. The Delegation of Peru acknowledged the importance that a number of delegations had attached to the LMCs texts. The texts reflected the positions of a set of countries which shared similar views despite the fact that those countries came from different regions. It added that the texts could be subscribed to by other delegations as well, should they wish to do so.

544. The Delegation of Slovenia, on behalf of the CEBS Group, reminded the IGC that the only way to achieve progress during the session was to reduce the options in the drafting texts.

545. The Delegation of Colombia supported the statement made by the Delegation of Peru. The LMCs texts came from a group of countries that were from different regions in the world, but who found that they had similar interests on certain issues. It said that the document had been submitted as a contribution to facilitate the IGC's work in order to reach agreement on an international system that would protect the rights of communities.

546. The representative of CAPAJ asked whether GRULAC would endorse the LMCS texts. It stated that this would facilitate the reduction of options.

547. The Delegation of South Africa said that it was its understanding that the texts presented by the Delegation of Indonesia on behalf the LMCs would not replace the documents WIPO/GRTKF/IC/19/4 (Draft Articles on TCEs) and WIPO/GRTKF/IC/19/5 (Draft Articles on TK). These texts were submitted for transparency purposes, to let everyone know the outcomes from the Bali meeting. It said that those texts were more of an input to the negotiations, and not a replacement of the current drafting texts. There was actually nothing new in the texts and they resulted from a streamlining of views. It was ready to work on the current documents with a view to borrowing from the LMCs texts what could improve the current drafting texts.

548. The Delegation of the Bolivarian Republic of Venezuela, replying to the representative of CAPAJ, said that individual countries coming from different regional groups might identify similarities of views, which may be different from the regional group's position. The LMCs texts could not be considered as having been endorsed by GRULAC.

549. The Delegation of Brazil said it could not speak on behalf of GRULAC but that it supported the LMCs' texts. It stated that it would be pleased, should they be considered as useful inputs for discussion.

550. In response to the representative of CAPAJ, the Delegation of Panama, on behalf of GRULAC, said that in GRULAC there were divergent positions regarding the LMCs texts as stated by the Delegation of the Bolivarian Republic of Venezuela. It recalled that each country had its own position regarding the LMCs' texts and that more time was needed for GRULAC to review the text as a group.

551. The Chair noted that there was no intention by the Delegation of Indonesia on behalf the LMCs, to introduce new texts that would replace the existing documents or become the basis of the present discussion. The texts had no formal status presently but constituted nevertheless a very important contribution to the process inasmuch as they tried to refine the texts and this was precisely what the IGC was trying to do at the present session. He therefore invited Member States and observers to review them and see how they could benefit from them. He referred to the statement made by the Delegation of South Africa in this regard which clearly described, in his view, the actual status of the document.

552. The representative of CISA asked the WIPO Legal Counsel whether there would be any way for indigenous peoples' representatives to participate in the WIPO General Assembly as observers despite the fact that the deadline for applying for observer status had lapsed. He also asked whether it would be possible to make arrangements with Member States to allow representatives of indigenous peoples to submit proposals to the upcoming General Assembly. He also requested the Chair to meet with the indigenous caucus to discuss issues related to their participation.

553. In response, the WIPO Legal Counsel said that the application forms for observer status to the General Assembly were available on the WIPO website, but that the deadline of May 31, 2011 had lapsed in so far as the upcoming General Assembly was concerned. He added that any interested organization could apply for observer status before May 31, 2012 in view of the September 2012 session of the WIPO Assemblies. On the submission of proposals by Member States at the General Assembly on behalf of indigenous representatives, he said that he was not aware of any *ad hoc* arrangement in this regard.

554. The Delegation of the Republic of Korea fully supported the extension of the mandate of the IGC in order to expedite the ongoing negotiations. It welcomed the Chair's suggestion to have a "Friends of the Chair" group and expressed its readiness to actively participate in the consultations. It strongly believed that further discussions would narrow the gaps on crucial issues among Member States and would facilitate consensus on an international legal instrument(s) to protect GRs, TK and TCEs more effectively in accordance with the existing international intellectual property regimes. It suggested that the binding aspect of the international legal instrument be dealt with at the General Assembly in 2013. TK, GRs and TCEs were all valuable parts of human heritage that should be treated on equal footing. It hoped that the 2013 General Assembly would be able to decide upon convening a diplomatic conference.

555. The Delegation of Canada echoed the comments made by several representatives of observers, including the MNC to the effect that meaningful and continuous engagement of indigenous representatives was crucial if the IGC was to move forward in a successful manner. It looked forward to the Chair's guidance on how best to do that. Regarding issues of participation of indigenous representatives, it asked that consultations take place as well with the user groups that were represented at the IGC. It added that their input should be recognized and valued, since user groups would also be impacted by the outcome of the IGC's process. Regarding the mandate, it aligned itself with the statement made by the Delegation of the United States of America on behalf of Group B and confirmed that it supported the renewal

of the IGC's mandate for the next biennium on the condition that sound working methods would be adopted. It believed that it should be left to the IGC to recommend by consensus whether extra sessions were required.

556. The representative of GRTKF International recalled that he had requested the IGC to provide mechanisms that would enable the effective participation of indigenous peoples and local communities' representatives in the process. On future work of the IGC, he requested that the regional Member States groups allow indigenous and local communities' representatives from the respective regions to participate in regional group meetings. This dialogue mechanism would facilitate the endorsement by Member States of drafting proposals that were formulated by indigenous and local communities' representatives coming from their own regions.

557. The representative of IPCB on behalf of the caucus of indigenous peoples and local communities echoed the concerns that the caucus had previously expressed at the 18<sup>th</sup> session of the IGC. She said that the IGC's future work should be guided by the following fundamental principles: first, a primary objective of the international legal instrument(s) must be to protect indigenous peoples' rights and interests as the owners or holders of TK, TCEs, and GRs; second, the legal instruments must establish a new international regime that would conform to customary law and processes regarding the use, protection from misuse and misappropriation of the GRs, TK, and TCEs belonging to indigenous peoples; third, the legal instrument(s) must reaffirm and implement the universal protection of the rights of indigenous peoples and nothing in the instrument(s) could be construed as diminishing or extinguishing the rights that indigenous peoples had presently or might acquire in the future; fourth, the international legal instrument(s) must comply with international norms by adopting the term "indigenous peoples" which would respect their lawful status and recognized rights; she said that this principle applied to the universal application of rights under customary and international law; fifth, the international legal instrument(s) must recognize and fully implement the principle of FPIC of indigenous peoples, in accordance with paragraphs 28, 31, 34 and 35 of the report of the tenth session of the UNPFII; sixth, the international legal instrument(s) must not assert or otherwise infer that any States or Member of WIPO were holders of, or the beneficiaries of indigenous peoples' TK, TCEs, and GRs; seventh, in the international legal instrument(s), indigenous peoples must have the right to redress, including repatriation of, any of their TK, TCEs, and GRs taken or used without their FPIC; eighth, by virtue of their right to self-determination, indigenous peoples must freely determine their political status and freely pursue their economic, social and cultural development; ninth, the right of indigenous peoples to permanent sovereignty over natural resources must be understood and respected in the development of the legal instruments, in accordance with, *inter alia*, paragraph 39 of the report of the tenth session of the UNPFII. Regarding indigenous peoples and local communities' participation as well as the future work and processes, she stated that the indigenous peoples and local communities required full and effective participation in all relevant negotiations and decision-making processes, including all regular and special sessions of the IGC, the General Assembly, diplomatic conference and any other related meetings regarding the proposed instrument(s) on GRs, TK and TCEs, in accordance with paragraphs 28, 31, 34 and 35 of the report of the tenth session of the UNPFII. She emphasized that the indigenous peoples, as peoples and indigenous nations, participated in these fora in their own right. In the spirit of cooperation in the development of an international instrument(s) that ought to be relevant, practical, and fair, she requested that indigenous peoples' proposals remain in the drafting texts without the qualification of Member States' support in the drafting process or reports. Indigenous peoples' proposals must be accepted on an equal footing as any Member State proposal. She requested that indigenous peoples be consulted on all proposals, deletions and amendments of any text in a collaborative manner. She also asked that indigenous peoples' rights to self-determination and permanent sovereignty over natural resources be recognized in the preamble and operative text(s) of the final instrument(s), in accordance with paragraph 39 of the report of the tenth session of the UNPFII. She reaffirmed that indigenous peoples were distinct peoples and/or indigenous nations, that they had the collective right to their territories and biodiversity in

all aspects of their economic, social and cultural development and that those principles should also be reflected in the final instrument(s).

558. The Chair thanked all delegations and observers representatives for their statements. He observed that all participants wished to see the mandate of the IGC renewed and that many wished to see it strengthened in one way or another. He also recognized that much work still needed to be done as no delegation had argued that the present texts were ready for final adoption in their current state. All three issues of the IGC should continue to receive equal treatment, as highlighted by most delegations, although he noted that some delegations seemed to suggest a particular focus on GRs, especially the disclosure requirement issue. He noted as well that participants referred to the need for sound working methods and a clear work program for the next biennium. Some delegations argued for thematic sessions of the IGC, while others called for additional special meetings to address individual issues. He said that the number and nature of meetings of the IGC to be held in the next biennium would need further consideration, especially by the "Friends of the Chair" group, as well as on whether the new mandate should refer to a diplomatic conference and if so, in what manner. He requested the "Friends of the Chair" to meet under the guidance of the Vice-Chair, Mr. José Ramón López de León Ibarra, and start drafting a decision on future work and remain open to consultation.

559. [Note from the Secretariat: This took place later in the session]: Mr. José Ramón López de León Ibarra, in his capacity as the Vice-Chair of the IGC, submitted and presented to the IGC the draft text of a decision regarding the recommendation on future work of the IGC to be submitted to the upcoming General Assembly. He informed the IGC that the draft decision was prepared by the group of the "Friends of the Chair" in due consultation with all interested parties.

560. The representative of FAIRA said that indigenous peoples' representatives did not participate in the discussion of the "Friends of the Chair". He drew the attention of the IGC to paragraph (f) of the draft decision, in relation to participation by observers. He reminded the IGC that the Voluntary Fund was running out of means and this aspect did not seem to have been addressed at all in this process. He reminded Member States to contribute to the Voluntary Fund, in order to facilitate indigenous peoples' participation in the upcoming process. He hoped that the report of the IGC would record some recommendations that were made from the Advisory Board of the Voluntary Fund in the margins of the present session, and made available for by the Secretariat in its forthcoming study of current practices regarding observers' participation.

561. The Chair confirmed that although the representative of FAIRA had not been part of the group of the "Friends of the Chair", the group had considerably consulted with all interested parties, including observers, as paragraph (f) of the draft decision reflected. He said that issues regarding the Voluntary Fund would be duly reflected under item 5 of the agenda.

562. The representative of CISA took note of paragraph (f) of the draft decision regarding observers' participation and expressed the hope that the upcoming General Assembly would strengthen this part of the recommendation and provide indigenous peoples with broader participatory status.

*Decision on Agenda Item 10:*

*563. The Committee agreed to recommend the following decision to the WIPO General Assembly meeting from September 26, 2011 to October 5, 2011:*



*“Bearing in mind the Development Agenda recommendations, the WIPO General Assembly agrees that the mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore be renewed as follows:*

*(a) The Committee will, during the next budgetary biennium (2012/2013), and without prejudice to the work pursued in other fora, expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.*

*(b) The Committee will follow, as set out in ... [Annex VI of this report], a clearly defined work program, based on sound working methods, for the 2012/2013 biennium. This work program will make provision initially for four sessions of the IGC, three of which will be thematic, as detailed in the future work program of the IGC, taking into account sub paragraph (d) with regard to the possible consideration by the General Assembly in 2012 of the need for additional meetings.*

*(c) The focus of the Committee’s work in the 2012-2013 biennium will build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/19/4, WIPO/GRTKF/IC/19/5, WIPO/GRTKF/IC/19/6 and WIPO/GRTKF/IC/19/7, which are to constitute the basis of the Committee’s work on text-based negotiations, as well as any other textual contributions by Members.*

*(d) The Committee is requested to submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012*

*will take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process.*

*(e) The General Assembly requests the International Bureau to continue to assist the Committee by providing Member States with necessary expertise and funding, in the most efficient manner, of the participation of experts from developing countries and LDCs, taking into account the usual formula.*

*(f) With a view to enhancing the positive contribution of observers, the General Assembly invites the Committee to review its procedures in this regard. To facilitate this review, the General Assembly requests the secretariat to prepare a study outlining current practices and potential options”.*

## **AGENDA ITEM 11: ANY OTHER BUSINESS**

564. There was no discussion under this Agenda Item.

## **AGENDA ITEM 12: CLOSING**

565. Several delegations thanked the Chair for his leadership during the session and at informal meetings and the Secretariat for its hard work and support, and expressed satisfaction with the results of the session. The Vice-Chairs, the facilitators and the “Friends of the Chair” were also thanked for the role they had played in facilitating the work of the IGC at the present session. The interpreters were also thanked for their flexibility and support both in plenary and the informal meetings.

566. The Delegation of the United States of America, on behalf of Group B, observed that that was the first time that the IGC had actually been able to recommend a renewal of the mandate to the General Assembly and for that, the IGC had a lot to be proud of.

567. The representative of IPCB, in her capacity as indigenous co-chair along with Mr. Thomas Alarcon, representative of CAPAJ, extended her appreciation to the Chair for his kind way of working with the indigenous representatives, and for always being open to meeting with them. The Secretariat was thanked for providing meeting rooms and secretarial support. She also acknowledged her fellow indigenous representatives at the meeting for their initiative and support. She also thanked the indigenous representatives from Latin America present at the meeting, who had brought some of their sacred items to lend support to the IGC, to ensure that it achieved work that would benefit future generations.

568. The representative of Tupaj Amaru thanked the Chair for his tolerance and for allowing representatives of indigenous peoples and communities to take the floor and put forward their suggestions on behalf of the indigenous people they represented. He said that the texts he had provided were based on existing legal instruments, particularly, the two redrafted proposals that he had submitted to the Secretariat. The proposed texts had a normative character and contained three basic articles which comprised: (1) restitution and restoration of indigenous cultural heritage; (2) ratification, acceptance and approval; (3) final provisions stemming from Article 45 of the UNDRIP. He also expressed his gratitude to the indigenous representatives who had supported his proposals.

569. The Deputy Director General, Mr. Christian Wichard, added his thanks to the IGC for its constructive participation, to the Vice-Chairs, the interpreters and to his colleagues in the TK Division. In particular, he expressed his gratitude to the Chair and said that it had been a great experience to work under his guidance through that biennium.

570. The Chair, in his closing remarks, said that it had indeed been a great honor and privilege to preside over the 2010-2011 biennium of the IGC. He was overwhelmed by the level of cooperation and support that he had received from all delegations. That had made it possible for that biennium to achieve a degree of unprecedented success after many years of what could be described as lacking progress. The IGC had good reason to pat itself on the back for that leap in the quest to add to the development of a text(s) of an international instrument(s) to ensure effective protection of GRs, TK and TCEs. Being the last session, he was pleased that all the delegates had spared no efforts to ensuring that the IGC had a constructive outcome which would be carried forward to the next mandate. In expressing his appreciation, he singled out the "Friends of the Chair" for their commendable efforts in ensuring that a decision on the future work was arrived at. In particular, he thanked the Vice-Chair, Mr. José Ramón López de León Ibarra (Mexico), for ably facilitating the outcome. He also acknowledged the facilitators for their commendable work and thanked the interpreters for their cooperation. He also thanked the other Vice-Chair, Mr. Vladimir Yossifov (Bulgaria), for his dedicated support and the Secretariat, led by the Director General, for its commitment and support. In conclusion, the Chair said that he might prepare a summary of some of the key issues that needed to be taken forward to the next round of negotiations.

571. The Chair closed the meeting.

*Decision on Agenda Item 12:*

*572. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6, 7, 8, 9 and 10 on July 22, 2011. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated before September 30, 2011. Committee participants would be invited to submit written corrections to their interventions as included in the draft report before a final version of the draft report would then be circulated to Committee participants for adoption at the next session of the Committee.*

[Annexes follow]

**LISTE DES PARTICIPANTS/  
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)

AFGHANISTAN

Fraidoon AMEL, Attaché, Permanent Mission, Geneva

AFRIQUE DU SUD/SOUTH AFRICA

Yonah Ngalaba SELETI, Chief Director, National Indigenous Knowledge Systems Office, Pretoria

ALGÉRIE/ALGERIA

Mohamed BOUDRAR, directeur général, Office national des droits d'auteur et droits voisins (ONDA), Ministère de la culture, Alger

Mohamed CHERGOU, chef, Service dépôt et examen, Direction des marques, Institut national Algérien de la propriété industrielle (INAPI), Alger

Hichem BOUTABBA, chef, Département système et technologie de l'information, Institut national algérien de la propriété industrielle (INAPI), Alger

Hayet MEHADJI (Mme), premier secrétaire, Mission permanente, Genève

ALLEMAGNE/GERMANY

Frank SCHMIEDCHEN, Senior Government Official, Federal Ministry for Economic Cooperation and Development, Berlin

Tilmann Andreas BUETTNER, Desk Officer, Patent Law, Federal Ministry of Justice, Berlin

ANGOLA

Manuel LOPES FRANCISCO, National Director, Ministry of Education, Science and Technology, Luanda

Honória SUSO DOMINGOS, Deputy Director, Ministry of Education, Science and Technology, Luanda

ARGENTINE/ARGENTINA

Verónica LÓPEZ GILLI (Sra.), Secretario de Embajada, Ministerio de Relaciones Exteriores, Buenos Aires

Alejandro Gabriel ROSSO, Experto, Ministerio de Agricultura, Ganadería y Pesca, Buenos Aires

Rodrigo BARDONESCHI, Primer Secretario, Misión Permanente, Ginebra

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Edwina LEWIS (Ms.), Assistant Director, International Policy and Cooperation Section, IP Australia, Canberra

Norman BOWMAN, Principal Legal Officer, Copyright and International Policy Section, Attorney-General's Department, Canberra

Anna GARRETSON (Ms.), Executive Officer, Department of Foreign Affairs and Trade, Canberra

AUTRICHE/AUSTRIA

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Hildegard SPONER (Ms.), Technical Department 2A – Mechanical Engineering, Austrian Patent Office, Vienna

AZERBAÏDJAN/AZERBAIJAN

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BELGIQUE/BELGIUM

Katrien VAN WOUWE (Mme), attaché, affaires juridiques et internationales, Office de la propriété intellectuelle, Service public fédéral, économie, petites et moyennes entreprises, classes moyennes et énergie, Bruxelles

Patrick VAN GHEEL, premier secrétaire, Mission permanente, Genève

BOLIVIE (ÉTAT PLURINATIONAL DE)/BOLIVIA (PLURINATIONAL STATE OF)

Horacio Gabriel USQUIANO VARGAS, Jefe, Unidad Derecho Económico Internacional, Viceministerio de Comercio Exterior e Integración, La Paz

Luis Fernando ROSALES LOZADA, Primer Secretario, Misión Permanente, Ginebra

Ulpian Ricardo LÓPEZ GARCÍA, Segundo Secretario, Misión Permanente, Ginebra

BOSNIE-HERZÉGOVINE/BOSNIA AND HERZEGOVINA

Lidija VIGNJEVIĆ (Ms.), Director, Institute for Intellectual Property of Bosnia and Herzegovina, Sarajevo

Irma DELIBASIC (Ms.), Trademark Expert, Institute for Intellectual Property of Bosnia and Herzegovina, Sarajevo

BOTSWANA

Mmanjabela Nnana TSHEKEGA (Ms.), Trade Attaché, Permanent Mission, Geneva

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Victor FARIA-GENU, Patent Examiner, National Institute of Industrial Property (INPI),  
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BULGARIE/BULGARIA

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Sibdou Mireille SOUGOURI KABORE (Mme), attachée, Mission permanente, Genève

BURUNDI

Pierre Claver NDAYIRAGIJE, ambassadeur, représentant permanent, Mission permanente,  
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Esperance UWIMANA (Mme), deuxième conseiller, Mission permanente, Genève

CAMBODGE/CAMBODIA

THAY Bunthan, First Secretary, Permanent Mission, Geneva

SON Mai Van, Counsellor, Permanent Mission, Geneva

CAMEROUN/CAMEROON

Charles Aurélien ETEKI NKONGO, premier secrétaire, Mission permanente, Genève

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Marcela PAIVA (Sra.), Asesora Legal, Departamento de Propiedad Intelectual, Dirección  
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Foundation for Aboriginal and Islander Research Action (FAIRA)

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Carlos MAMANI CONDORI (Delegate, Achocalla, Bolivia); Helena NYBERG (Ms.) (Delegate, Zurich)

Traditions pour demain/Traditions for Tomorrow

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Tulalip Tribes of Washington Governmental Affairs Department

Preston Dana HARDISON (Policy Analyst, Tulalip); Terry WILLIAMS (Member, Tulalip)

Union internationale des éditeurs (UIE)/International Publishers Association (IPA)

Jens BMMEL (Secretary General, Geneva)

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Angela R. RILEY (Ms.), School of Law, Director of the American Indian Studies Center,  
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VI. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE  
DE LA PROPRIÉTÉ INTELLECTUELLE (OMPI)/  
INTERNATIONAL BUREAU OF THE  
WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

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Christian WICHARD, vice-directeur général/Deputy Director General

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[Annex II follows]



<p><b>IGC 19: Facilitator’s text on traditional cultural expressions (for presentation to plenary)</b></p>	<p><b><u>Article one:</u></b> <b>Subject Matter of Protection</b></p>	<p><b><u>Option one: Policy approach</u></b></p> <p>To provide a definition of TCEs and eligibility criteria that is as simple as possible, avoids debate about the content and length of the list, and which leaves flexibility in national law or guidelines to list particular examples if that is considered desirable.</p>	<p><b><u>Option two: Policy approach</u></b></p> <p>To provide a more detailed definition of TCEs and eligibility criteria that provides greater certainty that particular things are protected through the listing of examples.</p>	<p><b><u>Comments:</u></b></p> <p>As delegations were divided on the issue of examples it was not possible to provide a clean and elegant draft without including two options.</p> <p>The text has been cleaned to remove repetition in existing drafting options, but the different policy approaches remain. In the interests of simplification, the text now cross references to the definition of beneficiaries in article two, which avoids the need to keep repeating the list of beneficiaries.</p> <p>Note also, in the interests of simplicity and building on the approach taken in the TK text, option one starts with a very basic description of TCEs, then lists eligibility criteria.</p> <p>Also in option one, I have tried to deal with the debate on “unique product etc” by borrowing the Norwegian approach from the TK text, to say “distinctive of or the unique product of”. This provides a choice for national legislation. In option 2, the formulation used is “characteristic of”. Note also in option 2 I have removed all square brackets from the lists. It may be that at a future IGC the proponents of the list approach need to consider if they agree with all the matters listed.</p> <p>In paragraph one of option one I have placed square brackets around “traditional knowledge” to highlight that some delegations have difficulty with a definition of TCEs that includes traditional knowledge. This is a matter that will need to be worked through at a future IGC.</p>
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	<p><b><u>Option one: Text</u></b></p> <p>1. Traditional cultural expressions are any form of artistic expression, tangible or intangible, in which traditional culture [and knowledge] are embodied including, but not limited to:</p> <ul style="list-style-type: none"> <li>(a) phonetic or verbal expressions;</li> <li>(b) musical or sound expressions;</li> <li>(c) expressions by action; and</li> <li>(d) tangible expressions of art.</li> </ul> <p>2. Protection extends to traditional cultural expressions that are:</p> <ul style="list-style-type: none"> <li>(a) the result of creative intellectual activity;</li> <li>(b) passed from generation to generation;</li> <li>(c) distinctive of or the unique product of the cultural and social identity and cultural heritage; and</li> <li>(d) maintained, used or developed; by the beneficiaries as set out in Article 2.</li> </ul> <p>3. The terminology used to describe the protected subject matter should be determined at the national, regional, and sub regional levels.</p>	<p><b><u>Option two: Text</u></b></p> <p>1. Traditional cultural expressions are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation, including, but not limited to:</p> <ul style="list-style-type: none"> <li>(a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;</li> <li>(b) musical or sound expressions, such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals;</li> <li>(c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, traditional sports and games, puppet performances, and other performances, whether fixed or unfixed;</li> <li>(d) tangible expressions, such as material expressions of art, handicrafts, works of mas, architecture, and sacred tangible spiritual forms, and sacred places.</li> </ul> <p>2. Protection shall extend to any traditional cultural expression that is associated with the cultural and social identity of the beneficiaries as defined in Article 2, and is used, maintained or</p>	
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		<p>developed by them as part of their cultural or social identity or heritage in accordance with national law and customary practices.</p> <p>3. The specific choice of terms to denote the protected subject matter should be determined by national legislation.</p>	
<p><b><u>Article 2:</u></b> <b>Beneficiaries</b></p>	<p><b><u>Option one: Policy approach</u></b></p> <p>One policy approach is that the beneficiaries of protection are indigenous peoples and local communities.</p> <p>The proponents of this approach have different views on whether to refer to “indigenous peoples” or “indigenous communities”. As a place holder, acknowledging that this is a matter that requires further work to resolve, I have referred to “indigenous peoples/communities”.</p> <p>There are also different views on whether to also refer to “traditional” or “cultural” communities. I have left these out of the draft, on the understanding that further work is needed concerning the definition of these terms, and the term “local communities”.</p>	<p><b><u>Option two: Policy approach</u></b></p> <p>Another policy approach is that protection should go beyond indigenous peoples and local communities. There are two sets of concerns here. The first is that the TCEs of nations should be included.</p> <p>There are also countries that do not use the terms indigenous peoples or local communities, but consider that individuals or families maintain TCEs and this should be reflected.</p>	<p><b><u>Comments:</u></b></p> <p>Because the IGC is so divided on this issue it is not possible to draft a single option which would be “clean and elegant”.</p> <p>I have included a “wild card” option 3, which could potentially address the concerns re nations. The need for clear definitions of terms such as local community, traditional community, cultural community (would this address the issue of communities in diaspora) and nation was raised during my informal consultations. Greater clarity on these definitions may reduce concerns about what is in scope. In the time available I have not been able to draft suggestions or consider what is already in the glossary, but this is a matter to address at a future IGC.</p> <p>Given that there was widespread support for the approach of referring to the “beneficiaries as defined in Article 2” in other articles, I have used a formulation of drafting which starts with “the beneficiaries of protection are...” rather than “protection shall extend to”.</p>

			<p>In option two I have included individuals, and initially qualified this by saying “in accordance with customs of the collective”. This language was not supported by the proponents of including individuals, but the concept is something that the IGC may wish to return to.</p> <p>Note: in option one it may be possible to remove the reference to “who develop etc” because this is defined in article one. However I did not have time to complete consultations on this point so I left the language in the draft.</p>
	<p><b><u>Option one: Text</u></b></p> <p>Beneficiaries of protection for traditional cultural expressions, as defined in Article 1, are indigenous peoples/communities and local communities, who develop, use, hold and maintain the cultural expressions.</p>	<p><b><u>Option two: Text</u></b></p> <p>Beneficiaries of protection of traditional cultural expressions, as defined in Article 1, are the holders of traditional cultural expressions which may include:</p> <ul style="list-style-type: none"> <li>(a) indigenous communities;</li> <li>(b) local communities;</li> <li>(c) traditional communities;</li> <li>(d) cultural communities;</li> <li>(e) families;</li> <li>(f) nations;</li> <li>(g) individuals within the categories listed above; and</li> <li>(h) where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.</li> </ul>	<p><b><u>Option three: Text</u></b></p> <p>Beneficiaries of protection for traditional cultural expressions, as defined under Article 1, are indigenous peoples, local and traditional communities, including small-island states.</p>

<p><b>Article 3: Scope of Protection</b></p>	<p><u>Option one: Policy approach</u> The policy approach underlying this option is that States should have maximum flexibility to determine the scope of protection.</p>	<p><u>Option two: Policy approach</u> This policy approach is more detailed and prescriptive, but contains two options within it. One is to prescribe the kinds of activities that should be regulated, but leave flexibility concerning the policy measures that would achieve this, and the other is to prescribe a rights based approach.</p>	
	<p><u>Option one: Text</u> The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should/shall be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.</p>	<p><u>Option two: Text</u> 1. Adequate and effective legal, administrative or policy measures should be provided to: (a) Prevent the unauthorised disclosure, fixation or other exploitation of secret traditional cultural expressions; (b) Acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible; (c) Prevent use which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary; (d) Protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries;</p>	<p><u>Comments:</u> Note: there were several different formulations of elements concerning offensiveness, secret TK etc. I have tried to distil the key concepts from these. It was not possible to use the precise language put forward by all delegations but I hope that delegations can see their concepts are reflected. The exact wording could be a matter for future IGCs.  Note: in developing the alternatives for para (e) I found it was possible to condense the two parts of Alternative 1, Article B (and the new alternative from Indonesia ), to avoid having two lists (one for signs etc and one for TCEs other than signs) and repeating the protections concerning offensive use and false representation. You will see that the remaining two matters from the second category – use for commercial purposes and acquisition of intellectual property rights – have been added to the first list of exclusive rights.  Regarding the alternative for equitable</p>

		<p>(e) [there are three options for para (e) ranging from the most flexible to the most prescriptive]</p> <p><u>Alternative one:</u> where appropriate, enable beneficiaries to authorise the commercial exploitation of TCEs by others.</p> <p><u>Alternative two:</u> require equitable remuneration to the beneficiaries for the following uses of traditional cultural expressions:</p> <ol style="list-style-type: none"> <li>i. fixation</li> <li>ii. reproduction</li> <li>iii. public performance</li> <li>iv. translation or adaptation</li> <li>v. making available or communicating to the public</li> <li>vi. distribution</li> </ol> <p><u>Alternative three:</u> ensure the beneficiaries have exclusive and inalienable collective rights to authorise and prohibit the following in relation to their traditional cultural expressions:</p> <ol style="list-style-type: none"> <li>i. fixation</li> <li>ii. reproduction</li> <li>iii. public performance</li> <li>iv. translation or adaptation</li> <li>v. making available or communicating to the public</li> <li>vi. distribution</li> <li>vii. any use for commercial purposes, other than their traditional use</li> <li>viii. the acquisition or exercise of intellectual property rights</li> </ol>	<p>remuneration, while this was in the text, I cannot recall any delegation insisting on it. This alternative could be removed at a future IGC.</p>
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<p><b>Article 5: Exceptions and Limitations</b></p>	<p><b><u>Option one: Policy approach</u></b></p> <p>Option one allows for less exceptions than under option two, so when combined with Article 3 on scope of protection, provides more protection overall for TCES than under option two.</p>	<p><b><u>Option two: Policy approach</u></b></p> <p>Option two allows for more exceptions than under option one, so when combined with Article 3 on scope of protection, provides less protection overall than under option one.</p>	
	<p><b><u>Option one: Text</u></b></p> <ol style="list-style-type: none"> <li>Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the member states].</li> <li>Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or cultural context.</li> <li>Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:</li> </ol>	<p><b><u>Option two: Text</u></b></p> <p>Option one [paragraphs 1 to 4 (a)], plus:</p> <p>4(b). The creation of an original work of authorship inspired by traditional cultural expressions.</p> <p>5. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions.</p>	<p><b><u>Comments:</u></b></p> <p>There seemed to be wide ranging agreement on some elements of the text on exceptions – re not affecting customary use, having a test for developing domestic exceptions, and having some sort of exception for libraries etc. The criteria where there was not agreement concerned derivative works and existing exceptions under copyright and trade mark law.</p> <p>On the test for developing domestic exceptions, I initially merged the two options, but this was not supported by some delegations so the separated the criteria into two alternatives.</p> <p>Another sticking point was the relevance of customary versus domestic law in paragraph one. I have parked this issue for now by square bracketing the reference to national law to reflect that there is not agreement on this matter.</p> <p>Regarding the exception for libraries etc, I had initially amended this to address concerns expressed by delegations of indigenous peoples that libraries etc should not act offensively. There was not widespread support for this (do I have</p>

	<p><u>Alternative one:</u></p> <ul style="list-style-type: none"> <li>(a) acknowledges the beneficiaries, where possible;</li> <li>(b) is not offensive or derogatory to the beneficiaries; and</li> <li>(c) is compatible with fair practice.</li> </ul> <p><u>Alternative two:</u></p> <ul style="list-style-type: none"> <li>(a) does not conflict with the normal utilisation of the traditional cultural expressions by the beneficiaries; and</li> <li>(b) does not unreasonably prejudice the legitimate interests of the beneficiaries.</li> </ul> <p>4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted:</p> <ul style="list-style-type: none"> <li>(a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation.</li> </ul>		<p>removed it), however this approach could be taken up at a later point. Regarding the exception for derivative works – there was a suggestion during the informal consultations that we do more work on the derivative works issue, and what is meant by “inspired by”. This may help us to better gauge the scope of the exception.</p>
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[Annex III follows]



**IGC 19: Second draft of facilitators' text on traditional knowledge – For informal consultation purposes**

General comments

- The primary intent of the co-facilitators during the course of this exercise, was to streamline the text with a view to clearly identify stand-alone options under each article, with variations if applicable, that would represent the two fundamentally different policy approaches: the first based on a circumscribed definition of traditional knowledge with limited scope of protection and responsibilities for Member States; and the second, rights-based, more expansive and prescriptive, notably in terms of Member States' obligations.
- Article 3, which relates to the scope of protection, proved to be particularly challenging to untangle. The co-facilitators approached this by isolating on the one hand the rights of the holders of traditional knowledge, and on the other, the measures to be taken in relation to the protection of traditional knowledge such as misappropriation.
- Informal consultations have confirmed that although the facilitators' text will be helpful to the IGC, if only because it eliminates overlap and repetition, it still falls short in drawing clear linkages between the problems related to the protection of traditional knowledge, and the possible measures to be taken to address these problems.
- One suggestion put forward is to restructure the text further by clustering the current provisions under four broad approaches: a rights-based approach; a broad and flexible framework; targeted provisions for the protection of secret traditional knowledge; and a mixed approach. The co-facilitators consider this suggestion to be interesting and encourage the IGC to consider it as it moves forward on this important pillar. They also recommend keeping in the text the definition of utilization, recognizing that a later stage in the discussion, the IGC may wish to create a separate section in the body of the text containing all definitions.
- Finally, during informal consultations, some delegations questioned whether secret and/or sacred traditional knowledge should be included within the scope of this future instrument. All recognized that further discussion was required on this important issue. In the meantime, the co-facilitators have chosen to keep the language related to secret and/or sacred traditional knowledge in the text.

<p><b>Article 1: Subject matter of protection</b></p>	<p><b>Option 1: Policy approach</b></p> <p>This option contains a simple, narrower definition of TK, along with a more detailed list of eligibility criteria.</p>	<p><b>Option 2: Policy approach</b></p> <p>This option contains a more detailed and open-ended definition of TK.</p> <p>However, the specific choice of terms to denote the protected subject matter is left to be determined by national/domestic law.</p> <p>This option also includes a reference to sacred or secret traditional knowledge.</p>	<p><b>Comments on policy approach</b></p> <p>With the aim to clean the text, both options exclude any elements that define what a beneficiary is. This issue is left in its entirety to Article 2.</p> <p>In light of comments received, the facilitators kept those two issues that deal with secret and sacred TK.</p> <p>Some delegations have expressed a desire to include a definition of secret traditional knowledge. However, some delegations wondered what were the boundaries of sacred traditional knowledge, and whether this issue should be addressed by this kind of instrument.</p>
	<p><b>Option 1: Text</b></p> <p><b>Definition of traditional knowledge</b></p> <p>1.1 For the purposes of this instrument, the term “traditional knowledge” refers to the know-how, skills, innovations, practices, teachings and learning, resulting from intellectual activity and developed within a traditional context.</p>	<p><b>Option 2: Text</b></p> <p><b>Definition of traditional knowledge</b></p> <p>1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from generation to generation and includes but is not limited to know-how, skills, innovations, practices processes and learning and teaching, that subsist in</p>	

		<p>codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity, traditional lifestyles and natural resources.</p>	
	<p><b><u>Option 1: Text</u></b> <b><i>Criteria for eligibility</i></b></p> <p>1.2 Protection extends to traditional knowledge that is:</p> <ul style="list-style-type: none"> <li>(a) the unique product of or is distinctively associated with beneficiaries as defined in Article 2;</li> <li>(b) collectively generated, shared, preserved and transmitted from generation to generation; and</li> <li>(c) integral to the cultural identity of beneficiaries as defined in Article 2;/. <i>alternative</i></li> </ul> <ul style="list-style-type: none"> <li>(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time with prior informed consent;</li> </ul> <p><u>or</u></p> <ul style="list-style-type: none"> <li>(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time;</li> <li>(e) not in the public domain;</li> <li>(f) not protected by an intellectual property right; and</li> <li>(g) not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.</li> </ul>	<p><b><u>Option 2: Text</u></b> <b><i>Criteria for eligibility</i></b></p> <p>1.2 Protection under this instrument shall extend to traditional knowledge that is generated, preserved and transmitted from generation to generation and identified or associated or linked with the cultural identity of beneficiaries, as defined in Article 2.</p>	<p><b><u>Comments on Article 1.2</u></b></p> <p>The text has been streamlined into two options.</p> <p>Option 1 maintains the concepts “distinctively”, “collectively” and “cultural identity”. The other concepts (such as the public domain and traditional knowledge that is not widely known or used, including as alternatives, need further discussion.</p>

<p><b>Article 2: Beneficiaries</b></p>	<p><b><u>Option 1: Policy approach</u></b></p> <p>In this option “beneficiaries” are indigenous and local communities.</p>	<p><b><u>Option 2: Policy approach</u></b></p> <p>In this option, “beneficiaries” include families, nations, and individuals. This option reflects the position of countries that do not use the term indigenous peoples or local communities but consider that individuals or families maintain TK.</p>	<p><b><u>Comments on policy approach:</u></b></p> <p>The facilitators believe that the term “beneficiaries” merits a parallel discussion in the TCE and the TK texts.</p> <p>As a placeholder, the facilitators have reflected in this draft the same texts that have been presented by the TCE facilitator.</p> <p>Option 1 contains the core types of beneficiaries. Option 2 contains additional types of beneficiaries that will require further discussion.</p>
<p><b><u>Option 1: Text</u></b></p> <p>2. Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples/communities and local communities.</p>	<p><b><u>Option 2: Text</u></b></p> <p>2. Beneficiaries of protection of traditional knowledge, as defined in Article 1, may include:</p> <ul style="list-style-type: none"> <li>(a) indigenous peoples/communities;</li> <li>(b) local communities;</li> <li>(c) traditional communities;</li> <li>(d) families;</li> <li>(e) nations;</li> <li>(f) individuals within the categories listed above; and</li> <li>(g) where traditional knowledge is not specifically attributable or confined to an indigenous peoples or local community or it is not possible to identify the community that</li> </ul>		

	<p>generated it, any national entity determined by domestic law.</p>		
<p><b>Article 3: Scope of protection</b></p>	<p><b>Option 2: Policy approach</b></p> <p>This policy approach is more detailed and prescriptive, and is a rights-based approach with stronger obligations for Member States.</p>	<p><b>Option 1: Policy approach</b></p> <p>The policy approach underlying this option is that Member States should have maximum flexibility to define the scope of protection (responsibilities of Member States and, in the alternative, the rights of the traditional knowledge holders).</p>	<p><b>Comments on policy approach</b></p> <p>For the purposes of this article, the facilitators have distinguished the rights given by the instrument to the traditional knowledge holders and the actions to be taken by Member States to support those rights.</p>
	<p><b>Option 2: Text</b></p> <p>3.2 For the purposes of this instrument, the term “utilization” in relation to traditional knowledge shall refer to any of the following acts:</p> <ul style="list-style-type: none"> <li>(a) where the traditional knowledge is a product: <ul style="list-style-type: none"> <li>(i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or</li> <li>(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.</li> </ul> </li> <li>(b) where the traditional knowledge is a process: <ul style="list-style-type: none"> <li>(i) making use of the process beyond the traditional context or;</li> <li>(ii) carrying out the acts referred to</li> </ul> </li> </ul>	<p><b>Option 1: Text</b></p> <p>3.1 Adequate and effective legal, policy or administrative measures should be provided, as appropriate and in accordance with national law, to:</p> <ul style="list-style-type: none"> <li>(a) prevent the unauthorized disclosure, use or other exploitation of [secret] traditional knowledge;</li> <li>(b) where traditional knowledge is knowingly used outside the traditional context: <ul style="list-style-type: none"> <li>(i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;</li> <li>(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders.</li> </ul> </li> <li>(c) encourage traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.</li> </ul>	<p><b>Comments on Article 3.1</b></p> <p>In Option 1, facilitators have created two sub-options. The first one contemplates measures to be taken by Member States, while Option 2 contemplates rights to be provided to beneficiaries, in addition to the aforementioned measures. This mirrors used in the TCE facilitators’ text.</p> <p>Facilitators have used the term Member States as to avoid prejudging the nature of this instrument. Regarding sub-paragraph e) under option 2, facilitators wonder whether this should be a right given to traditional knowledge holders or, rather, an obligation for Member States like under option 1.</p> <p>Regarding the country of origin, facilitators wondered whether it was the country of origin of the</p>

	<p><u>optional addition</u></p> <p>3.2 Beneficiaries, as defined in Article 2, should, according to national law, have the following exclusive rights:</p> <p>(a) enjoy, control, utilize, maintain, develop, preserve and protect their traditional knowledge;</p> <p>(b) authorize or deny the access and use of their traditional knowledge;</p> <p>(c) have a fair and equitable share of benefits arising from the commercial use of their traditional knowledge based on mutually agreed terms;</p> <p>(d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the establishment of mutually agreed terms;</p> <p>(e) prevent the use of traditional knowledge without acknowledgment and attribution of the origin of their traditional knowledge and its holders, where known;</p> <p>(f) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.</p>	<p>under sub-clause a) with respect to a product that is a direct result of the use of the process; or</p> <p>(c) when Traditional knowledge is used for research and development leading to profit-making or commercial purposes.</p> <p>3.3 Member States shall provide adequate and effective legal measures to:</p> <p>(a) ensure the application of the aforementioned rights, taking into account applicable domestic law and customary practices;</p> <p>(b) prevent the unauthorized disclosure, use or other exploitation of traditional knowledge;</p> <p>(c) where traditional knowledge is knowingly used outside the traditional context:</p> <p>(i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;</p> <p>(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders;</p> <p>(iii) encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms</p>	<p>traditional knowledge or of the holders of the traditional knowledge</p> <p>Facilitators have suggested to move suggested 3.4 to article 6 since it refers to exclusions.</p> <p>The paragraph referring to the principles of the right to self-determination was removed as the facilitators felt it did not deal with scope of protection, and would be more appropriate under principles and objectives.</p> <p>For paragraph 3.2 under Option 3, facilitators were unsure as to the intent of the proposed paragraph and did not include it in the two options.</p>
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		<p>addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.</p>	
<p><b>Article 6: Exceptions and limitations</b></p>	<p><b><u>Option 1: Text</u></b></p> <p>6.1 Measures for the protection of traditional knowledge should not restrict, according to domestic/national law, the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context.</p> <p>6.2 Limitations on protection should extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.</p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge: <i>alternative</i></p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries, provided that the use of traditional knowledge: <i>alternative</i></p> <p>(a) acknowledges the beneficiaries, where possible;</p>	<p><b><u>Option 2: Text</u></b></p> <p>6.1 Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context [consistent with national/domestic laws of the Member States].</p> <p>6.2 Limitations on protection shall extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.</p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge: <i>alternative</i></p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the beneficiaries</p>	<p><b><u>Comments</u></b></p> <p>Language was proposed in Plenary to the effect that “[t]he independent discovery or the independent innovation is based on traditional knowledge, exemptions and limitations should be over traditional knowledge with country of origin.” The facilitators chose not to include that language until clarification is obtained from its proponents.</p>

	<p>(b) is not offensive or derogatory to the beneficiaries; and (c) is compatible with fair practice.</p> <p><u>alternative</u></p> <p>(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.</p> <p>6.4 Regardless of whether such acts are already permitted under Article 6.2 or not, the following shall be permitted:</p> <p>(a) the use of traditional knowledge in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation should be permitted; and (b) the creation of an original work of authorship inspired by traditional knowledge.</p> <p>6.5 There shall be no right to exclude others from using knowledge that:</p> <p>(a) has been independently created; (b) derived from sources other than the beneficiary; or (c) is known outside of the beneficiaries' community.</p> <p>6.6 [Secret and sacred traditional knowledge should not be subjected to exceptions and limitations.]</p>	<p>beneficiaries, provided that the use of traditional knowledge:</p> <p><u>alternative</u></p> <p>(a) acknowledges the beneficiaries, where possible; (b) is not offensive or derogatory to the beneficiaries; and (c) is compatible with fair practice.</p> <p><u>alternative</u></p> <p>(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.</p> <p>6.4 [Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.]</p>	
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Objective 1 Options	Original Text Analysis	Revised Text
1	<p>Ensure those accessing genetic resources and associated traditional knowledge comply with specific conditions for access, use and benefit-sharing under national law.</p> <p>Option 1 aims at ensuring that those accessing GR and ATK comply with national laws on access, use and benefit sharing without describing the specific conditions.</p>	<p>Ensure [that] those accessing [and/or using] genetic resources [, their derivatives] and associated traditional knowledge [in particular applicants for intellectual property rights] comply with national law and [requirements<sup>1</sup> of the country providing<sup>2</sup> for prior informed consent, mutually agreed terms, fair and equitable] benefit-sharing [and disclosure of origin.]</p>
3&4	<p><b>Ensure that those accessing and/or using genetic resources, their derivatives and/or associated traditional knowledge in particular applicants for intellectual property rights comply with national law and requirements<sup>3</sup> of the country providing<sup>4</sup> for prior informed consent, mutually agreed terms, fair and equitable benefit-sharing and disclosure of origin.</b></p> <p>Option 3/4 aims at ensuring that those accessing GR, derivatives and ATK in particular applicants for IP rights comply with national law and requirements (including customary norms) of the providing country (noting this term is in the CBD) on prior informed consent, mutually agreed terms, fair and equitable benefit sharing and disclosure of origin.</p>	<p>Text merged with brackets to take account of different issues, whilst keeping common language and policy concepts.</p>

<sup>1</sup> National law and requirements include customary norms.

<sup>2</sup> Country providing is the country of origin or that has acquired the genetic resources / with traditional knowledge in accordance with the CBD.

<sup>3</sup> National law and requirements include customary norms.

<sup>4</sup> Country providing is the country of origin or that has acquired the genetic resources / with traditional knowledge in accordance with the CBD.

Objective 1 Principles Options	Original Text Options and Policy Analysis	Revised Text
1	<p>Recognize the wide variety of ownership arrangements pertaining to genetic resources, their derivatives and/or associated traditional knowledge, including the sovereign rights of States, the rights of indigenous peoples and local communities, as well as private property rights.</p>	<p><b>Principle 1</b></p> <p>Recognize the wide variety of ownership arrangements pertaining to genetic resources[, their derivatives] and associated traditional knowledge, including the sovereign rights of States, the rights of indigenous peoples and local communities, as well as private property rights</p> <p><i>(Text above attempts to capture the key issue reflected in the options 1-3 varied ownership relations. From the perspective of the facilitators option 3 is reflected in recognition of state and indigenous rights reflected in options 1 and 2)</i></p>
2	<p>Recognize the wide variety of ownership arrangements pertaining to genetic resources and associated traditional knowledge, including the sovereign rights of States, the rights of indigenous peoples and local communities, as well as private property rights.</p>	
3	<p><b>Sovereign states have the authority to determine access to genetic resources [in their jurisdiction.]</b>  <i>[Subject to national legislation,] persons accessing traditional knowledge associated with genetic resources from the knowledge holder(s) and applying that knowledge in the development of an invention should obtain approval from the knowledge holder(s) and seek their involvement.</i></p>	<p><b>Principle 2</b></p> <p>Ensure respect for the principle of self determination of indigenous peoples and local communities, including peoples partially or entirely under occupation and their rights over genetic resources and associated traditional knowledge, including the principles of prior informed consent, mutually agreed terms, and full and effective participation, noting the United Nations Declaration on the Rights of Indigenous Peoples.</p> <p><i>(stand alone principle)</i></p>
5	<p>Ensure respect for the principle of self determination of indigenous peoples and local communities, including peoples partially or entirely under occupation and their rights over genetic resources and associated traditional knowledge, including the principles of prior informed consent, mutually agreed terms, and full and effective participation, noting the United Nations Declaration on the Rights of Indigenous Peoples.</p>	

Objective 2 Options	Original Text Options and Analysis	Revised Text
2 & 6	<p>Prevent intellectual property rights involving the access and utilization of genetic resources, their derivatives and/or associated traditional knowledge from being granted where there is no prior informed consent, mutually agreed terms and/or fair and equitable benefit-sharing, and disclosure of origin.</p> <p>Option 2/6 aims at preventing grant of IP rights involving the access and utilization of GR, their derivatives and/or ATK where there has not been prior informed consent, mutually agreed terms, fair and equitable benefit sharing and disclosure of origin.</p>	<p>Prevent [intellectual property rights] [patents] involving the access and utilization of genetic resources, their [derivatives] and associated traditional knowledge from being granted:</p> <ul style="list-style-type: none"> <li>- [in error for inventions that are not novel or inventive]</li> <li>- [where there is no prior informed consent, mutually agreed terms and/or fair and equitable benefit-sharing, and disclosure of origin]</li> <li>- [or that was granted in violation of the inherent rights of the original owners] or</li> <li>- [in Bad faith]</li> </ul>
3	<p>Prevent patents from being granted in error for inventions that are not novel or inventive in light of genetic resources and associated traditional knowledge [in the prior art].</p> <p>Option is related to standard patentability requirements</p>	<p>Text essentially specifies the key issues to be assessed when examining a patent in relation to GR and ATK. As these are not currently agreed by all members they are bracketed.</p>
4	<p>Prevent intellectual property rights from being granted in error and/or bad faith for intellectual property applications relating to genetic resources, their derivatives and/or associated traditional knowledge that do not satisfy the eligibility conditions.</p> <p>Option is very general in nature as it does not state the eligibility requirements which could include options above.</p>	<p>Option 4 was deleted as it was to general in nature and did not specify the eligibility conditions.</p>
5	<p>Ensure that no patents on life and life forms are granted for genetic resources and associated traditional knowledge, because they do not comply with the requirements of novelty and inventive step. Recommend delete.</p> <p>Policy Analysis. Option 5 aims to ensure that life and life forms are not patentable.</p>	<p>Option 5 was deleted as it is covered under the first dot point in the above text. However, it is accepted that there may be a much broader policy issues inherent in option 5, but is this the appropriate forum.</p> <p>Option 7 was removed as it considered covered in other objectives and principles.</p>

Objective 2 Options	Original Text Options and Analysis	Revised Text
7	Increase transparency in access and benefit-sharing. Recommend delete captured in	
Objective 2 Principles Options	Original Text Policy Analysis	Revised Text
1	<p>Patent applicants should not receive exclusive rights on inventions that are not new or inventive. The patent system should provide certainty of rights for legitimate users of genetic resources.</p> <p>[The patent system should <u>foresee appropriate measures to provide certainty of rights for legitimate users of genetic resources</u>] It was unclear to the facilitators how this sentence in the principle could be practically implemented.</p>	<p><b>Principle 1</b></p> <p>Patent applicants should not receive exclusive rights on inventions that are not new or inventive.</p> <p><b>Principle 2</b></p> <p><b>Option 1</b></p> <p>The patent system should provide certainty of rights for legitimate users of genetic resources and [their derivatives] and associated traditional knowledge.</p> <p><b>Option 2</b></p> <p>The intellectual property system should provide certainty of rights for legitimate users and providers of genetic resources, their derivatives and/or associated traditional knowledge.</p> <p>The intellectual property system must provide for mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge.</p> <p>Administrative and/or judicial authorities shall have the right to (a) prevent the further processing of the intellectual property applications or (b) prevent the granting of intellectual property rights, as well as (c) revoke intellectual property rights subject to <u>judicial review</u>/ to Article 32 of the TRIPS Agreement and render unenforceable intellectual property rights when the applicant has either failed to comply with the objectives and principles or provided false or fraudulent information.</p>
2	<p>The intellectual property system should provide certainty of rights for legitimate users and providers of genetic resources, their derivatives and/or associated traditional knowledge.</p> <p>The intellectual property system must provide for mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge.</p> <p>Administrative and/or judicial authorities shall have the right to (a) prevent the further processing of the intellectual property applications or (b) prevent the granting of intellectual property rights, as well as (c) revoke intellectual property rights subject to <u>judicial review</u>/ to Article 32 of the TRIPS Agreement and render unenforceable intellectual property rights when the applicant has either failed to comply with the objectives and principles or provided false or fraudulent information.</p>	<p><b>Option 1</b></p> <p>The patent system should provide certainty of rights for legitimate users of genetic resources and [their derivatives] and associated traditional knowledge.</p> <p><b>Option 2</b></p> <p>The intellectual property system should provide certainty of rights for legitimate users and providers of genetic resources, their derivatives and/or associated traditional knowledge.</p> <p>The intellectual property system must provide for mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge.</p>

6	<p>Intellectual property rights applicants should not receive exclusive rights where free, prior and informed consent and fair and equitable benefit-sharing requirements for accessing and using genetic resources and their derivatives and their associated traditional knowledge have not been met <u>ensuring free prior informed consent and fair and equitable benefit sharing for indigenous peoples and local communities.</u></p>	<p>and/or associated traditional knowledge. Administrative and/or judicial authorities shall have the right to (a) prevent the further processing of the intellectual property applications or (b) prevent the granting of intellectual property rights, as well as (c) <u>revoke intellectual property rights subject to judicial review/ to Article 32 of the TRIPS Agreement and render unenforceable intellectual property rights when the applicant has either failed to comply with the objectives and principles or provided false or fraudulent information.</u></p>
7	<p>Persons applying for intellectual property rights involving the use of genetic resources and/or associated traditional knowledge have a duty of good faith and candor to disclose in their applications all background information relating to the genetic resources and associated traditional knowledge, including the country of source or origin.</p>	<p><b>Principle 3</b></p> <p>Intellectual property rights applicants should not receive exclusive rights where free, prior and informed consent and fair and equitable benefit-sharing requirements for accessing and using genetic resources and their derivatives and their associated traditional knowledge have not been met <u>ensuring free prior informed consent and fair and equitable benefit sharing for indigenous peoples and local communities.</u></p> <p><b>Principle 4</b></p> <p>Persons applying for intellectual property rights involving the use of genetic resources and/or associated traditional knowledge have a duty of good faith and candor to disclose in their applications all background information relating to the genetic resources and associated traditional knowledge, including the country of source or origin.</p> <p>The majority of these principles were maintained as individual principles though further work could be carried out to simplify and reduce. Principle 2 was reflected in two options noting the significant divergent approach.</p>

Objective 3 Options	Original Text Analysis	Revised Text
1	<p>Ensure patent offices have available the information needed to make proper decisions in granting patents.</p> <p>Option 1 aims to ensure patent offices have information needed to make proper decisions in granting patents.</p>	<p>Ensure that intellectual property [Patent] offices have appropriate information on genetic resources, their [derivatives] and associated traditional knowledge needed to make proper and informed decisions in granting intellectual property rights [patents]. [Such information shall include confirmation through the mandatory disclosure requirements that prior informed consent has been obtained and access has been granted on mutually agreed terms which can be made through an internationally recognized certificate of compliance.]</p>
3	<p>Ensure that intellectual property offices have appropriate and available information on genetic resources, their derivatives and/or associated traditional knowledge needed to make proper and informed decisions in granting intellectual property rights. Such information shall include confirmation through the mandatory disclosure requirements that prior informed consent has been obtained and access has been granted on mutually agreed terms which can be made through an internationally recognized certificate of compliance.</p> <p>Option 3 is consistent with option 1 with the exception of the addition of a mandatory disclosure requirement.</p>	<p>These options have been merged using brackets to identify different policy positions, in particular mandatory disclosure.</p>

Objective 3 Principles Options	Original Text Analysis	Revised Text
1	<p>Patent offices must consider all relevant prior art when assessing the patentability of an invention.</p> <p>Patent applicants must indicate the background art which, as far as known to the applicant, can be regarded as useful for the understanding, searching and examination of the invention.</p> <p><b>There is a need to recognize that some holders of traditional knowledge may not want their knowledge documented.</b></p> <p>Three principles issues are inherent in this option; assessing relevant prior art, identification of the prior art in applications (disclosure), and documentation of knowledge.</p>	<p><b>Principle 1</b></p> <p>Intellectual property [Patent] offices should [must] consider all relevant prior art [as far as known to the applicant] relating to genetic resources, their [derivatives] and associated traditional knowledge when assessing the eligibility for grant of intellectual property rights [a patent].</p> <p><b>Principle 2</b></p> <p>[Intellectual property [Patent] applicants should disclose all background information of genetic resources, their derivatives and associated traditional knowledge relevant for determining the eligibility conditions.]</p> <p><b>Principle 3</b></p> <p>There is a need to recognize that some holders of traditional knowledge may not want their knowledge documented.</p> <p>Text identifies the three separate principles reflected in the original options.</p>
2	<p>Intellectual property offices should consider all relevant prior art information relating to genetic resources, their derivatives and associated traditional knowledge when assessing the eligibility for grant of intellectual property rights.</p> <p>Intellectual property applicants should disclose all background information of genetic resources, their derivatives and associated traditional knowledge relevant for determining the eligibility conditions.</p> <p>This option is similar to 1 in that it deals with prior and disclosure.</p>	<p><b>Principle 1</b></p> <p>Intellectual property [Patent] offices should [must] consider all relevant prior art [as far as known to the applicant] relating to genetic resources, their [derivatives] and associated traditional knowledge when assessing the eligibility for grant of intellectual property rights [a patent].</p> <p><b>Principle 2</b></p> <p>[Intellectual property [Patent] applicants should disclose all background information of genetic resources, their derivatives and associated traditional knowledge relevant for determining the eligibility conditions.]</p> <p><b>Principle 3</b></p> <p>There is a need to recognize that some holders of traditional knowledge may not want their knowledge documented.</p> <p>Text identifies the three separate principles reflected in the original options.</p>

Objective 4 Options	Original Text Analysis	Revised Text
1	<p><b>Promote a mutually supportive relationship with relevant international agreements and processes.</b></p> <p>Option 2/3 aims to establish both a coherent system and a mutually supportive relationship between existing international and regional agreements and treaties and IP rights involving the utilization of GRs, their derivatives and/or ATK.</p>	<p><b>Establish a coherent and mutually supportive [system] relationship between intellectual property rights involving the utilization of genetic resources, their [derivatives] and/or associated traditional knowledge and existing international and regional agreements and treaties, [including ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples]</b></p> <p>Facilitators have tried to capture all concepts in a single objective utilising brackets to identify different positions.</p>
2&3	<p><b>Establish a coherent system and promote mutually supportive relationship between intellectual property rights involving the utilization of genetic resources, their derivatives and/or associated traditional knowledge and existing international and regional agreements and treaties.</b></p> <p>Option 4 aims to ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples to their genetic resources and/or associated traditional knowledge by establishing a transparent, independent, accessible mechanism for oversight and dispute resolution, with associated rights to local communities.</p>	
4	<p><b>Ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples to their genetic resources and/or associated traditional knowledge by establishing a transparent, independent, accessible mechanism for oversight and dispute resolution, with associated rights to local communities</b></p> <p>Option 1/10 aims to prevent adverse effects of the IP system on the customs, beliefs and rights of indigenous peoples with the aim of recognizing and protecting their rights to use, develop, create and protect their knowledge and innovation in relation to GRs.</p>	



Object 4 Principles Options	Original Text Analysis	Revised Text
1	<p>Promote respect for and seek consistency with other international and regional instruments and processes.</p> <p>Promote cooperation with relevant international and regional instruments and processes.</p>	<p><b>Principle 1</b></p> <p><b>Promote respect for and seek consistency with other international and regional instruments and processes.</b></p>
2	<p>Promote respect for and seek consistency with other international and regional instruments and processes.</p> <p>Promote cooperation with relevant international and regional instruments and processes.</p> <p>The work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should not prejudice the work pursued in other fora.</p>	<p><b>Principle 2</b></p> <p><b>Promote cooperation [awareness and information sharing] with relevant international and regional instruments and processes [and support, in particular, the implementation of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity.]</b></p>
3	<p>Respect the decisions adopted by the United Nations treaty bodies pertaining to cases submitted by indigenous peoples.</p>	<p>Text has attempted to capture the key principles reflected in the options; respect for and consistency, awareness raising and information sharing; and cooperation with International /regional instruments and processes. Option 4 has also been incorporated in principle 2.</p>
4	<p>Support, in particular, the implementation of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity.</p>	<p>Second sentence in option 2 has not been included as the facilitators believe that it is not relevant as the IGC will pre-date this text once agreed.</p>
6	<p>Promotion of awareness raising and information sharing among different relevant and related international and regional agreements, instruments and processes related to genetic resources.</p>	

Objective 5 Options	Original Text Analysis	Revised Text
1 & 10	Preventing the adverse effects of the intellectual property system on the indigenous peoples' customs, beliefs and rights with the aim of recognize and protect the rights of indigenous peoples to use, develop, create and protect their knowledge and innovation in relation to genetic resources.	Recognize and maintain the role of the intellectual property system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of genetic resources, their [derivatives] and associated traditional knowledge in a manner conducive to social and economic welfare [while]:
2	Maintain the role of the intellectual property system in promoting innovation.	<ul style="list-style-type: none"> <li>- [contributing to the protection of genetic resources, their [derivatives] and associated traditional knowledge.]</li> </ul>
3	Recognize and maintain the role of the intellectual property system in promoting innovation and transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge.  Option 4 aims to recognize the role of the IP system in the protection of TK, GR and TCEs.	<ul style="list-style-type: none"> <li>- [preventing the adverse effects of the intellectual property system on the indigenous peoples' customs, beliefs and rights with the aim of recognize and protect the rights of indigenous peoples to use, develop, create and protect their knowledge and innovation in relation to genetic resources.]</li> </ul> <p>All options focus on recognizing and maintaining the role of the IP system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of GR, their derivatives and/or ATK in a manner conducive to social and economic welfare, while contributing to the protection of GR, their derivatives and/or ATK., while</p>
4	Recognize the role of the intellectual property system in the protection of traditional knowledge, genetic resources and traditional cultural expressions.	<ul style="list-style-type: none"> <li>- contributing to the protection of GR and ATK</li> <li>- preventing the adverse effects of the IP system on indigenous peoples</li> </ul>
6	Recognize and maintain the role of the intellectual property system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of genetic resources, their derivatives and/or associated traditional knowledge in a manner conducive to social and economic welfare, while contributing to the protection of genetic resources, their derivatives and/or associated traditional knowledge.	<ul style="list-style-type: none"> <li>- contributing to the protection of GR and ATK</li> <li>- preventing the adverse effects of the IP system on indigenous peoples</li> </ul>

Objective 5 Principles Options	Original Text Analysis	Revised Text
1	<p>Maintain the incentives for innovation provided by the intellectual property system.</p> <p>Promote certainty and clarity of intellectual property rights.</p> <p>Protect creativity and reward investments made in developing a new invention. Promote transparency and dissemination of information by publishing and disclosing technical information related to new inventions, <u>where appropriate and where publicly available</u> so as to enrich the total body of technical knowledge accessible to the public.</p>	<p><b>Principle 1</b></p> <p><b>Option 1</b></p> <p>Maintain the incentives for innovation provided by the intellectual property system.</p> <p><b>Option 2</b></p> <p>Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and in the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.</p>
2	<p>Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources and associated traditional knowledge.</p> <p>Promote certainty and clarity of intellectual property rights, noting the relationship with genetic resources and associated traditional knowledge.</p> <p>Protect creativity and reward investments.</p> <p>Promoting transparency and dissemination of information by publishing and disclosing technical information related to new inventions, where appropriate and when publicly available, so as to enrich the total body of knowledge accessible to the public.</p>	<p><b>Principle 2</b></p> <p>Promote certainty and clarity of intellectual property rights [, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and obligations with respect to the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit-sharing.</p> <p>Protect creativity, reward investments and ensure</p>
3	<p>Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and in the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.</p>	<p>Protect creativity, reward investments and ensure</p>

	<p>Promote certainty and clarity of intellectual property rights, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and obligations with respect to the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit-sharing.</p> <p>Protect creativity, reward investments and ensure prior informed consent and fair and equitable benefit-sharing with the knowledge holders.</p> <p>Promoting transparency and dissemination of information by disclosing country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.</p>	<p>prior informed consent and fair and equitable benefit-sharing with the knowledge holders.]</p> <p><b>Principle 3</b></p> <p>Protect creativity and reward investments made in developing a new invention.</p> <p><b>Principle 4</b></p> <p>Promote transparency and dissemination of information [,where not in contrast with public morality and/or public order,],by:</p> <ul style="list-style-type: none"> <li>- [publishing and disclosing technical information related to new inventions, so as to enrich the total body of technical knowledge accessible to the public.</li> <li>- [disclosing country of origin and publishing and inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.]</li> <li>- [Increase legal certainty and trust between users and providers of genetic resources and traditional knowledge through a mandatory disclosure of origin or source.]</li> </ul> <p>Principle one relating to respecting and maintaining the role of IP in innovation includes 2 options to reflect the divergent language. The remain principles are reflected separately as specific principles; promote certainty, protect creativity and reward investment and promote transparency and dissemination of information. Principle 4 captures options 5 and 12.</p>
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[Annex V follows]

## **DRAFT OBJECTIVES AND PRINCIPLES – GENETIC RESOURCES FACILITATORS TEXT IGC 19**

### **OBJECTIVE 1**

Ensure [that] those accessing [and/or using] genetic resources [, their derivatives] and associated traditional knowledge [in particular applicants for intellectual property rights] comply with national law and [requirements of the country providing for prior informed consent, mutually agreed terms, fair and equitable] benefit-sharing [and disclosure of origin.]

### **PRINCIPLE 1**

Recognize the wide variety of ownership arrangements pertaining to genetic resources [, their derivatives] and associated traditional knowledge, including the sovereign rights of States, the rights of indigenous peoples and local communities, as well as private property rights

### **PRINCIPLE 2**

Ensure respect for the principle of self determination of indigenous peoples and local communities, including peoples partially or entirely under occupation and their rights over genetic resources and associated traditional knowledge, including the principles of prior informed consent, mutually agreed terms, and full and effective participation, noting the United Nations Declaration on the Rights of Indigenous Peoples.

### **OBJECTIVE 2**

Prevent [intellectual property rights] [patents] involving the access and utilization of genetic resources, their [derivatives] and associated traditional knowledge from being granted

- [in error for inventions that are not novel or inventive]
- [where there is no prior informed consent, mutually agreed terms and/or fair and equitable benefit-sharing, and disclosure of origin]
- [or that was granted in violation of the inherent rights of the original owners] or
- [in Bad faith]

### **PRINCIPLE 1**

Patent applicants should not receive exclusive rights on inventions that are not new or inventive.

### **PRINCIPLE 2**

#### **OPTION 1**

The patent system should provide certainty of rights for legitimate users of genetic resources and [their derivatives] and associated traditional knowledge.

## OPTION 2

The intellectual property system should provide certainty of rights for legitimate users and providers of genetic resources, their derivatives and/or associated traditional knowledge.

The intellectual property system must provide for mandatory disclosure requirements ensuring that the intellectual property offices become key checkpoints for disclosure and monitoring the utilization of genetic resources, their derivatives and/or associated traditional knowledge.

Administrative and/or judicial authorities shall have the right to (a) prevent the further processing of the intellectual property applications or (b) prevent the granting of intellectual property rights, as well as (c) revoke intellectual property rights subject to judicial review/ to Article 32 of the TRIPS Agreement and render unenforceable intellectual property rights when the applicant has either failed to comply with the objectives and principles or provided false or fraudulent information.

## PRINCIPLE 3

Intellectual property rights applicants should not receive exclusive rights where free, prior and informed consent and fair and equitable benefit-sharing requirements for accessing and using genetic resources and their derivatives and their associated traditional knowledge have not been met ensuring free prior informed consent and fair and equitable benefit sharing for indigenous peoples and local communities.

## PRINCIPLE 4

Persons applying for intellectual property rights involving the use of genetic resources and/or associated traditional knowledge have a duty of good faith and candor to disclose in their applications all background information relating to the genetic resources and associated traditional knowledge, including the country of source or origin.

## OBJECTIVE 3

Ensure that intellectual property [Patent] offices have appropriate information on genetic resources, their [derivatives] and associated traditional knowledge needed to make proper and informed decisions in granting intellectual property rights [patents]. [Such information shall include confirmation through the mandatory disclosure requirements that prior informed consent has been obtained and access has been granted on mutually agreed terms which can be made through an internationally recognized certificate of compliance.]

## PRINCIPLE 1

Intellectual property [Patent] offices should [must] consider all relevant prior art [as far as known to the applicant] relating to genetic resources, their [derivatives] and associated traditional knowledge when assessing the eligibility for grant of intellectual property rights [a patent].

## **PRINCIPLE 2**

[Intellectual property [Patent] applicants should disclose all background information of genetic resources, their derivatives and associated traditional knowledge relevant for determining the eligibility conditions.]

## **PRINCIPLE 3**

There is a need to recognize that some holders of traditional knowledge may not want their knowledge documented.

## **OBJECTIVE 4**

Establish a coherent and mutually supportive [system] relationship between intellectual property rights involving the utilization of genetic resources, their [derivatives] and/or associated traditional knowledge and existing international and regional agreements and treaties, [including ensure consistency with international legal standards in the promotion and protection of the collective rights of indigenous peoples]

## **PRINCIPLE 1**

Promote respect for and seek consistency with other international and regional instruments and processes.

## **PRINCIPLE 2**

Promote cooperation [awareness and information sharing] with relevant international and regional instruments and processes [and support, in particular, the implementation of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention of Biological Diversity.]

## **OBJECTIVE 5**

Recognize and maintain the role of the intellectual property system in promoting innovation, transfer and dissemination of technology, to the mutual advantage of holders and users of genetic resources, their [derivatives] and associated traditional knowledge in a manner conducive to social and economic welfare [while]:

- [contributing to the protection of genetic resources, their [derivatives] and associated traditional knowledge.]
- [preventing the adverse effects of the intellectual property system on the indigenous peoples' customs, beliefs and rights with the aim of recognize and protect the rights of indigenous peoples to use, develop, create and protect their knowledge and innovation in relation to genetic resources.]

## **PRINCIPLE 1**

### **OPTION 1**

Maintain the incentives for innovation provided by the intellectual property system.

### **OPTION 2**

Recognize and maintain the role of the intellectual property system in promoting innovation, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and in the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.

## **PRINCIPLE 2**

Promote certainty and clarity of intellectual property rights [, noting the relationship with genetic resources, their derivatives and/or associated traditional knowledge and obligations with respect to the protection of traditional knowledge, genetic resources, their derivatives and/or associated traditional knowledge and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit-sharing.  
Protect creativity, reward investments and ensure prior informed consent and fair and equitable benefit-sharing with the knowledge holders.]

## **PRINCIPLE 3**

Protect creativity and reward investments made in developing a new invention.

## **PRINCIPLE 4**

Promote transparency and dissemination of information [,where not in contrast with public morality and/or public order,].by:

- [publishing and disclosing technical information related to new inventions, so as to enrich the total body of technical knowledge accessible to the public.
- [disclosing country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.]
- [Increase legal certainty and trust between users and providers of genetic resources and traditional knowledge through a mandatory disclosure of origin or source.

[Annex VI follows]



<b>Date</b>	<b>Activity</b>
February 2012	IGC 20 (GRs). Undertake text based negotiations with a focus on considering options for a draft legal text as detailed in WIPO/GRTKF/IC/19/7. In developing this text, the IGC should also carefully consider texts already submitted by Members. Duration 8 days, including Saturday.
April/May 2012	IGC 21 (TK). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions.
July 2012	IGC 22 (TCEs). Focus on 4 key Articles <i>viz</i> Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions
September 2012	WIPO General Assembly
2013	IGC 23. Consider decision of General Assembly and take stock of further work required to finalize the text/s.

[End of Annexes and of document]