

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

**Thirty-First Session**  
**Geneva, September 19 to 23, 2016**

REPORT

*Adopted by the Committee*

1. Convened by the Director General of the World Intellectual Property Organization (“WIPO”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “the IGC”) held its Thirty-First Session (“IGC 31”) in Geneva, from September 19 to 23, 2016.
2. The following States were represented: Algeria, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bolivia (Plurinational State of), Brazil, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cuba, Czech Republic, Denmark, Egypt, Ecuador, Estonia, Ethiopia, Fiji, Finland, France, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Latvia, Lithuania, Malaysia, Mexico, Montenegro, Mozambique, Namibia, Netherland, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Thailand, Tunisia, Turkey, Tuvalu, United Arab Emirates, United Kingdom, United States of America, Uzbekistan, Yemen and Zimbabwe (85). The European Union (“the EU”) and its 28 Member States were also represented as a member of the Committee.
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.
4. The following intergovernmental organizations (“IGOs”) took part as observers: African Union (AU), General Secretariat of the Andean Community, and South Centre (SC) (3).
5. Representatives of the following non-governmental organizations (“NGOs”) took part as observers: Assembly of Armenians of Western Armenia; Center for Multidisciplinary Studies Aymara (CEM-Aymara); CropLife International; Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ); Comité consultatif mondial des amis (CCMA); Copyright Agency Limited; European Law Students’ Association (ELSA International); Foundation for Aboriginal and Islander Research Action (FAIRA); France Freedoms - Danielle Mitterrand Foundation; Health and Environment Program (HEP); Incomindios Switzerland; Indian Council of South America (CISA); Indian Movement - Tupaj Amaru; Indigenous Peoples’ Center for Documentation, Research and Information (DoCip); Indigenous ICT Task Force (IITF); International Committee for the Indians of the Americas (Incomindios); International Federation of Pharmaceutical Manufacturers Associations (IFPMA); International Indian Treaty Council; International Trademark Association (INTA); International Video Federation (IVF); Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi); Kanuri Development Association; Korea Institute of Oriental Medicine (KIOM); Massai Experience; Pacific Island Museums Association (PIMA); Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España); Sámi Parliamentary Council (SPC); Tebtebba Foundation - Indigenous Peoples’ International Centre for Policy Research and Education; and Tulalip Tribes of Washington Governmental Affairs Department (29).
6. The list of participants is annexed to this report.
7. Document WIPO/GRTKF/IC/31/INF/2 provided an overview of the documents distributed for IGC 31.
8. The Secretariat noted the interventions made, and the proceedings of the session were communicated and recorded on webcast. 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.
9. Mr. Wend Wendland of WIPO was Secretary to IGC 31.

## AGENDA ITEM 1: OPENING OF THE SESSION

10. The Chair of the IGC, Mr. Ian Goss from Australia, opened the session and invited the Director General of WIPO to take the floor.

11. The Director General, Mr. Francis Gurry, welcomed delegations to this session on traditional knowledge (“TK”). The current IGC’s mandate envisaged a large number of meetings, two of which had taken place on the subject of intellectual property (“IP”) and genetic resources (“GRs”). The present session was the first of two on TK and they would be followed by two sessions on traditional cultural expressions (“TCEs”) in 2017. The WIPO Secretariat had also been requested to organize seminars to build regional and cross-regional knowledge and consensus on issues related to IP and GRs, TK and TCEs with a focus on unresolved issues. He expressed indebtedness and gratitude to Mr. Goss, the Chair of the IGC, for his extraordinary energy, persistence, and constructive engagement in moving this very important process forward. He acknowledged the two Vice-Chairs of the IGC, namely Ambassador Robert Matheus Michael Tene from Indonesia and Mr. Jukka Liedes from Finland, for their engagement, and the constructive engagement of Regional Coordinators. The last time the IGC had addressed TK specifically was in March 2014, over two years before, when the IGC had advanced work on the draft articles of an international legal instrument for the protection of TK. Much work was still needed to be done. He hoped that delegations would be able to show flexibility and pragmatism and that the IGC would be able to progress the discussion on this specific subject matter in the course of the week. He mentioned that the Voluntary Fund, which had been designed to facilitate the participation of indigenous peoples and local communities (“IPLCs”), had been out of funds for some time, which had a radical impact on the capacity of the representatives of IPLCs to participate in the IGC. He made a plea for assistance with respect to funding. Finally, he welcomed Dr. Laila Susanne Vars, a member of the Sami People in Norway, Ms. Jennifer Tauli Corpuz, a member of Kankana-ey Igorot People in the Philippines, and Mr. Jim Walker, a member of the Iman and Goreng Goreng Peoples in Australia, who would participate in the session’s Indigenous Panel.

12. The Chair thanked the Vice-Chairs, Ambassador Tene and Mr. Liedes, with whom he worked as a team, for their support and valuable contributions. They had worked collectively and regularly communicated between sessions. He thanked Regional Coordinators for their continuous support and constructive guidance. Without them, it would be very difficult to make progress. He hoped that they would help build a constructive working atmosphere for the two TK sessions. He also thanked the Secretariat for its continued support and the significant behind-the-scenes work that it did to support the IGC, the Chair and the Vice-Chairs. He also hoped that the IGC could continue the respectful and friendly tone of previous meetings. As a Chair, he would attempt to be friendly and fair but also firm when required to ensure that the IGC remain focused on substance. He recalled that the present IGC session, as previous sessions, was on live webcast on the WIPO website, which further improved its openness and inclusiveness. This was a five-day session, the first session this biennium dealing exclusively with TK. He suggested to use the time as efficiently as possible and intended to begin sessions punctually. To that end, opening statements of up to three minutes would be allowed by Regional Groups, the EU and the Like-Minded Countries (“the LMCs”). Any other opening statements could be handed to the Secretariat or sent by email and they would be reflected in the report. Member States and observers were strongly encouraged to interact with each other informally, as this increased the chances that Member States be aware of and perhaps support observers’ proposals. Pursuant to the new mandate, the IGC should focus on narrowing existing gaps, reaching a common understanding on core issues, and considering options for a draft legal instrument(s). In addition, as detailed in the work program, IGC 31 should, as an outcome, elaborate an indicative list of outstanding/pending issues to be tackled/solved at IGC 32. As such, IGC 31 and 32 had to be viewed collectively, with the aim of producing a “result” or “output” by the end of IGC 32. He noted that delegations had received two documents from

the Chair. The first was the Chair's Information Note, in which he had given some background to the discussions on TK to identify the core issues that needed to be addressed at IGC 31, noting that the IGC had not discussed TK for over two years. He reemphasized that the views in that paper were his alone and were without prejudice to Member States' positions. The second document detailed the approach and the methodology for IGC 31, which had been developed in consultation with Regional Coordinators and interested Member States. He acknowledged the importance and the value of indigenous representatives, as well as other key stakeholders such as representatives of industry and civil society. If the IGC was to achieve an effective outcome, it needed to consider and balance the interests of all stakeholders. The plenary was a decision-making body. The IGC had to reach a decision on each agenda item as it went along. On Friday, September 23, the decisions would be circulated for final confirmation by the IGC. The report would be prepared after the session and circulated to all delegations for comment. It would be presented in six languages for adoption at IGC 32 in November 2016. The Chair conveyed key messages to set the tone for the week. First, IGCs 31 and 32 were clearly linked, as the only meetings under the current mandate specifically on TK. Recognizing that many delegations would need to consider proposals and issues raised at IGC 31 and engage with capitals, it was important to spend time between these two meetings to seriously look at the proposals and issues prior to IGC 32 in order to arrive prepared to reach positions on the core issues discussed during IGC 31. Second, there was significant opportunity to give greater clarity to the core issues on the current text. The working document included significant duplications throughout the text. There were concepts that used different words, which were often a matter of semantics rather than substance. There were similar concepts in different articles, which needed to be rationalized. Without that clarity, there would be limited progress. In essence, at a practical level, the IGC had to reach clarity and narrow gaps in relation to some of the language and approaches within the working document. Delegations might wish to consider some of those issues after IGC 31, but they would need to raise those issues at IGC 31 so the participants could come prepared at IGC 32 to deal with those issues at a substantive level. Third, the most difficult part was to agree on the purpose of the legal instrument, in essence, objective(s), the nature of the subject matter, beneficiaries, scope of protection, and limitations and exceptions. Those were substantive core issues which the IGC needed to make progress on at IGCs 31 and 32. He noted that the tiered approach had been introduced in the text in relation to scope of protection. He believed that it provided a useful framework to use practical examples to unpick that central issue of scope or protection, particularly as the IGC attempted to balance protection and access and consider what rights should be afforded to TK, either moral or economic, and also consider the relationship with the public domain. Last, he recalled the important backdrop of the IGC's work: the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").

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

### *Decision on Agenda Item 2:*

13. *The Chair submitted the draft agenda circulated as WIPO/GRTKF/IC/31/1 Prov. 3 for adoption and it was adopted.*

14. The Chair opened the floor for opening statements.

15. The Delegation of India, speaking on behalf of the Asia-Pacific Group, supported the working methodology and the work program proposed by the Chair. The Group had studied the Information Note in which the Chair had summarized the work undertaken by the IGC on TK since the text-based negotiations in 2010. It favored the discussion on the core issues in order to arrive at a common landing zone, namely on the issues of objectives, beneficiaries, subject

matter, scope of protection, and exceptions and limitations. How TK was defined would lay down the foundation of the IGC's work. The definition of TK had to be inclusive and capture the unique characteristics of TK. The text should have a comprehensive definition that did not require separate eligibility criteria. It was in favor of a differential level of protection of TK using a tiered approach. That would provide an opportunity to strike an optimal balance between the rights and interests of the owners, the users of TK and the wider public interest. Establishing different levels of rights based on the characteristic of the TK could be a way forward towards narrowing the existing gaps, with the ultimate objective of reaching an agreement on an international legal instrument(s), which would ensure the balanced and effective protection of TK, in addition to the protection of GRs and TCEs. On the issue of beneficiaries, some members of the Asia-Pacific Group had different positions; however, most of the members were of the view that it was pertinent to include national authorities within the definition of beneficiaries, if there were instances in which TK could not be directly attributed to IPLCs. Most of the members of the Asia-Pacific Group were of the view that the Member States needed to recognize the important role played by the national authorities as the trustees of TK where beneficiaries could not be identified and in cases where beneficiaries were identified, the State had to be accorded a fiduciary role in consultation with local communities. On scope of protection, the Group was in favor of providing maximal possible protection for widely held TK, especially traditional medicinal knowledge, which was of immense commercial value. There had to be some form of economic rights, such as user fees as decided by contracting parties. In case of research and development, widely established concepts of prior informed consent ("PIC"), mutually agreed terms ("MAT") and access and benefit sharing ("ABS") had to be included while providing protection to such widely held TK. On exceptions and limitations, it was fundamental to ensure that the provisions be considered in a balanced way between the specific situations of each Member State and the substantive interests of TK holders. Hence, the integration of the principle of differential protection of TK had to be reflected in the text of the instrument(s). Some members of the Group had a different position, but most of the members reiterated that there was a need for a legally binding instrument(s) providing effective protection to GRs, TK and TCEs. It expressed its appreciation for the leadership provided by the Chair and the Vice-Chairs. It thanked the Secretariat for the meticulous preparation, and it was hopeful that the discussions would lead to visible progress in the work of the IGC.

16. The Delegation of Latvia, speaking on behalf of the Group of Central European and Baltic States ("CEBS"), thanked the Secretariat for all the preparatory work accomplished for the session. The IGC had not addressed TK for more than two years, so the CEBS Group welcomed the Chair's Information Note, which was a useful tool to refresh memories on the work that had been completed in the past, and to focus current discussions in the context of the mandate. As outlined in the mandate, the IGC had to focus on finding a common understanding on the core issues. It believed that discussions could move forward with the consideration of a possible outcome, only after reaching a common understanding on a number of core issues, including objectives, beneficiaries, subject matter, relationship with the public domain and misappropriation. The IGC could only focus on a balanced and effective protection of the TK in the IP context. It highlighted that the possible instrument would not fulfill the aims and the objectives of other existing instruments outside the IP system, such as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ("the Nagoya Protocol"). At a more substantive level, the CEBS Group preferred a measures-based approach. It was carefully looking at the tiered approach introduced at IGC 27; however, the TK categories had to be defined in a clear manner so as to ensure legal certainty. The outcome of the deliberations had to take into account that very important aspect. It did not wish to pronounce itself on an instrument that could have unpredictable or undesirable effects on the IP system. Any possible outcome had to be carefully examined in terms of its impact on all the stakeholders and their respective legislative systems. Finally, the CEBS Group assured of its constructive engagement during IGC 31.

17. The Delegation of Nigeria, speaking on behalf of the African Group, welcomed the opportunity to continue the discussion on TK and its interface with the IP system in a manner that provided sufficient promotion and protection of TK and benefits from TK. It was confident that the IGC negotiations would continue to be steered towards positive results. It expressed its appreciation to the Secretariat for its excellent advance briefing and preparation for the session. As it had been more than two years since the IGC had formally discussed TK, it was important to underline anew that TK was the oldest form of knowledge, and also a living body of knowledge that constituted an essential source of identity for its holders. The Group was committed to advancing negotiations towards a practical legal instrument for the effective protection of TK in the modern international IP framework. Such an outcome would inherently express a common understanding. Therefore, it did not anticipate a broad conceptual discussion on divergent views. That had been the trend of discussions in the past without achieving objective results. The Group urged participants to focus on achieving a workable flexibility on objectives, misappropriation, beneficiaries, subject matter of protection, scope of protection, and exceptions and limitations, among others. Mindful that IGC 31 and 32 should ideally conclude the discussions on TK and bearing in mind the immense social and economic impact of TK, the Group assured of its constructive engagement in the negotiations.

18. The Delegation of Greece, speaking on behalf of Group B, thanked the Secretariat for its dedication on bringing the work of the IGC forward. It recognized the importance of the balanced and effective protection of GRs, TK and TCEs. The protection relating to those subjects had to be designed in a manner that supported innovation and creativity, ensured legal certainty, was practicable and recognized the unique nature of those subjects. The mandate of the IGC provided that the IGC continue to expedite its work, with a focus on narrowing existing gaps. The primary focus was to reach a common understanding on core issues, including the objectives of the IGC's work. In that regard, the Group thanked the Chair for preparing the draft methodology, which facilitated the way the discussions would be organized at IGC 31. It was hopeful that the IGC would develop a common understanding on core issues and advance in a meaningful way. In the further work of the IGC, that common understanding could be increased. The IGC had to use "an evidence-based approach, including studies and examples of national experiences, including domestic legislation and examples of protectable subject matter and subject matter that is not intended to be protected". The Group remained committed to contribute constructively towards achieving a mutually acceptable result.

19. The Delegation of Chile, speaking on behalf of the Group of Latin American and Caribbean Countries ("GRULAC"), was very grateful for the preparatory work by the Chair and the Secretariat. The objective of the biennium for the IGC was to "expedite its work, with a focus on narrowing existing gaps, with open and full engagement, including text-based negotiations, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs)". As defined by the General Assembly ("the GA") in 2015, negotiations would be undertaken on TK, focusing on unresolved issues and the consideration of various options relating to a legal instrument. It was grateful for the Information Note and the Methodology Note prepared by the Chair. The identification of core issues and the various alternatives proposed for the organization of the IGC's work were a good contribution to focusing its work so as to achieve concrete results. The IGC had to draw up an indicative list of issues that had to be dealt with at IGC 32, so as to reduce gaps, on the basis of a common understanding on core issues on TK. It was important the starting point must be the work already done by the IGC. It assured of its commitment to make progress at IGC 31.

20. The Delegation of Tajikistan, speaking on behalf of the Group of Central Asian, Caucasus and Eastern European States ("CACEES"), had high expectations and firmly believed that Member States would find a common understanding on core issues, by narrowing existing gaps,

reflecting the interests of all stakeholders. It thanked the Secretariat for its continuous and tireless work for the preparations and welcomed the methodology proposed by the Chair. It recognized that the operation of the IGC was vital to developing an IP-related international legal instrument(s) to ensure the balanced and effective protection of GRs, TK and TCEs. It remained engaged with a pragmatic and flexible approach through the work of the IGC.

21. The Delegation of China thanked the Secretariat for the preparatory work. It was happy to return with the other Member States to make progress in the discussion on GRs, TK and TCEs. It appreciated the efforts of the Chair and the Vice-Chairs to make progress in the IGC. With all those efforts, positive results had been achieved, but there were still gaps which needed to be narrowed. It wished, based on the experience of the last two sessions, to make progress, narrow gaps, and achieve more common understanding so as to achieve positive results. In that way, the IGC could work towards international legally binding instruments.

22. The Delegation of Indonesia, speaking on behalf of the LMCs, hoped that there would be constructive and fruitful discussions throughout the meeting. It invited the IGC to take into account the practical value of establishing the level of rights as determined by the character of TK, along the spectrum of secret, sacred and widely-diffused TK, and their use. Such an approach could be a useful tool in the process of determining the characters of TK and designate rights to them accordingly. Recalling the outcome of the Bali Consultative Meeting held in 2014, the differentiated protection in the tiered approach offered an opportunity to reflect the balance of rights and interests of owners and users. Establishing the level of rights by the characters of TK provided an opportunity to find convergence on core issues, namely, subject matter, beneficiaries, scope of protection, and exceptions and limitations. In that regard, it recommended to further continue the discussion on that particular issue. With respect to the subject matter, a definition of TK in a broad and inclusive sense would be preferable, while recognizing that such a definition should also provide a certain level of clarity. Moreover, the distinguishing features of TK, namely “intergenerational,” “maintain” and “develop” had to be maintained as a part of the definition. The protection granted by the instrument(s) should also extend to the publicly available or widely diffused TK. In that connection, it also recommended that the question of criteria of eligibility be removed from the subject matter, and suggested consolidating all references on criteria of eligibility within Article 3. On the issue of beneficiaries, it was imperative to address the role of the State. Such a role was essential as there were certain circumstances in which TK could not be specifically attributable to particular IPLCs. That usually occurred when TK was not specifically attributable or confined to an IPLC or it was not possible to identify the IPLC which had generated it. Under those circumstances, the provision on beneficiaries should include State as an administrator. Identification of the beneficiaries was closely related to the scope of the instrument as a whole. Reaching a common understanding on beneficiaries, including the role of the State, was of paramount importance. On “Scope of Protection”, there were converging views that emphasized the need to safeguard the economic and moral interests of the beneficiaries. For that purpose, determining a standard on certain levels of protection that accommodated the rights granted for each TK would ensure that safeguarding was achieved. The safeguards put in place had to take into account the nature of the rights by which the extent of protection granted with consideration towards the level of diffusion of TK. On exceptions and limitations, it was essential to ensure that the provisions were not too extensive so as not to compromise the scope of protection. There was a need for a legally binding instrument(s) providing effective protection of GRs, TK and TCEs. It expressed its confidence in the Chair and the Vice-Chairs to guide the discussions, and in the work of the Secretariat, to enable the IGC to make progress on the draft text on TK.

23. The Delegation of the EU, speaking on behalf of the EU and its Member States, was looking forward to a constructive dialogue. It thanked the Secretariat for all the support provided. It believed that if the week’s discussions were to be fruitful, the focus had to be on the core issues, as identified in our mandate. Gaining greater understanding on these issues would be an essential step without which further progress would become either impossible or

meaningless. The Chair's Information Note usefully recalled these core issues, : a definition of misappropriation, beneficiaries, subject matter, objectives, and what TK subject matter was entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain. It emphasized the importance of concentrating on each core issue, beginning with how to achieve a common understanding on the objectives. Discussions on the core issues had to take place without prejudging the outcome, as stipulated in the mandate. It looked forward to a substantive debate to reach a mutual understanding of the facts rather than one geared towards any particular type of outcome. Agreement had to be found in relation to those basic issues before discussing the nature of the instrument. A number of different possibilities for the enhanced protection of TK had already been placed before the IGC, such as awareness-raising, encouraging the use of existing legal frameworks, including trademark, design, trade secret, geographical indication and copyright systems, and improving access to those frameworks. It noted that the EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure had been adopted in 2016. The Directive harmonized the definition of trade secrets in accordance with existing international binding standards. From a practical perspective, using the existing IP structure to protect TK would appear to offer many advantages, not least the speed with which it could be used by potential beneficiaries. On the question of working methods, it continued to advocate for an evidence-based discussion that considered real world implications and feasibility in social, economic and legal terms. The effect on stakeholders at large, including the public domain, had to be thoroughly examined. To that end, it supported a study on national experiences and how those could inform discussions. It had submitted a working document WIPO/GRTKF/IC/31/9, which requested the WIPO Secretariat to undertake a study of national experiences and domestic legislation and initiatives recently adopted in relation to the protection of TK. To inform discussions at the IGC, the study should (1) analyze domestic legislation and concrete examples of protectable subject matter and subject matter that was not intended to be protected; and (2) take into account the variety of measures that could be taken, some of which could be measures-based, whilst others could be rights-based.

24. [Note from the Secretariat: the following opening statements were submitted to the Secretariat in writing only.] The Delegation of the Republic of Korea expressed its sincere appreciation to the WIPO Secretariat for its efforts in preparing and arranging the meeting. It believed in the importance of protecting TK, but its protection had to be designed in a manner that did not create adverse effects on innovation and creativity. The definition of TK had to be concise and clear-cut to prevent future ambiguous interpretation in the process of implementation because it was closely related to the subject matter, limitations and exceptions, and level of protection. It opposed the inclusion of nations or national entities as beneficiaries, since it was contrary to the purpose of protecting TK. Accordingly, the beneficiaries had to be the IPLCs who had made, preserved and transmitted TK. On exceptions and limitations, it was important to ensure that the provisions consider the specific situations of each Member State. Especially TK in the public domain should be considered under an exceptional clause. On databases, establishing and utilizing databases was a very efficient way to prevent erroneously granted patents or as a means of protecting TK. The database in the Republic of Korea contained vast amounts of published information and had been used very successfully as prior art for patent examination as well as for other purposes. Further discussion on the scope of information, security measures and access control would provide a better idea of how to improve the usefulness of databases. With regard to the disclosure requirement, when it came to the process of granting rights for inventions, it was worried that, due to the legal uncertainties caused by the disclosure requirement, users may ultimately avoid utilizing patent systems, and instead bypass IP regimes altogether. Lastly, regarding the form of the outcome, it preferred non-legally binding instruments. Securing rights for parties could also be achieved through other means outside the patent system, such as private contracts, rather than by revoking rights or imposing sanctions through the IP Office. In that context, it was necessary to take more time



for deep discussions and research, giving consideration to users' opinions and the potential ripple effect on industry and other related areas.

25. The Delegation of Uganda fully aligned itself with the statement delivered by the Delegation of Nigeria, on behalf of the African Group. It urged the IGC to build on the momentum from other international fora in 2015 to come to a consensus on an international instrument(s) for the protection of IP and GRs, TK and TCEs. Since that session was dedicated to TK, members needed to have a deeper reflection on the subject in order to reach a closure. Knowledge was not the exclusive domain of modern societies. Since the advent of civilization, indigenous communities had used traditional systems to generate knowledge systems and practices to determine their own development. Those systems, including improving and preserving their health, increasing their farm yields, educating their children, and decreasing infant and maternal mortality, were still applied by IPLCs. However, the current wave of modernization, as well as the IP system, did not, to a greater degree, plan for protection of and preservation of traditional or indigenous knowledge. It overlooked the potential role of TK as a useful developmental tool. As a result, in some cases, TK had been misappropriated, marginalized and, in some extreme cases, threatened with extinction. Therefore, in line with the WIPO Development Agenda, members needed to give a new meaning to empowering all people, including indigenous people – not only as recipients of knowledge (through technological transfer), but also as contributors of knowledge in the development process. It urged members to stick to the decision of the GA, thus focusing on negotiating the draft text with a view to narrowing existing gaps. It envisaged a minimum-standard instrument(s) at the end of the process.

26. The Delegation of Japan expressed its appreciation for the hard work of the Chair toward the success of IGC 31. It commended the Secretariat for its effort in arranging the meeting. The IGC had been discussing TK over the years. In that context, due recognition should be given to the progress the IGC has made so far. Nevertheless, the Delegation had to admit that, even with its long history of discussion, the IGC had not been able to find a common ground on the fundamental issues, such as policy objectives, beneficiaries, subject matter and definition of misappropriation. The gap on those issues still remained. As the Delegation had mentioned at the high level segment of IGC 26, the IGC should not be afraid of going back to discuss the fundamental issues. Such discussion would hopefully enable the IGC to overcome divergent views and reach a common understanding. In that regard, as a first step to finding a way out of the current situation, it welcomed the opportunity to deepen the understanding of the core issues detailed in the current IGC's mandate. The Delegation suggested focusing on finding the importance of preventing the erroneous granting of patents at IGC 31, which could be done by creating a database with non-secret TK. The Delegation of Japan, together with the Delegations of Canada, the Republic of Korea and the United States of America, had resubmitted the "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources". It believed that the discussion on that proposal could complement and even facilitate the text-based negotiations. The Delegation was ready to engage in work at IGC 31 with a constructive spirit.

27. The Delegation of Brazil informed the IGC about the consultation process that had led to the enactment of Law 13.123, of 2015, and of Decree 8.772 of 2016, which regulated, among other themes, the management of TK associated with GRs. The Law 13.123/15 and the Decree 8.772/16 had been extensively debated with society in a lively process. The Law had been mainly discussed in Brazil's National Congress. The Decree, for its part, had been open for debate since the beginning of the normative process, taking on board contributions from civil society, especially from those groups directly interested: indigenous peoples, traditional communities and small farmers. The Ministry of Environment had created a dedicated webpage to receive suggestions, contributions and recommendations on the regulations to be considered during a public hearing organized in October 2015. In July 2015, in parallel with the

consideration of online contributions, a multi-stakeholder working group had been established, with the participation of representatives of associations of indigenous peoples, associations of traditional communities and small farmers. This working group was responsible for guiding the debate on the implementation of the Decree. The multi-stakeholder working group had prepared public consultation events held during the months of August, September and October 2015. In total, six regional workshops had been held to discuss the project. It was noteworthy that the NGO INBRAPI, present at this IGC meeting, had also taken part in the workshop organized in the city of Porto Alegre, from October 16 to 18, 2015. As a result of the very active participation of interested groups in discussion of the benefit-sharing mechanism, Brazil's national legislation contemplated a strong protection for indigenous peoples' and local communities' rights. For example, Article 8 defined that at least 25 percent of sectorial chambers should be comprised of associated TK holders. Article 12 granted the right of participation of indigenous communities in the decision-making process of matters related to access to associated TK. A third example was that Article 13 granted to those populations the right to deny access to GRs or associated TK on their possession. The recognition of strong protection to those stakeholders would not have been possible without an open and inclusive consultation process.

28. The representative of FWCC wished that IGC 31 and 32 would facilitate consensus-building among Member States on how TK fitted within the international legal system. An essential relationship existed between TK and GRs in the context of food security. What seemed to be missing from the discussions was more attention to small-scale farmers. Small-scale farmers actively maintained and further developed the majority of the world's plant GRs for food and agriculture. Those resources were inseparable from the evolving body of knowledge passed down from generation to generation through informal social and economic networks about the unique characteristics of different varieties, the benefits of various management practices, and a deep and evolving wisdom of the interconnection between the health and wellbeing of farmers and their natural environments. TK associated with food and agriculture was inherently dynamic. Farmers were among those at the forefront of global environmental change - continually innovating and experimenting on-farm, integrating beneficial technologies with existing management practices, and sharing success within their social and economic networks. This evolving body of knowledge was among the greatest assets for mitigating the impacts of climate change and achieving global food security. Yet, at present small-scale farmers were among the most food insecure demographic in the world, and were losing plant genetic diversity and the TK associated with it at a rapid rate. The TK associated with food and agriculture was also culturally and spiritually significant to small-scale farmers. The food security implications of the draft texts relating to the rights and responsibilities over GRs and associated TK had to be better understood. Questions – such as how the proposed text might support and encourage on-farm innovation; how it might facilitate benefit-sharing; or how it might affect the choice and availability of desired technologies – needed to be asked and explored. She acknowledged and appreciated the essential representation of indigenous peoples present at the session. However, representation of small-scale farmers, acknowledgement of their being TK holders, and the connection between GRs, TK and food security, were lacking. It was critically important for the IGC to encourage the participation of small-scale farmers, whether or not they identified themselves as indigenous. While small-scale farmers could be understood to be included in the definition of “local communities,” there was value in their explicit recognition. Small-scale farmers should be included as beneficiaries and as expressly eligible for support from the Voluntary Fund - which she hoped would be replenished and fully operational again very soon. This should in no way detract from resources available to indigenous peoples. The strength, effectiveness and integrity of any treaty addressing IP, GRs and TK depended on the meaningful participation of non-State actors, including indigenous peoples, small-scale farmers and those that represented them.

29. The representative of Copyright Agency Limited, speaking on behalf of the Indigenous Caucus, applauded the Chair and the IGC for recommencing the IGC in 2016, as there had

been a hiatus in 2015. It was important for the text-based negotiations to continue in good faith. The IGC was re-energized to work on those issues which required nuanced solutions with indigenous peoples.

30. The representative of the Andean Community expressed that the Andean Community was ready to continue its active cooperation to achieve a positive outcome which was of supreme importance to the Andean countries. After more than two years, IGC 31 was again considering the draft articles set out in document WIPO/GRTKF/IC/31/4, and the Chair had proposed that those issues – which were wide-ranging and complex – should be considered. He supported the methodology and would actively contribute to its implementation. It should be borne in mind that document WIPO/GRTKF/IC/31/4 was the main working document and contained the essential features of the legal and institutional framework for an international regime that was able to regulate, protect and promote aspects of IP concerning access to and proper use of TK. He was confident that the enthusiasm and flexibility shown by all the delegations would also permeate the proceedings of the IGC, so that IGC 32 would continue to consider and, where appropriate, agree on common criteria based on the indicative list of outstanding/pending issues that would be established during the present session. The Andean Community followed the proceedings of the IGC very closely and with great interest, focusing on the three pillars into which its work had been divided, namely: GRs and associated TK; TK as such; and TCEs. In the Andean Community, those three pillars had a profound impact on the definition, protection and promotion of cultural identity. The negotiations in the IGC were a bright beacon guiding the efforts of the Andean Community to develop IP systems that were flexible, modern and promoted ingenuity and investment, and were capable of protecting and promoting ancestral knowledge with the requisite force and firmness. The Andean region was one of the few regions in the world with an extremely diverse natural environment, in terms of biological and cultural resources. It also held one of the cradles of human civilization. Consequently, it was easy to understand its need for an international legal regime, fleshed out in one or more instruments, which guaranteed the vibrant and forward-looking development of all aspects of IP relating to this rich cultural tradition and its application for the benefit of society as a whole. The fact that over 183 aboriginal languages were spoken within the Andean Community attested to its great cultural diversity. The General Secretariat of the Andean Community therefore attached special importance to the work of the IGC on the protection and promotion of the IP aspects of TK. This discussion involved fundamental human rights issues such as the right of indigenous peoples to their cultural identity, their worldview and immanence in time, and respect for their diversity, etc., as well as more practical but equally important issues that related to economic gain and improvement of the wellbeing of all stakeholders in general. The representative believed that those were the relevant points that should guide discussions on the critical aspects of the topics that the Chair had identified as core issues in his Information Note. The Andean Community was honored to continue working hard to contribute to building consensus in order to achieve the legal certainty that would ensure the fair, balanced, valid and effective protection of TK.

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

#### *Decision on Agenda Item 3:*

31. *The Chair submitted the revised draft report of the Thirtieth session of the Committee (WIPO/GRTKF/IC/30/10 Prov. 2) for adoption and it was adopted.*

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

*Decision on Agenda Item 4:*

32. *The Committee unanimously approved the accreditation of all the organizations listed in the Annex to document WIPO/GRTKF/IC/31/2 as ad hoc observers, namely: Alliance Nationale des Autorités Traditionnelles du Congo (ANATC); Jeunesse Sans Frontières Bénin (JSF Bénin); Juristes pour l'Environnement au Congo (JUREC conseil); Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España); Suivi des Couvents Vodoun et Conservation du Patrimoine Occulte (SUCOVEPO).*

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

33. The Chair recalled that the Voluntary Fund was depleted. He called upon delegations to consult internally and make contributions. Indigenous representation was important for the credibility of the negotiations. He acknowledged the financial support provided by the United States Patent and Trademark Office ("the USPTO") directly to the indigenous representatives who had been recommended for funding by the Advisory Board of the Voluntary Fund to attend IGC 31. He drew attention to document WIPO/GRTKF/IC/31/INF/4, which provided information on the current state of those applications for support, and document WIPO/GRTKF/IC/31/3 on the appointment of the members of the Advisory Board. The IGC would later be invited to elect members of the Board. The Chair proposed that His Excellency Ambassador Tene, the Vice-Chair serve as Chair of the Advisory Board. The outcomes of the Voluntary Advisory Board's deliberations would be reported on in document WIPO/GRTKF/IC/31/INF/6.

34. The representative of Copyright Agency Limited, speaking on behalf of the Indigenous Caucus, thanked the Delegation of the United States of America ("the USA") for its support for the selected representatives of indigenous peoples. She appealed to Member States to consider replenishing the Voluntary Fund. It was crucial that the IGC discussions included indigenous peoples, as they were the rights holders of TK, TCEs and GRs. They had to be present when the discussions were happening, as those instruments would affect the social, economic, spiritual and emotional wellbeing of their communities. She also asked that a document be tabled at the WIPO GA in 2017 to request that, if the funds in the Voluntary Fund were low, WIPO be able to contribute funds from its regular budget so that indigenous representatives could be funded to attend the IGC. Document WIPO/GRTKF/IC/28/10 had been put forward by some Member States at the WIPO GA in 2014 but it had not been agreed to. She wanted to see that issue raised again as Member States were struggling to provide funds to the Voluntary Fund voluntarily.

35. The representative of Tupaj Amaru continued to advocate for the active and effective participation of indigenous peoples in the work of the IGC, not merely as simple observers, but as guardians and actors. He observed that the GA had previously requested the IGC to reexamine the rules of procedure, and to recognize their substantive contribution to the work of

the IGC. Progress could only be made with the constructive and full participation of indigenous peoples.

36. [Note from the Secretariat]: The Indigenous Panel at IGC 31 addressed the following topic: "IGC Draft Articles on the Protection of Traditional Knowledge: Indigenous Peoples' and Local Communities' Perspectives". The keynote speaker was Dr. Laila Susanne Vars, Member of the Sami People, Norway. The two other panelists were: Ms. Jennifer Tauli Corpuz, Member of Kankana-ey Igorot People of Mountain Province, Philippines; and Mr. Jim Walker, Member of the Iman and Goreng Goreng Peoples, Australia. The Chair of the Panel was Mr. Herson Huinca-Piutrin from Chile. The presentations were made according to the program (WIPO/GRTKF/IC/31/INF/5) and are available on the TK website as received. The Chair of the Panel submitted a written report on the Panel to the WIPO Secretariat which is reproduced, as summarized, below:

"The following issues were discussed and suggested by the panelists:

- Indigenous peoples were self-determined and were a source of biodiversity: TK relied on them and underpinned their very existence and future.
- There was a lack of understanding between States and their indigenous peoples regarding the protection of TK. Indigenous peoples had different aspirations and views regarding the use of their TK.
- Indigenous peoples and States must be on an equal footing to ensure protection from the misuse of indigenous knowledge.
- In the various countries with indigenous peoples, there was some debate around the victimization of those peoples through the appropriation of their culture and knowledge, owing to ignorance and information about indigenous ways of life.
- Indigenous peoples had a right to maintain, control, protect and develop their cultural heritage. However, in the development of the IGC instrument this perspective was being lost, both generally and in the substance of debates.
- Indigenous peoples stood to gain the most from and had a great deal to contribute to the IP debate. Indigenous peoples had their own institutions and organizations.
- In many countries, there was still much work to be done before local/national legislation could be established to protect the TK of indigenous peoples. For instance, questions remained as to whether States or indigenous peoples themselves should be responsible for protecting TK, and what form that protection should take.
- Indigenous peoples made an important contribution at a national level. For this reason, consultation was vital to take account of their opinions and perspectives.
- Institutional standards and agreements must be established to curb misappropriation of the TK systems of indigenous peoples.
- TK was not in the public domain: this was a major legislative challenge. There was concern around the use of the term 'public domain'. One example was the knowledge provided by indigenous people to doctoral students writing their theses. That knowledge was imparted in good faith. But was it considered part of the public domain because it featured in a scientific paper? The panelists recommended that the concept used in the instrument be more clearly defined.
- Difficulties arise where States did not recognize indigenous peoples and concepts such as 'nation', 'first nations', among others, were used in national legislation. However, the panelists favored the concept of indigenous peoples, as enshrined in the UNDRIP.
- Pursuant to Article 3, which governed the scope of protection, protection as such must spring from a binding principle.
- In Article 4bis regarding the disclosure requirement, this decision should rest with indigenous peoples.

- Article 6 was deemed to be quite restrictive in terms of protecting the TK of indigenous peoples. Thus, it was recommended that the proposals in James Anaya's Technical Review (WIPO/GRTKF/IC/31/INF/9) be adopted.
- A similarity had been drawn between the debates around the concepts of 'territory', considered by indigenous peoples as being for collective use and by States as 'individual property', and 'traditional knowledge', also considered by indigenous peoples as being for collective use and by the national legislation of States as 'individual property'."

37. [Note from the Secretariat]: The Advisory Board of the WIPO Voluntary Fund met on September 20 and 21, 2016 to select and nominate a number of participants representing indigenous and local communities to receive funding for their participation at the next session of the IGC. The Board's recommendations were reported in document WIPO/GRTKF/IC/31/INF/6 which was issued before the end of the session.

38. The representative of INBRAPI pointed out the importance for indigenous peoples to be able to continue to participate in the IGC. There were no funds. Representatives had been selected for the Voluntary Fund but it was not certain whether they would be able to come. She would be grateful if the Member States could contribute funds to support the participation of the indigenous representatives in the future.

39. The representative of CISA would be pleased if new indigenous representatives could be invited to participate in the IGC because it was always the same people, contributing to varying degrees.

*Decisions on Agenda Item 5:*

40. *The Committee took note of documents WIPO/GRTKF/IC/31/3, WIPO/GRTKF/IC/31/INF/4, and WIPO/GRTKF/IC/31/INF/6.*

41. *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.*

42. *The Chair proposed, and the Committee elected by acclamation, the following eight members of the Advisory Board to serve in an individual capacity: Mr. Babagana Abubakar, Representative, Kanuri Development Association, Nigeria; Mr. Parviz Emomov, Second Secretary, Permanent Mission of Tajikistan, Geneva; Ms. Ema Hao'uli, Policy Advisor, Labour and Commercial Environment, Ministry of Business, Innovation and Employment, New Zealand; Mrs. Lucia Fernanda Inacio Belfort Sales, Representative, Instituto*

*Indígena Brasileiro para Propriedade Intelectual (INBRAPI), Brazil; Mr. Kumou Makonga, First Secretary, Permanent Mission of Côte d'Ivoire, Geneva; Mrs. Rosario Luque Gil, Representative, Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ), Peru; Ms. Nusta Maldonado, Third Secretary, Permanent Mission of Ecuador, Geneva; and Ms. Priscilla Ann Yap, Second Secretary, Permanent Mission of Malaysia, Geneva.*

43. *The Chair of the Committee nominated Ambassador Robert Matheus Michael Tene, Vice-Chair of the Committee, to serve as Chair of the Advisory Board.*

## **AGENDA ITEM 6: TRADITIONAL KNOWLEDGE**

44. The Chair recalled that he had consulted with the Regional Coordinators and interested delegations on the work program and working methodology for the session, especially for Agenda Item 6. He had circulated the agreed methodology and program. The proposed working methodology would be flexible and dynamic, based on the progress made. The IGC would begin, in plenary, to address the core issues identified in the mandate. He would introduce the issues, providing some initial commentary to promote discussion. The plenary remained the decision making body and its discussion would be reported on as usual. The informals were to facilitate, in a smaller, informal setting, discussion of the text (document WIPO/GRTKF/IC/31/4), so as to reach a common understanding and narrow existing gaps. Each regional group would be represented by a maximum of six delegates, one of whom should, preferably, be the regional coordinator. In order to increase transparency, other Member State representatives would be permitted to sit in on the informals without speaking rights. Indigenous representatives would be invited to nominate two representatives to participate, and an additional two representatives to observe in the meetings without speaking rights. Concerning the methodology, the delegates forming the informals might take the floor and make textual proposals. However, there would be no live drafting. He might, depending on progress made in the plenary and informals, establish one or more small *ad hoc* contact group(s) to tackle a particular issue so as to further narrow existing gaps. The composition of such contact groups would depend on the issue to be tackled but would typically comprise a representative from each region, depending on the issue and Member States' interests. One of the Vice-Chairs or facilitators would coordinate the discussion in such contact group(s). Such contact groups would have short term mandates within the current session and would need to report back to the plenary or informals its results, if any. After consultation with Regional Coordinators, Ms. Margo Bagley from Mozambique, Mr. Emilio Fernando Uzcategui Jiménez from Ecuador and Ms. Ema Hao'uli from New Zealand were agreed to be facilitators. The Chair welcomed the nomination of a third facilitator from Regional Groups. The facilitators would assist the plenary and the informals by following the discussions closely, and keeping track of views, positions and any proposals, including drafting proposals. They might take the floor and make proposals. They would review all the materials, undertake drafting and prepare the revision(s) of document WIPO/GRTKF/IC/31/4. Throughout the week, the facilitators would

listen to all interventions in plenary and informals and undertake drafting incorporating textual proposals submitted. The facilitators might introduce and present on the screen their progressive work on core issues as “work-in-progress” for reaction and comment, if any. The facilitators would follow the following formatting rules: (1) proposed additions or insertions would be introduced in track change mode; (2) proposed deletions or questioned passages would be put between square brackets (in track change mode); (3) stand-alone options might be introduced by “Option” or “Alt” (in track change mode); (4) drafting options would be separated by “slashes” (in track change mode); (5) names of proponents will not be included in the text; and (6) facilitators’ own textual proposals will be identified as such. As in previous sessions, text would be retained if there was support by at least one Member State, any text that was not supported by one or more Member States would be bracketed, and observers’ drafting proposals could remain in the text only if supported by a Member State. Regarding the “result” of IGC 31, it was proposed that it would be a revised version of document WIPO/GRTKF/IC/31/4. The same methodology as used in previous IGC sessions would be followed. A Rev. 1 would be prepared and presented by Wednesday morning. Time would then be given for comments and further suggestions, including textual proposals. A Rev. 2 would be prepared and presented by Friday morning. Time would be given for correction of any obvious errors and general comments which would be included in the report. Obvious errors included typographical errors and inadvertent non-inclusion of textual proposals that had already been presented in plenary or informals. The plenary would be invited to note Rev. 2 and transmit it to IGC 32 as it was. In the last session under Agenda Item 6, taking into account all discussions over the week, the Chair would propose an indicative list of outstanding/pending issues to be tackled/solved at IGC 32. The plenary would be invited to review the indicative list and agree to it being transmitted to IGC 32. To sum up, the objectives of IGC 31 would be to (1) transmit to IGC 32 an indicative list of outstanding/pending issues; and (2) on the basis of WIPO/GRTKF/IC/31/4, discuss core issues related to IP and TK so as to prepare a further version of document WIPO/GRTKF/IC/31/4 for discussion at IGC 32. The Chair then commenced the discussion on the core issues, starting with objectives. As indicated in the Chair’s Information Note, objectives were fundamental to the development of an operative text of any instrument, as they detailed the purpose and intent of the instrument. In recent years, the objectives within the TK text had been significantly refined and modified with five themes reflected, but clearly not agreed. There were a number of brackets. In reviewing the objectives, Member States could reflect on which of the concepts detailed in the Policy Objectives set out in document WIPO/GRTKF/IC/31/4 were most directly related to IP, noting the mandate of the IGC was to “reach an agreement on an international legal instrument(s) relating to IP” for the balanced and effective protection of TK. He opened the floor for comments on objectives.

45. The Delegation of Egypt suggested, regarding subparagraph (c), replacing “promote” with “implement”, which had a legal obligatory aspect. Regarding the term “nations”, a lengthy dialogue would have to be undertaken because more clarification was needed on the use of that term.

46. The Delegation of Switzerland welcomed the progress made by the IGC on the Policy Objectives during the previous sessions addressing TK. It saw room to further enhance the common understanding as well as to streamline and simplify them. It highlighted two important general issues. First, there were other international instruments outside of the IP system that were relevant to achieve a balanced and effective protection of TK. Therefore, the international legal instrument in the IGC had to contain objectives that clearly focused on the IP issues. In contrast, the instrument should not contain objectives that were already contained in other international instruments or that were not relevant to the IP system. Second, there had to be a direct link between the Policy Objectives and the substantive provisions. Therefore, it was useful to consider the approaches contained in the main substantive provisions of the draft text, in particular the beneficiaries as well as the scope of protection. Once further progress was made on those fundamental provisions, the IGC could return to the Policy Objectives that could then be more easily refined.



47. The representative of Tupaj Amaru said there was a need to protect TK and GRs because in the globalized world, modern man had become the big predator of genetic and biological resources that were a spiritual source for the survival of humanity. They were threatened by extinction. The IGC had a mandate to examine the legal protection of TK and GRs.

48. The Delegation of India said that the objectives were to protect TK in an IP context. The negotiated *sui generis* instrument for the protection of TK should take care of its unique nature. The objectives could not be strictly as per the provisions of the conventional IP system. All the objectives in the current text were, therefore, appropriate.

49. The Delegation of the USA supported the statement made by the Delegation of Greece, on behalf of Group B. In particular, the work of the IGC was to reach a common understanding on core issues, including the objectives. At the outset, it believed that the objectives would benefit from simplification. The Policy Objectives did not fully describe what it viewed as a core objective, i.e., to promote the sharing of ideas and knowledge. Historically, societies had benefited from an exchange of ideas and knowledge. The copyright system, for example, rewarded authors by giving them a limited-in-time right to exclude others from copying others' idea but did not prevent others from using the idea itself. Similarly, patents protected the invention and allowed others to use it once the patent had expired. The form of those IP systems was not to reward rights but to promote the dissemination of knowledge. The protection and enforcement of new IP rights should be commensurate with the protection of IP reflecting a balance of interests, and a balance of rights and obligations. It suggested, borrowing from Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement), the following wording: "The protection of traditional knowledge should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations. The objective of protecting traditional knowledge should also be to the benefit of mankind, but encouraging a sharing of information, i.e. to promote the public domain. Yet also preserving to the holder of traditional knowledge certain limited in scope duration rights." WIPO had recognized in the Development Agenda Recommendations the value of the public domain. When a patent expired, the patented invention was available for all to use. When a copyright on a song expired, that song was available for all to perform. The social value of making more and more information and knowledge for all to make and use was important and that should be used to guide the IGC's work. It noted that paragraph (d) attempted to guide the work in that direction, but it wondered whether it was drafted clearly enough. The significant value of the public domain had to be acknowledged in the Policy Objectives. It proposed the following new text: "Recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain". It also flagged that it would come back later in the discussion on Objectives to provide further thoughts on "misappropriation".

50. The Delegation of Tunisia echoed the comments made by the Delegation of Egypt, especially on the term "nations", noting that more clarification was needed.

51. The Delegation of Latvia, speaking on behalf of the CEBS Group, said that the possible instrument had addressed the issues from an IP perspective. For that reason, it did not believe that the IGC should aim to fulfill the objectives of other existing instruments such as the Nagoya Protocol. It favored working based on paragraphs (a) and (d). Paragraph (c) could be the objective of another instrument. As to paragraph (b), the CEBS Group was not really clear how the instrument would fulfill that objective.

52. The Delegation of the EU, speaking on behalf of the EU and its Member States, believed that a common understanding of the Objectives and Principles was necessary. Without it,

progress would be very difficult. As stated by the Delegation of Switzerland, the IGC should not duplicate matters, such as those that had been dealt with under the Convention on Biological Diversity (“the CBD”) and the Nagoya Protocol. The IGC should focus its work on paragraphs (a) and (d). In paragraph (a), it supported the wording “misuse” as that was an indicator for a measures-based approach. In paragraph (d), it wished to focus on encouraging [tradition-based] creation and innovation.

53. The representative of the Tulalip Tribes commented on the suggestion made by the Delegation of the USA, which was the objective of assimilation. The tribes in the USA, like the Tulalip Tribes, held TK since time immemorial that existed prior to the existence of the country. The tribes of the USA had inherent and preexisting rights. The Constitution of the USA recognized tribes as sovereign entities that had a government-to-government relationship with the USA. There were some limitations in sovereignty, but fundamentally the Supreme Court had repeatedly asserted that the USA did not grant tribes their rights. Those rights existed prior to the establishment of the country and they could be only terminated either by the secession of rights by the tribes or by an act of Congress. In other legal systems, indigenous rights were viewed as imprescriptible and other nation States recognized that their indigenous peoples had inherent rights of self-determination. That was what the UNDRIP stated. There was a problem with the term “balance”, which was a governmental term. It was used in governance where a government granted rights, and among stakeholders of equal standing allocated the interests among different stakeholders. However, sovereigns did not allocate the rights of other citizens of other States. In order to do that, a treaty needed to be negotiated, as the IGC was doing. What the Delegation of the USA had proposed was that the TK held by the Tulalip Tribes would be assimilated because the objective was to not allow permanent or indefinite protection. If that was the objective of this instrument, indigenous representatives could no longer participate in the negotiations.

54. The Delegation of Nigeria, speaking on behalf of the African Group, reiterated that it wished to see the elaboration of a legal instrument for the effective protection of TK in the modern international IP framework. The current text was a good basis for continued discussion on the Policy Objectives. It emphasized the need for certainty in the elements on promoting and protecting TK as well as ensuring benefit-sharing.

55. The Delegation of Japan said that the Policy Objectives were very important and needed to be clear and concise. It supported the proposal made by the Delegation of the USA, in accordance with Article 7 of the TRIPS Agreement. It was appropriate to be placed as an objective. It also supported the proposal on the public domain.

56. The representative of FAIRA said that the title of the document had to do with the protection of TK. It was not about the protection of IP *per se*, but about the rights of indigenous peoples. The backdrop was the UNDRIP, especially Article 31. To ignore that would not be doing the work intended for that session.

57. The Chair proposed just retaining the word “beneficiaries” in the first sentence to avoid repetition, which would be dealt with in Article 2.

58. The representative of CISA said that indigenous peoples had their rights enshrined in the UNDRIP, which had taken a great deal of time to draft. The issue of the rights had to be looked at with the UNDRIP in mind. Indigenous people knew their TK and their TCEs because they were owners of their land and territory.

59. The Delegation of Egypt restated the need for a legally binding instrument. The text had to be improved, not undermined or weakened, especially if the IGC genuinely wished to fulfill its objectives, in conformity with its mandate. Paragraphs (b) and (c) hence had to be retained, after improving paragraph (c) by and replacing the word “promote” by the word “achieve” or

“fulfill”. That statement was fully in conformance with all international agreements that recognized the rights of indigenous peoples, who had full sovereignty over their TK and possession of their land.

60. The Chair suggested moving on with retaining the words “beneficiary” in the first line since no one had objected to his proposal.

61. The representative of Tupaj Amaru said that Member States needed to reflect on the basis of the objectives. The aim was to protect TK, which belonged, due to its very nature, to IPLCs. The IGC was dealing with an international instrument whose aim was to protect TK of the IPLCs from piracy, illicit appropriation and misappropriation. The term “misappropriation” did not exist in international instruments. The text needed to correspond to the spirit of the UNDRIP.

62. The Delegation of Chile wondered how paragraph (b) would be implemented. It wondered whether other delegations could share what they envisaged through that objective.

63. The Chair asked if any Member State wished to respond to the Delegation of Chile. There were none. The Chair closed the discussion on objectives and introduced the core issues of beneficiaries. The IGC had in past sessions considered the definition of “beneficiaries” as well as the choice of terms. However, there was no agreement on the extent to which the instrument should extend beyond IPLCs, so as to include “nations”. References were also made to a national authority acting as a custodian. Clearly, the identification of beneficiaries was closely related to the scope of the instrument as a whole and, as such, it would be important that Member States reached a common understanding of who the beneficiaries should be. He wondered if the attempt to define IPLCs in Article 2.1 was necessary. The second issue for consideration was Article 2.2, which attempted to provide a catchall article when the owner of TK could not be identified. It could be useful to provide some practical examples of the situations when it would arise, and how such TK would meet the definition of the subject matter or the criteria for eligibility referred to in Article 1. The Chair opened the floor for comments.

64. The Delegation of Ghana proposed a very simple description of beneficiaries: “For the purposes of this instrument, beneficiaries shall include indigenous and local communities, and agencies authorized by States to oversee the use or exploitation of traditional knowledge”.

65. The Delegation of Japan said that the beneficiaries had to be specified in relation to individual TK, as the distinctive link between TK and the cultural identity of beneficiaries was crucial. Therefore, including “nations” as beneficiaries was problematic and significantly diluted such links. It needed further consideration of whether it was appropriate or not to limit the scope of beneficiaries to IPLCs. The definition of “national authority as custodian” had to be dealt with under Article 5, since it should not be the direct beneficiary of the protection. Finally, the meaning of “local communities” had to be clearly defined.

66. The Delegation of the Republic of Korea said that the protection of TK was to award the benefits of using TK to local communities who had maintained and handed down TK from generation to generation. The inclusion of a national authority within the definition of beneficiaries was inappropriate for protecting TK. In addition, because the national authorities could have changed for a long time, the original state of TK might be difficult to trace from the perspective of the definition of TK and there might be several national authorities having ownership of TK. It was not appropriate for the national authority to be given a fiduciary role including PIC and ABS.

67. The Delegation of the USA said that the beneficiary of the IP system was society at large because the system promoted creativity and innovation. The beneficiary of the protection of an individual trademark, copyright or patent was the holder of that trademark, copyright or patent.

Similarly, the beneficiaries of protection of protected TK had to be those who used, held and maintained the protected TK. Where knowledge was not specifically attributable to a specific community, it would not be within the scope of Articles 1.3 and 1.4. Article 2.2 could be deleted as unnecessary. With respect to “nations”, it agreed with the comments made by the Delegations of Japan and the Republic of Korea. It wished to gain a better understanding as to why nations should be included within the scope of beneficiaries and looked forward to that discussion.

68. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported indigenous and local communities (“ILCs”) as beneficiaries. It requested bracketing the term “peoples” through the text for constitutional reasons within its Member States. It believed that the TK as described in the footnote did not fulfill the necessary criteria mentioned in Article 1. In relation to Article 2.2, Articles 2.2(b), 2.2(c) and 2.2(d) seemed to define TK which fell outside of the definition in Article 1. It would welcome examples for discussion. The Delegation believed that the IGC could explore Article 2.2(a) further, as there might be cases where ILCs wished to designate a national authority. However, it would not support a collective rights system, as it envisaged a measures-based approach. The Delegation wished to add “with the consent of the beneficiaries” in Article 2.2.

69. The Delegation of India had an example of TK which originated from identified communities and had been passed on from generation to generation and was currently widely spread. That was Ayurveda and other Indian traditional system of medicine. It was pertinent to include national authorities within the definition of beneficiaries, in instances where TK could not be directly attributable to a local community. The IGC had to recognize the important role of the national authorities as the trustee of TK where beneficiaries could not be identified, and where they were identified, States had to be accorded the fiduciary role in consultation with local communities. Therefore, it was important to explore the role of State.

70. The Delegation of Switzerland said that IPLCs should be the beneficiaries, because they were the creators, conservers and holders of TK. It did not support the inclusion of nations as beneficiaries. That would not be in accordance with the UNDRIP as well as with the relevant provisions of the CBD and the Nagoya Protocol. In particular, Article 5 of the Nagoya Protocol did not support the designation of nations or States as beneficiaries. Article 5.5 of the Nagoya Protocol obliged each Party to take administrative, policy or legislative measures, as appropriate, in order that the benefits arising from the utilization of TK associated with GRs were shared in a fair and equitable way with the ILCs holding such knowledge. While it recognized that the Nagoya Protocol only referred to TK associated with GRs and not all Member States were parties to the Nagoya Protocol, the Delegation saw no difference with regard to other forms of TK in that regard. On the other hand, it saw merit in considering designating, in the international legal instrument, one or more national authorities as having a supportive role in the protection of TK. The establishment and working of such national authorities should occur with the direct involvement and approval of the IPLCs concerned. Important functions of such authorities could be: (1) to simplify the identification of the rightful holders of TK; (2) to facilitate cooperation among various IPLCs that shared the same TK; and (3) to encourage the protection of TK to the benefit of all IPLCs. However, the issue of the competent authority was best dealt with under Article 5 rather than under Article 2.2.

71. The Delegation of Latvia, speaking on behalf of the CEBS Group, said that the beneficiaries should be ILCs as they were the TK holders, but not nations. As to Article 2.2, it aligned itself with the comments made by the Delegation of the EU, on behalf of the EU and its Member States.

72. The Delegation of Canada supported the statement made by the Delegation of Greece, on behalf of Group B. It supported defining ILCs as beneficiaries of any protection that the IGC

might agree on. However, it had concerns regarding the concept of national authorities as beneficiaries and welcomed discussion on the implications of including nations as beneficiaries.

73. The Delegation of Ghana wished to respond to the question on Article 2.2. It had proposed that the term “beneficiaries” include IPLCs and national competent bodies set up by States to oversee the use or exploitation of TK. The reference to national competent bodies would capture fully all the matters raised in Article 2.2. It pointed out that the reference to Article 5 might not respond to the concerns that other delegations had expressed. The main purpose of Article 5 was to provide for the creation of a competent authority. So it was not really inconsistent to have a clear statement of beneficiaries as well as a provision creating national competent authorities. It noted the role that national competent authorities could play. In some cases the local groups or indigenous groups might be well organized to exercise those rights themselves, but, in other areas, it might be necessary for the State to play a supportive role even though the State might not own those rights. So to the extent that a competent authority would be set up, such authority would be able to deal with who were interested in using TK. To the extent that there were benefits to be derived from such uses, that agency might also be the one responsible or at least involved in the collection and disbursements of those material benefits. It made sense to identify national competent authorities, not specifically limited to the concept of national competent authority, but rather with a clear role to play.

74. The Delegation of Algeria said that there was much TK in Algeria. TK had been transmitted from one generation to another. Nowadays it was disseminated throughout the national territory. So it was difficult to know who owned the TK and to put it in the hands of a specific agent or population. Moreover, the Algerian Constitution enshrined the fact that the Algerian people was one and indivisible. All Algerian people benefited from the same rights and duties. One could not admit granting any kind of privilege on any basis whatsoever. Thus, maintaining the concept of nations was necessary. It was flexible, however, and could possibly envisage replacing it by national bodies or competent bodies.

75. The Delegation of Nigeria, speaking on behalf of the African Group, said that the African dynamic was different. It favored a definition that would be as inclusive as possible to identify and recognize IPLCs and States as beneficiaries. Some African countries had IPLCs, and some did not and beneficiaries were just identified as a State. The Group had discussed the idea of competent authorities overseeing the administration of the rights of TK users. It would come back at a later stage with a specific proposal.

76. The Delegation of Thailand said that the beneficiaries should first be the IPLCs. However, “nations” should be included as beneficiaries, such as in the cases where some TK of certain IPLCs might have been practiced in more than one community and/or might have become popularly adopted for practice by many communities at the national level. It was necessary for the nation or a national competent authority to play a role, as appropriate, to help preserve and protect the TK of the communities concerned, of course, with the PIC of the concerned communities.

77. The representative of Tupaj Amaru read out his proposal: “For the purpose of this international instrument, the term traditional knowledge shall be understood as the cumulative and dynamic conglomeration of traditional knowledge made up of traditional and collective knowledge, which are constantly evolving, the innovations, experience and creative practices, traditional technologies, ecological knowledge which is closely related to language, social relationships, spirituality, natural cycles, the conservation and sustainable use of biodiversity, the profound connection between the indigenous people, the land and nature, and this knowledge which has been preserved within indigenous communities from time immemorial and which is passed from generation to generation. Traditional knowledge represents the output of collective creativity, the results of the talents and genius of human kind and their ability to understand society and the world, which essentially form an intrinsic part of the world heritage

and a positive proof of human history through time and space.” That definition was inspired from the CBD and the UNESCO instruments. He said that looking at those historical words would help better understand what the IGC was trying to do.

78. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

79. The Delegation of China said that TK existed in different forms. In some countries it was only held by IPLCs, but in others like China or India, there were other cases. There was cultural diversity and biodiversity, and there was also TK diversity. The instrument should be inclusive and, therefore, had to take into account the diversity of TK. Therefore, sometimes nations or States existed not only as trustees. They could also be the holders or the owners of TK. The CBD and the Nagoya Protocol mentioned TK associated with GRs held by IPLCs. However, under the framework of the IGC, the scope of TK had to be wider.

80. The Delegation of Namibia, reflecting on the contributions made so far, said it would be a wise idea to remind that the IGC was part of WIPO. There were very different national views on what TK was and how it was owned in a particular national context. It was realistic that national political considerations around identification of IPLCs or around the legal status in a particular nation State could not be resolved. If the IGC stuck to WIPO’s norm-setting mandate in IP, the suggestion that the definition and implementation would inevitably be done according to national legislation, would lead to exactly the same kind of outcome as in the Nagoya Protocol. The exact same issues had been discussed, albeit for a smaller set of TK, for ten years. In that case, the benefits had to be shared with the IPLCs who were the holders of TK, but subject to national legislation. The IGC had to acknowledge the fact that that was the best that one could do at WIPO to set a norm and leave the implementation of that internationally agreed norm to national circumstances. That was done with all other forms of IP. There was an agreement on how it should work and then there was a lot of national flexibility about how it was implemented. The IGC had to be more modest about what could be achieved, and go for a very simple formulation, i.e. “the beneficiaries are ILCs and all other institutions as defined in national law”.

81. The Delegation of Peru said that the beneficiaries in the case of Peru were indigenous people and that included the voluntary element of people, people who had not been contacted as well as the native and rural communities. That was a multilateral negotiation, and no doubt it was not just a matter of imposing national definitions. It was quite clear that for some Member States limiting the definition of beneficiaries to IPLCs was not sufficient. It proposed to look at Alternative 2.1, taking into account the cases where beneficiaries were not just limited to IPLCs. That alternative was the basis on which an agreement could be reached. A solution had to take into account IPLCs and States.

82. The Delegation of Egypt supported fully what the Delegations of Ghana and India had expressed concerning the inclusion in the definition of the State or a national authority entrusted with TK.

83. The representative of CEM-Aymara commended and thanked the USPTO for their support to indigenous representatives. He recalled the important role of the Voluntary Fund and urged the Member States to continue the efforts so that the Voluntary Fund would continue to be successful. The mandate of WIPO and the IGC focused on IP, but to ensure the rights of indigenous peoples and to ensure the control of their TK, the IGC’s work had to guarantee the protection or the dignity of those peoples. On Beneficiaries, as the text reflected and several delegations had mentioned, he was pleased with the direct reference to IPLCs. He was concerned that the term “indigenous peoples” continued to be in square brackets. The mandate of the IGC endeavored to protect TK and their creators. The creators were indigenous peoples as well as local or traditional communities. The term “peoples” represented the collective nature of indigenous peoples. In the same way, it ensured the fundamental right to self-determination.

The UNDRIP and the CBD had already adopted the use of the term “indigenous peoples” when referring to those groups. To maintain the brackets or to delete the term “peoples” would be moving backwards.

84. The Delegation of the Islamic Republic of Iran supported the statement delivered by the Delegation of India, on behalf of the Asia-Pacific Group. To fulfill the mandate and establish an international framework for the effective protection of TK, the IGC needed to learn a lesson from other norm-setting processes, such as the Nagoya Protocol. While it agreed on specific standards, it was important to preserve some policy space for the countries in their national level to implement those principles and standards, consistent with their national laws. For example, while accepting a definition for beneficiaries, it could recognize the role of each State in identifying the beneficiaries under its jurisdiction, provided that the rights met the eligibility criteria of the definition. With that methodology, endless discussion could be avoided on any list to be recognized as beneficiaries. The main beneficiaries of TK protection ought to be the IPLCs, but not exclusively. States should have a role as custodians of the rights.

85. The Chair opened the discussion on “Subject Matter”. Document WIPO/GRTKF/IC/31/4 detailed the issue in paragraph 1 of Article 1. Paragraph 2 attempted to define the criteria for eligibility. However, he noted that most of the key elements detailed in paragraph 1 were also detailed in paragraph 2. Additionally, Article 3 “Scope of Protection” also detailed eligibility criteria, though different to Article 1 paragraph 2. The IGC could consider the appropriate place to deal with the criteria for eligibility, and whether to consolidate all the eligibility criteria in one place. There was also the question as to whether criteria for eligibility were necessary at all in Article 1, since, in the view of some delegations, in elaborating rights it could be left to scope of protection and exceptions and limitations to define what was ultimately to be protected.

86. The representative of Tupaj Amaru proposed the following: “(a) Traditional knowledge was the cultural, collective cultural heritage, ancestral, spiritual heritage, intellectual and immaterial heritage, and considered being secret, sacred or collectively held; (b) Traditional knowledge intrinsically linked to the use and handling of natural resources in the context of traditional life and considered as vital for the presentation and use and sustainable use of biological diversity, and to guarantee food security; (c) traditional knowledge has a relation with the lands, territories, water resources, flora and fauna and other traditionally owned resources, occupied and in use by the indigenous peoples and local communities; (d) TK is part of a collective cultural heritage, identity, memory, cultural diversity, social and commune diversity enshrined in traditional lifestyles of the indigenous peoples are part of the juridical legal systems; and (e) traditional knowledge is transmitted from generation to generation in different forms and is inalienable, indivisible and imprescriptible. Indigenous peoples and local communities as owners of TK would also enjoy the legal protection against other illicit acts of unfair competition and national and international piracy. The equitable distribution of benefits deriving from said knowledge would be regulated by the current international instrument and in conformity with practices and norms and with the prior informed consent of indigenous peoples and local communities.”

87. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

88. The representative of INBRAPI said that Article 1 was consistent with the IGC’s mandate. The instrument had to provide legal certainty on the issues discussed. The term “nations” should be included in Article 5 rather than in Articles 1 and 2. TK was created and maintained by IPLCs. She wondered which TK was created by States. IP protected creators while States were not creators and should not be beneficiaries. The parties could appoint a national authority under national laws for the purposes of administration of rights.

89. The representative of HEP stated there were a lot of brackets in Article 1 and it was difficult to know what to expect. Regarding “nations”, she said indigenous peoples were not stateless, but belonged to countries. She said she was from Cameroon, where indigenous peoples were represented by the State and it was the State that decided what those peoples could do. The brackets around “nations” had to be removed. Traditional medicine was essential to the people in Africa. The 50-year time limit was too constraining. It could not be limited to 50 years.

90. The Delegation of India said that the way TK was defined would lay down the foundation of the IGC’s work. The definition of TK had to be inclusive and capture its unique characteristics. That included TK that subsisted in codified form and was widely/publicly available. There had to be a comprehensive definition that did not require separate eligibility criteria. It wanted to avoid using terms like “directly” or “distinctly” before “linked” or “associated” because of the undue burden of proof on the TK holders or owners. The Delegation proposed a new cleaner formulation as follows: “The subject matter of protection is traditional knowledge: (a) that is created, and maintained in a collective context, by indigenous and local communities, whether it is widely spread or not; (b) that is associated/linked with the cultural or social identity and cultural heritage of indigenous and local communities; (c) that is transmitted from generation to generation, whether consecutively or not; (d) that is know-how, skills, innovations, practices, processes, teachings and learning, which may subsist in codified, oral or other forms; or (e) that may be associated with biodiversity, traditional lifestyles, natural resources”.

91. The Delegation of the EU, speaking on behalf of the EU and its Member States, believed that the subject matter needed to have a strong link with the ILCs. It supported “maintained” in paragraph (a) as that expressed a continued link with the ILCs. Further, in relation to the options in paragraph (b), it supported that the TK should be directly linked with the cultural and social identity, as that language established a strong link between the ILCs and TK. In paragraph (c), it wished to ensure that TK which had not been practiced since historical times and had entered into the public domain was not reclaimed as being the subject matter of this instrument. Paragraphs (a) to (e), which essentially contained the criteria that needed to be fulfilled, had to be cumulative.

92. The Delegation of the USA remained unclear as to what “protection” meant in Article 1. It asked whether it implied economic rights or only moral rights. An important principle was that all societies had TK, and all TK could not be protected the same way. The term “protection” had to be bracketed until it had a better understanding of what it meant. It could not accept the definition of the criteria for eligibility that allowed information that was widely known outside of the community to be protected as TK of the community. Article 1 had to be part of the definition of what TK was entitled to be protected, so that it would be clear what was eligible for protection. As noted in the mandate, the IGC had to come to a common understanding on what TK subject matter was entitled to protection at an international level. It looked forward to the discussion of examples of TK that should be entitled to protection and what was meant by protection. It was helpful to discuss examples of subject matter that would not be protected. Without having some examples of TK that was eligible for protection, it would be difficult to come to a common understanding. The Delegation supported to include criteria for eligibility in paragraph 2, notwithstanding that Article 3 dealt with that specific issue.

93. The Delegation of the Plurinational State of Bolivia said that the issues of the collective context and of transmissibility as well as the fact that TK was dynamic were very important elements and characteristics. However, the temporality element should not be considered in the eligibility criteria. The time factor contained in paragraph 2 would limit those elements in the final analysis. That would run the risk of binding the protection of TK within the scope of copyright and related rights. Also, the word “nations” had to be discussed. TK belonged to indigenous peoples. In that context, it was the State that granted the protection for those peoples.



94. The Delegation of the Russian Federation drew attention to terminology. In Article 1 under paragraph (a), the expression used was “widely spread”. However, that term did not appear in the section “Use of Terms”. It was not clear how that term pertained to the concept in that section “Public domain” and “Publicly available”. Furthermore, the concept “wide diffusion” was used Article 4.6 and the term “widely known” was used in Articles 3.2 and 3.3. All of those terms needed to be brought in line with one another.

95. The Delegation of Japan emphasized that enhanced clarity was essential on subject matter to avoid possible disputes on whether or not protection should be provided to certain TK at the international level. Criteria to determine which TK was traditional needed to be clarified further. For instance, concise and objective criteria which might be time elements or backgrounds of the development of the knowledge should be set forth so that the word “traditional” could be defined clearly. If the subject matter of protection were defined to include any skills or know-how passed down by a nation, the scope of TK would expand unlimitedly and include virtually any type of knowledge. That definition was inappropriate. Wordings such as “from generation to generation,” “dynamic and evolving,” “intergenerational” and “associated with cultural heritage of the beneficiaries” were not appropriate as a subject matter of the instrument, because their meanings were vague. Moreover, there could be possible conflicts over the same or almost the same TK between different TK holders. In other words, the same or almost the same TK might be generated in different regions independently from each other. Therefore, enhancing clarity was essential in order to avoid any possible disputes.

96. The representative of FAIRA said that Article 1 was very important in establishing TK, its nature and the grounds for protection, but it did not acknowledge properly the relationship between TK and its holders. He proposed Article 1 as follows: “The subject matter of [protection]/[this instrument] is [traditional] knowledge that is maintained, controlled, protected and developed: [(a) that is created and [maintained]] in a collective context, by indigenous [peoples] and local communities [or nations] [whether it is widely spread or not]; ...”. Article 1 was important for setting the context for the instrument. It should therefore respect the relationship between the “knowledge” and the “holders” of the knowledge. The proposed text established a more clear understanding that IP might exist over the knowledge and that such property rights were equal to all other IP rights. The international regime would deal with protections but it was IPLCs who provided protection in domestic situations, not the State.

97. The Delegation of Namibia supported the proposal made by the representative of FAIRA.

98. The Delegation of Canada said that the article as drafted was mixing a number of different things, such as the definition of TK, the subject matter of the instrument and the scope of protection. It was important to come up with clear criteria that would be certain and discernible for entities other than the IPLCs. The IGC had to come up with one clear, well-drafted statement about what was the subject matter of the instrument. For example, in paragraph (a), the phrase “whether it is widely spread or not” rather belonged in a discussion under Article 3. The way paragraphs (d) and (e) were drafted effectively covered all forms of TK, so they did not really contribute to clarifying the subject matter. Paragraph (d), without prejudice to whether TK was dynamic and evolving, was not really contributing to clarifying the subject matter. It could be moved to the definition. It was difficult to decide whether TK was dynamic or evolving and how it related to assessing whether TK was part of the subject matter or not.

99. The Delegation of the Islamic Republic of Iran preferred a broad and inclusive definition of TK, while recognizing that such a definition also had to provide a certain level of clarity. In order to achieve that, a non-exhaustive list of examples could be included. The protection granted by the instrument had to extend to publicly available or widely diffused TK. The eligibility criteria had to be removed from Article 1.

100. The Delegation of Latvia, speaking on behalf of the CEBS Group, stated that in order to ensure legal certainty, a clear link between the subject matter and the ILCs had to be established in Article 1. In paragraph (a), “maintain” should be kept. In paragraph (b), “directly linked” was very important to ensure legal certainty. All five criteria had to be cumulative.

101. The Delegation of Ghana referred to the intervention made by the Delegation of the USA to the effect that the term “protection” had to be bracketed or deleted pending provision of further examples as to what constituted protection. It was unclear why there should be such a concern because the term “protection” was a general term, commonly found in many international instruments. The use of that term did not denote the scope of protection, which was dealt with in Article 1. The Delegation of the USA was a joint author of documents WIPO/GRTKF/IC/31/5 and WIPO/GRTKF/IC/31/6. Both documents used the term “protection”. So it was unclear in what sense the term was understood to mean when the Delegation of the USA had itself incorporated that term in its documents. The Delegation asked whether the Delegation of the USA would be open to amend its previous intervention.

102. The Delegation of the USA gave a preliminary response. Its concern with respect to the use of “protection” stemmed from the fact that the work was a *sui generis* international legal instrument and that was different from the proposals submitted in the past on that issue.

103. The Delegation of Switzerland said that Article 1 was closely linked to the scope of protection and to the definition of TK. Therefore, reaching a common understanding on the eligibility criteria depended on further progress on the issue of the scope of protection. There had to be a clear link between the TK that would be protected in the instrument and the community or communities holding such TK. It supported the statement made by the Delegation of the EU, on behalf of the EU and its Member States, to use the term “maintained” in paragraph (a) and “directly linked” in paragraph (b) to express that relationship.

104. The Delegation of Namibia offered a direct response to the statement made by the Delegation of Switzerland. Following that logic, any community that had been weakened by the forces of globalization and that was starting to lose control of its culture would have taken the first step down a slippery slope where everything else would be stripped from it. Clearly that could not have been the intention of the people who had started the IGC. It urged to think very carefully about that. It referred to the point raised by the Delegation of the USA and responded to by Ghana, about bracketing “protection”. It was not possible to protect all TK. There might be some things that were so far gone into common usage that there would be very little point in protecting them. But there was a principle of natural justice saying that one should not take other people’s things without their permission and use them without sharing some of the benefits with them if they gave you permission. The IGC could use that generally agreed principle of justice as a starting point in order to make progress. The Delegation of Japan had referred to the need to avoid any possible disputes over ownership of the same or almost the same TK. If no IP system had been set up to avoid any possible disputes, there would never have been IP courts. Companies would not be suing about patent infringement. The IP system was there exactly to set up certain rights, which could then be taken to court and establish case laws. That could in many cases actually create soft rights that were not necessarily challenged in law because it was simply not cost effective to do so. It suggested looking at language that would follow the divided nature of TK ownership in various jurisdictions and create policy space for countries to define exactly what kind of TK was protected within their jurisdiction. In the same way, countries had certain flexibilities within the patent system to decide what was protected or not. That would take the IGC down a road that could lead to an international agreement.

105. The Delegation of the Republic of Korea stated that paragraph (a), whether the TK was widely spread or not, could be interpreted to include public domain elements within TK protection. Public domain should not be included, because it contained elements that had been

used by and available to the general public for a long time. If exclusive legal protection was to be given to TK that had been in the public domain for a long time, it would increase the uncertainty of the legal status on TK and could have a negative impact on the IP system. Therefore, it proposed to delete “widely spread or not”.

106. The Delegation of Nigeria, speaking on behalf of the African Group, said that the subject matter of protection was TK that was created in a collective context by indigenous peoples, local communities or States, whether it was widely spread, diffused or not. TK was directly linked with the cultural and social identity and cultural heritage of indigenous peoples, local communities or States. It wished to maintain the intergenerational aspect in the definition. TK could subsist in codified, oral or other forms and it could be dynamic and evolving. Criteria for eligibility should not be part of Article 1.

107. The Delegation of Egypt said that paragraph (d) was about defining the subject matter of protection. The text had to use specific terms. Paragraph (e) with its current wording was ambiguous. The IGC had to define how those traditional forms of knowledge were identified. It asked what was dynamic and evolving and who decided that. All those questions were ambiguous. Also, the condition of duration had to be deleted. It was not logical, particularly since there was an intergenerational element of TK that showed the durability of TK. This issue of duration was redundant and should be removed.

108. The Delegation of Indonesia wished to address a breach of the two polarities: exclusive rights and the public domain. It proposed the term of “inclusive right” as a midterm between exclusive right and public domain. That right could be held not only by custodians but also by the bearers, for example IPLCs who were not having special authority as custodians or leaders of the community. It could also be held based on traditional protocols by a wider society. For example, all Indonesian people could be supportive of Balinese culture or Balinese traditional medicine.

109. The representative of Tupaj Amaru referred to the statement made by the Delegation of the USA on economic and moral rights and its objection to the word “protection”. He wanted to understand what economic and moral rights meant. The IGC was discussing an international instrument on the protection of TK, and not a private right or right to succession. He was totally opposed to the idea of including “nations” under beneficiaries. Nations were not mentioned in international laws as holders of rights.

110. [Note from the Secretariat: The following took place on the next day, September 20, 2016.] The Chair said the facilitators had reflected on the discussion on the core issues that had taken place the day before and would be presenting some initial proposals and thoughts based on those discussions. He emphasized that the material presented was simply work-in-progress, and it had no status and was not a revision. It was just some ideas and thoughts that the facilitators thought were worthy of presenting and getting initial comments on before working on the first revision. He invited the facilitators to present their work.

111. Ms. Bagley, speaking on behalf of the facilitators, said that the facilitators had developed approaches to “Policy Objectives”, “Subject Matter” and “Beneficiaries”. As a reminder, it was not a revision. It was meant to elicit further comments from Member States on the core issues prior to production of a Rev 1. The facilitators, with the help of the Vice-Chair, had reviewed the draft articles and interventions made by Member States and had developed optional approaches that crystallized common views. The objective was to aid in the development of a cleaner, simpler, more streamlined text that captured and reflected common positions on core issues. On Policy Objectives, the facilitators had developed two options. Option 1 provided: “This instrument should aim to: 1. Provide beneficiaries, as defined in Article 2, with the means to: (a) prevent the misappropriation, misuse, and unauthorized use of their traditional knowledge; (b) control ways in which their traditional knowledge is used beyond the traditional

and customary context; (c) equitably share in the benefits arising from the use of their traditional knowledge with prior informed consent or approval and involvement, as appropriate; and (d) protect their tradition-based creations and innovations. [2. Prevent the grant of erroneous intellectual property/[patent rights] over [traditional knowledge and [[traditional knowledge] associated [with] genetic resources].]]” This option streamlined the text of the chapeau, recognizing that beneficiaries would be addressed in Article 2. It retained the four related objectives and there were brackets around preventing the grant of erroneous patent or IP rights, as it was addressed in the GRs text. The facilitators also reworded paragraph (c) to fit the format of paragraphs (a), (b) and (d). They had noted the proposal of the Delegation of Egypt on replacing “promote the equitable sharing of benefits” with “achieve the equitable sharing of benefits”, but when focusing on the chapeau, they noted that it was providing beneficiaries with means to accomplish a variety of goals. So that formulation seemed problematic, as beneficiaries would not be seeking means to promote sharing of benefits but rather means to share the benefits. Option 2 was quite succinct, and it stated: “This instrument should aim to prevent the misuse of traditional knowledge and encourage [tradition-based] creation and innovation.” That option addressed a preference of the Delegation of the EU, on behalf of the EU and its Member States, and the Delegation of Latvia, on behalf of the CEBS Group, to focus on paragraphs (a) and (d) of the original text and delete paragraphs (b) and (c). The facilitators also reflected the focus on misuse rather than on misappropriation, as proposed by the Delegation of the EU, on behalf of the EU and its Member States. The facilitators had retained paragraphs (b) and (c) of the original text in Option 1 because there were provisions in Article 3 that were designed to give effect to those objectives by, for example, allowing beneficiaries to say no to certain uses of certain kinds of TK, such as sacred TK, and also provide benefit-sharing provisions for different kinds of TK. The facilitators had included a note with additional objectives proposed by the Delegation of the USA. It was not clear where those objectives would fit, as the language was not consistent with the chapeau of the original text of the Policy Objectives and sounded more like language of the preamble. The facilitators requested further clarification regarding the insertion of those provisions. The note stated: “Note: The U.S. also proposed the following additions: The protection of protected traditional knowledge should contribute towards the promotion of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of traditional knowledge, in a manner conducive to social and economic welfare and to a balance of rights and obligations. The objective of protecting traditional knowledge should also be to the benefit of mankind, but encouraging a sharing of information, i.e., to promote the public domain. Yet also preserving to the holder of traditional knowledge certain limited in scope duration rights. Recognize the value of a vibrant public domain, the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.” Regarding “Use of Terms”, the facilitators had only reproduced the provision discussed in plenary which was a revised definition of TK. The revised definition related to Option 1 of Article 1. On Article 1, they had deleted the bracketed term “protection” from the title to focus the article on subject matter of the instrument. They had also drafted a streamlined Option 1 based on the intervention made by the Delegation of Canada that was quite similar to one of the options for subject matter in the GR text, which had received significant support. Option 1 provided a concise subject matter and moved the definition of TK from the original text to “Use of Terms”. Taking into account the suggestion made by the Delegation of India, the facilitators had simplified the text of Article 1 and included the definition of TK in “Use of Terms” section. Option 1 read: “This instrument applies to traditional knowledge.” Options 2 and 3 were very similar in wording. Both eliminated the word “traditional” and focused on knowledge. Both options included bracketed “directly” recognizing the nature of the linkage with knowledge and identifying features of TK yet to be agreed upon, noting contrasting views of the African Group and the Delegation of Switzerland, among others. The options included the five prior requirements for TK of the original text but had some slightly different wording regarding the role of indigenous peoples in stewarding and creating TK. Option 2 stated: “The subject matter of this instrument is knowledge that is created and maintained in a collective context, that is [directly] linked with the social identity and/or cultural heritage of indigenous people[s] and local

communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving.” Option 3 was similar but slightly different: “The subject matter of this instrument is knowledge that is maintained, controlled, protected and developed by indigenous people[s] and local communities and that is [directly] linked with the social identity and/or cultural heritage of indigenous people[s] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving.” Those three options were intended to be operative without a separate paragraph on criteria for eligibility. They had reproduced the original text minus the criteria for eligibility, which appeared redundant to the textual language. For clarification, Option 1 was very succinct, with the remainder of the information that had been under subject matter provided in the “Use of Terms” section, expanding the definition of TK there. Regarding beneficiaries, the facilitators had identified two options, based on several Member States’ interventions. Option 1: “2.1 Beneficiaries of this instrument are indigenous people[s] and local communities, as defined in national law, and agencies authorized or competent to oversee the use or exploitation of traditional knowledge in accordance with national law. 2.2 The identity of any competent agency under Paragraph 1 shall be communicated to the International Bureau of the World Intellectual Property Organization.” Option 1 was based on the intervention made by the Delegation of Ghana and identified beneficiaries as indigenous peoples with its “s” bracketed as requested by the Delegation of the EU, on behalf of the EU and its Member States, and local communities as defined by national law, plus agencies authorized or competent to oversee the use or exploitation of TK in accordance with national law. Option 2 stated: “2.1 Beneficiaries of this instrument are indigenous people[s] and local communities, as defined in national law. Member states may also designate competent bodies to act as custodians on behalf of beneficiaries in accordance with national law. 2.2 The identity of any competent body established under Paragraph 1 shall be communicated to the International Bureau of the World Intellectual Property Organization.” Option 2 was based on a formulation provided by the representative of FAIRA and supported by the Delegation of Namibia, allowed a Member State to designate a competent body to act as custodian in accordance with national law. It would allow a country whose constitution did not recognize separate indigenous peoples to designate a body to act as custodian to whom the instrument identified as beneficiaries without violating national law. Original Article 2.2 had been deleted from both of those options as unnecessary, as both had provision for a competent body to act on behalf of beneficiaries, which would include beneficiaries that could not be identified. Consequently, both options had a paragraph 2.2 that was a modification of former Article 2.3, which required a Member State to communicate to WIPO the identity of the competent body or agency. Those formulations sought to capture concerns mentioned by a number of Member States. It was a difficult area and those options would be further discussed towards a Rev 1.

112. The Chair opened the floor for initial feedback.

113. [Note from the Secretariat: all speakers thanked the facilitators for their work]. The Delegation of Thailand stated that the text was very complex and hopefully would narrow the gaps.

114. The Delegation of the USA referred to its proposal on replicating Article 7 of the TRIPS Agreement and another text on public domain in the objectives. It preferred to keep that text in the objectives at this stage. There had not been a discussion on the preamble yet. With respect to Option 1, regarding misappropriation and misuse, it had some thoughts on misappropriation that would be more appropriate under “Use of Terms”. It highlighted that there could be further thinking with respect to Option 1(a) and whether another term would capture all of what had been said under that section.

115. The representative of Tupaj Amaru said that a delegation had proposed to include “nations” as beneficiaries which was unacceptable because there was no international

instrument that mentioned the rights of nations. Deleting “protected” meant undermining the legal and social scope of the instrument and undermining what was protected by the CBD and other instruments. The IGC had to follow the spirit and the line provided by other instruments and could not just move away from them. The word “traditional” could not be deleted. Indigenous peoples were the rights holders of TK. The IGC could not ignore a historical reality.

116. The Delegation of Egypt said that its request to replace the term “promote” by “achieve” in paragraph (c) had not been reflected.

117. The Delegation of Canada welcomed the attempts to simplify the text, but it needed to be clarified. On objectives, the way that paragraph (d) had been bracketed in the original text made it look like two provisions in one. One was about protecting innovation itself but one Member State had added “tradition-based” which gave another flavor to the provision and the IGC had to reflect on the meaning of that term. The facilitators’ text of Article 1 was a good step forward. There were two options surfacing: (1) a well-drafted definition of TK could be referred to in the article on “Subject Matter”, or (2) a stand-alone article with the definition of TK that would be covered by the instrument. It welcomed the fact that it now referred to knowledge rather than TK. Many terms had to be clarified, such as “dynamic and evolving”. It wondered what the term added to the definition, what its function was and how to assess whether something was dynamic and evolving for the purposes of an instrument. On Article 2, it had concerns about both options insofar as they contemplated agencies or competent bodies. It wished to have further discussion of the implications to relieve those concerns.

118. The Delegation of India found the language of Option 1 of the objectives more acceptable and would come back after having had a closer look. On Article 1, it was important to retain TK in all options. TK was the subject matter of the instrument. There was no harm in keeping “traditional” before “knowledge” because that was what was being debated in the treaty. It needed to understand why the word “protected” had been added in Option 3. It had certain reservations on the use of that term and it reserved its right to come back to it.

119. The Delegation of Egypt agreed with the Delegation of India to keep the word “traditional” before “knowledge” because TK was a legal term and was indivisible. Since the subject of the instrument as a whole was TK, the term “traditional knowledge” had to remain intact in the text.

120. The Delegation of the Islamic Republic of Iran stated that the proposal generally could be a basis to narrow the gaps. It agreed with the Delegation of India concerning the word “traditional” before “knowledge”.

121. The Delegation of China believed that the text provided by the facilitators provided a good basis for discussion. Regarding objectives, it was concerned that the word “nations” had been deleted.

122. The Delegation of Nigeria believed that the facilitators’ text clarified a number of issues and hopefully moved closer to a discreet set of options. It supported Option 1 for the subject matter, seeing it applied only to TK and perhaps using “Use of Terms” as the place for a definitional approach. It left flexibility for the countries at the domestic level to tweak the definition and either expand or further clarify so as to be consistent with national laws. It remained flexible on Option 2 because that also gave sufficient flexibility and clarity. It was less comfortable with the use of the word “control” in Option 3 because some of the reasons for the discussion in the IGC were the loss of control. It was concerned that that term might suggest that illegitimate or unauthorized leaks of TK were somehow completely outside of the scope of what could be the subject matter of the instrument. In general, it was quite pleased with the combination of the “Use of Terms” with Option 1 or with Option 2. With regard to beneficiaries, it cautioned against too much specificity, particularly in defining competent national authorities. That was a statement of minimum principles and it was important for national governments to

have the room to both define and apply terms, as was the case in so many other IP treaties. It was comfortable with an approach that sought to define terms that were essential to the architecture of the potential instrument, but it was less comfortable with going into nitpicky definitions that might otherwise limit the policy space at the national level. In particular, the Delegation was pleased to see the beneficiaries as IPLCs under Option 1. It was still thinking about the prospect of having the competent authority or agency be responsible, in consultation with IPLCs, for identifying the beneficiaries. It was an approach that conceived of some authority designated by the State in consultation with the beneficiaries such as IPLCs. It wanted to make sure that either Option 1 or 2 did not foreclose the possibility of domestic consultations to identify appropriate beneficiaries.

123. The Delegation of the EU, speaking on behalf of the EU and its Member States, reserved its right to comment on the text at a later stage.

124. The Chair introduced the issues on scope of protection. IGC 27 had introduced for discussion a tiered approach, whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control by the beneficiaries and its degree of diffusion. The tiered approach proposed differentiated protection along a spectrum from TK that was available to the general public to TK that was secret/not known outside of the community and controlled by the beneficiaries. That approach suggested that exclusive economic rights could be appropriate for some forms of TK (for instance, secret TK, and TK uniquely attributable to the specific IPLC), whereas a moral rights-based model could, for example, be appropriate for TK which was disclosed, already publicly available but still attributable to a specific IPLC. He opened the floor for comments.

125. The Delegation of India supported the tiered approach of protection of TK, which would provide an opportunity to strike an optimal balance between the rights and interests of the owners, the users of TK and the wider public interest. Establishing the level of rights based on the characteristics of TK could be a way forward towards narrowing the existing gaps with the ultimate objective of reaching an agreement on an international legal instrument, which would ensure the balanced and effective protection of TK. It wished to follow the principle of exclusion in the tiered approach, i.e. the knowledge that was not covered under Articles 3.1 and 3.2 should get protection under Article 3.3. That would avoid use of terms “publicly available,” “widely known” or “are in the public domain” in Article 3.3 and would also avoid a debate on finalizing the definition of those terms. The Delegation further recommended providing maximum possible protection for widely held TK, as such knowledge, specifically traditional medicinal knowledge, was of immense commercial value. There had to be some form of economic rights flowing, such as a user fee, as decided by contracting parties. In case of research and development, widely established concept of PIC and MAT should be included while providing protection to the widely held TK in Article 3.3. It proposed Article 3.3 as follows: “Where the traditional knowledge is not covered under Paragraphs 3.1 or 3.2, Contracting Parties shall ensure that users of said traditional knowledge: (a) attribute said traditional knowledge to the beneficiaries; (b) use the traditional knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge; and (c) where applicable, deposit any user fee into the fund constituted by such Contracting Party except in cases where the use is for research and development leading to new and useful products and processes and in such cases provide the beneficiaries with a fair and equitable share of benefits arising from the use of said traditional knowledge based on prior informed consent and on mutually agreed terms.”

126. The Delegation of the EU, speaking on behalf of the EU and its Member States, suggested including another option in the text, which would replace Articles 3.1, 3.2 and 3.3. That option came from Option 2 of Article 3.1 of the TCE text. It read: “[[Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the

beneficiaries concerning their [protected] traditional knowledge, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.]” That option could give Member States the flexibility needed in addressing those issues. In relation to the current Articles 3.1, 3.2 and 3.3, the dividing lines between the different levels of TK diffusion were unclear and open to interpretation. It would be difficult to ensure legal certainty. The Delegation was therefore not convinced by the tiered approach as it stood. The most logical line was between TK that was confined solely to the ILCs, namely TK that was secret, and TK that was not. In relation to TK that was secret, the IGC had to encourage the prevention of its unauthorized disclosure.

127. The Delegation of Switzerland said that the draft text of the international legal instrument on TK contained two approaches, namely a measures-based and a rights-based approach. It favored the measures-based approach, with the understanding that those measures could be of an administrative, policy or legal nature, which therefore included rights. Further, the IGC was not working in an empty space. Other relevant international instruments existed and had to be taken into account, such as the UNDRIP, the Nagoya Protocol, etc. Moreover, there were also draft guidelines of the CBD for the development of mechanisms, legislation or other appropriate initiatives to ensure PIC of and benefit-sharing with IPLCs, as well as for reporting and preventing unlawful appropriation of TK. Those guidelines might be adopted during the next COP of the CBD in December in Mexico, and might be relevant to achieve a better protection of TK. The tiered approach was an interesting approach, which could be further explored by the IGC. In particular, it would be important to further clarify the following issues: (1) How many levels of TK would be useful to define at the international level? Could the IGC define international criteria that were sufficiently clear to distinguish between the different levels? (2) More specifically, with regard to “TK that is secret and not known outside of the community”, it remained unclear what would happen, if such TK had been protected by exclusive economic rights by one community, but the same TK would also be secretly held by another community? (3) With regard to “TK which is publicly available but still closely linked and held by a community”, it needed to further clarify what was meant by “closely linked and held by a community”. (4) An additional important question in this regard was how such TK had been made publicly available? Had it been made “freely” available to the public? Did this mean with the “free and prior informed consent” or “approval and involvement” of IPLs? Or was it publicly available because somebody had had published or diffused the knowledge outside the community without the consent of this community? (5) With regard to “TK, which was widely known and in the public domain”, the IGC should clarify what was meant by “widely known”? Moreover, if the said TK could not be attributed to a specific community or communities, the question arise what meaningful measures could still be applied? In any case, also widely known TK should still be used in a respectful manner.

128. The representative of PIMA stated that IPLCs were the rightful beneficiaries of TK as opposed to nations. TK had unique characteristics and Article 1(a) to (e) reflected some of those. Some of the growing concerns regarding the Policy Objectives were about misappropriation of TK, erroneous grant of patent to inventions that were associated with or were TK-based, and the inadequate protection had accorded to TK under the western IP system. Trademarks and copyright had not provided adequate protection to TCEs, including traditional signs and artworks. The patent system did not provide adequate protection to TK. Under the patent system, inventions drawn from TK had been registered as patents even though the TK pertaining to the alleged invention constituted as relevant prior art. He valued the work of the IGC and of the Secretariat. He requested to have an international legal instrument. Because of the unique characteristics of TK, Member States should take an open-minded approach. It might be impossible to limit the duration of protection on TK as in other forms of IP. Others could freely use material in the public domain; however, it might not work for TK. Some of the rationale behind the IP system was to protect the interests of the owners/beneficiaries and to promote innovations, i.e. protected IP encouraged IP owners to innovate further. But with TK one had to take into account the interests of the TK owners and the human rights



perspective of indigenous people, including the right to control, protect and develop their TK and the right to self-determination under the relevant legal instruments. With regard to Article 3, economic rights were directly attached to proprietary rights. Economic rights were intended to assist TK holders to economically exploit their TK, i.e., to reap the commercial benefits. This might include exclusive rights to perform certain acts, i.e., the right to enter into an authorized use agreement in exchange of fees, compensation royalties or other payment. Moral rights in TK should arise automatically as in other forms of IP. This included the right of attribution and the right of integrity of TK holders. Articles 3.1(a) and (b) might be the way forward as it reflected the exclusive rights of TK owners. It also provided for the recognition of moral rights and economic rights through equitable compensation and control.

129. The representative of Tulalip Tribes said that the Indigenous Caucus had not settled on a unified position on the tiered approach. The tiered approach might provide a way forward, but not in the current form. The protection of TK focused on strong rights only in regard to secret/sacred knowledge, but this distinction did not capture the variety of ways in which IPLCs thought about their TK. It was common in indigenous societies that when knowledge was shared, it was not shared in the way that occurred in modern secular societies. There was often what had been referred to as “stewardship obligations” that went with the knowledge. Those obligations arose from customary laws, indigenous concepts of the teachings of the ancestors, the wishes of the creator, and so on. Those obligations were passed on to those who receive the knowledge and who were expected to use the knowledge in the right way. Knowledge exchanges had often not been made using formal contracts with clear terms understood by both parties. It was unclear whether such informal knowledge exchanges could be taken as evidence of free, prior and informed consent (“FPIC”). The Indigenous Panel discussion had suggested a way to deal with this was to take an approach based on intent – what was the intention, relevant customary law, evidence of FPIC for particular consequences of sharing, and so on. The tiered approach should not be made on the basis of “widely available” or “public domain,” but should refer to the rights, aspirations and expectations, and customary laws of the owners and holders themselves, which could be flexibly adjusted to the national context and the type of knowledge. One-size-fits-all classifications would not work.

130. The Delegation of Japan preferred the measures-based approach to the rights-based approach since the protection of TK could be given in various ways to satisfy each country’s needs. The flexibility to choose between the two approaches should be given to Member States. As to the tiered approach, it was concerned that third parties would suffer an unreasonable loss if the classification of TK was unclear and unpredictable. Thus, clear and objective criteria for each tier of TK had to be provided, taking into account the existing IP system. As for the moral rights-based model, the transparency pertaining to attribution of rights should be ensured. On the premise of registering TK as a requirement of the right, some sort of opposition measure would be necessary to resolve disputes over attribution of rights. Regarding Article 3.1(a), it would be inappropriate to give a TK holder an exclusive right, because the subject matter of protection was still unclear. Additionally, it did not see a need to adopt the disclosure mechanism, which would not be an effective way to address issues concerning TK.

131. The Delegation of Latvia, speaking on behalf of the CEBS Group, preferred the measures-based approach. As to the tiered approach, looking at the three proposed categories, there would need to be clear borders between the first level of protection and the other two.

132. The Delegation of the Islamic Republic of Iran emphasized the need to safeguard the economic and moral interests of the beneficiaries. The IGC had to determine a standard on levels of protection that accommodated the rights guaranteed for the beneficiaries. The safeguards put in place should take into account the nature of the rights according to the level of diffusion of the TK. The categories of rights listed in Article 3.1 were exclusive rights. The

Delegation was in favor of providing maximum protection to closely held TK. It supported the deletion of “protected” TK.

133. The Delegation of Nigeria, speaking on behalf of the African Group, supported the tiered approach for distinguishing the different layers of rights. It viewed rights as inherent property rights. On Article 3.1, it wished to propose as below: “Contracting Parties shall (a) ensure beneficiaries have the exclusive, collective rights to provide legal, policy and administrative measures as appropriate and in accordance with national law allowing beneficiaries to produce, maintain, control and develop subject matter, (b) discourage the unauthorized disclosure or use of the subject matter, (c) authorize or deny access to and use of the said subject matter based on prior informed consent.” Moreover, it wished that beneficiaries be informed of access to their TK with a disclosure mechanism in IP, which would require evidence of compliance, consent, approval, involvement and beneficiary requirements straight to the end. It supported the idea of attribution and preventing uses of TK in the manner which did not respect cultural sentiments. However, the Group was still discussing its presentation in the current draft. There could be a simpler definition of scope of protection.

134. The Delegation of Thailand said that the tiered approach was a practical, useful tool in establishing the appropriate level of rights based on the characteristics of TK. However, the approach was not yet clearly understood. It supported the suggestion made by the Delegation of Switzerland that the approach be further discussed. If agreed, it could help move the IGC forward on finding convergence on many core issues such as subject matter, beneficiaries, scope of protection, and exception and limitations. Finally, it was leaning towards the first option of Article 3.1 and it was open to further discussion.

135. The representative of INBRAPI said that indigenous peoples had various types of TK that required different levels of protection under the instrument. Some of the TK continued to be sacred and secret and had not been disclosed. There was also TK that had gone out from IPLCs, but continued to be linked with them. In respect to TK that had gone out of the community, the question was whether there had been FPIC and ABS. There was a third type of TK that was so widely disseminated. It was difficult to identify the original owners, i.e. TK in the public domain and publicly available. In all cases, it was important to recognize the moral and economic rights. There were already international instruments that recognized those rights and the instruments negotiated in the IGC could not reduce or diminish the rights that already existed in those other instruments, such as the UNDRIP, the CBD and the Nagoya Protocol. The customary law of indigenous peoples was of great use to evaluate the level of importance of TK within communities. That would determine, for example, sharing of benefits.

136. The representative of IFPMA said that a major difficulty regarding scope of protection was maintaining commercial rights on TK if it was already public. It was impractically difficult to prevent further dissemination and use of such knowledge, or to link it to legal obligations. Any such retroactive creation of rights would also lead to enormous legal uncertainty and could block important future scientific and commercial activities. Modern legal systems needed to provide certainty and predictability for all stakeholders and could not function in such a way. Further details on that and other TK related issues, especially on a balanced system of rights, were detailed in a paper of the ICC, to which IFPMA was a member, available out-side the room.

137. The Delegation of the USA supported the statements made by the Delegation of Japan and the Delegation of Latvia, on behalf of the CEBS Group, particularly the comments and questions related to the tiered approach. With regard to the comments made by the Delegation of the EU, on behalf of the EU and its Member States, it had looked at that formulation with interests and it could be a way forward on some of the discussions. With respect to Article 3, the phrase “protected traditional knowledge” had to remain in the text. It could not support Article 3.1(a)(iv) as it envisaged a disclosure requirement. On Article 3.2, it could not support “ensure that” because Article 3.2 presumed a disclosure requirement and the right to ABS.

Article 3.2 had to remain in brackets. The Delegation supported the complementary measures approach. In Articles 3bis.1(a), 3bis.1(f) and 3bis.2, and 3bis.5, “publicly accessible” had to be added before the term “databases” throughout that section. It wished to avoid any confusion as to the nature of those databases. They were not archives of private data but intended for the larger, social purpose to preserve TK and as a tool to facilitate proper decision making as to whether to deny or grant a patent application.

138. The representative of Tupaj Amaru proposed text for Article 3: “For the purposes of this international instrument whether or not it is binding, the Contracting Parties shall recognize the holders of and beneficiaries of traditional knowledge in conformity with Article 2, the exclusive rights: to control, preserve, distribute, exploit and practice their traditional knowledge and their traditional expressions; to authorize, to give access to or to prohibit access to, to prohibit misuse, misappropriation of traditional knowledge and derivations of the traditional knowledge in accordance with mutually agreed terms to prevent the undue use, elicit appropriation, acquisition through fraudulent means, appropriation, exploitation of this traditional knowledge without fundamental free prior informed consent on the part of the traditional knowledge holders; with regard to traditional knowledge and intellectual property rights of those using traditional knowledge without the authorization of holders of this traditional knowledge of the country of origin, without presenting proof of free prior informed consent; to prohibit use of traditional knowledge outside of their traditional context and without having recognized the source and origin of this knowledge and in prejudice to the holders of traditional knowledge. Acts of acquisition, appropriation such as means of unfair competition, through robbery, trickery, including recourse to violence in order to obtain commercial benefits, industrial advantages and monetary advantages will be subject to civil and criminal sanctions. The contracting party shall establish appropriate mechanisms and effective measures in order to guarantee the application of the rights to protection of traditional knowledge as stipulated in this article in conformity with the customary law of the traditional peoples.”

139. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

140. The Delegation of Indonesia supported the tiered approach and suggested that it be reflected in the text. It proposed giving flexibility for ILCs to conduct a self-identification method to identify the scope of protection, especially related to secret, sacred, and closely held TK of which they were the custodians. It proposed that national laws and regulations define secret and sacred TK. It did not wish to use the terms “public domain” and “publicly available” in the text.

141. The Delegation of Egypt said that the text was extremely complicated. The whole text should state the following: “The exclusive mandatory rights of the holders of TK are the rights of IPLCs to derive economic benefit from this knowledge and the State could use this knowledge and allow its exploitation on the basis of FPIC. The income from that exploitation will be divided up according to international legislation.” The aim was not just the financial income but also the fact that it should go back to the peoples involved so that they could benefit from the technology used in the exploitation. The text should reflect in a transparent way moral rights, including the right of attribution for the communities since they were the holders of TK and they had a right to the preserve it against any modifications. The text should also stipulate the rights of those peoples to withdraw their permission from exploitation of the TK if they knew that the use affected their identity and damaged their sacred beliefs. Disclosure requirements were extremely important for the protection of TK. Any application for a patent had to disclose the use made of the TK and provide evidence that permission had been acquired with FPIC. That was what Article 13 of the Egyptian Law on Intellectual Property stated. It reserved its right to come back to Article 3bis.

142. The Delegation of Canada was interested in the tiered approach as a possible approach. The devil was in the details however. It supported some flexibility to allow Member States to implement measures in accordance with national circumstances. However, to make progress and identify appropriate approaches, the IGC needed more concrete information from the Member States implementing those measures about how they operated in practice, and how measures were applied and interpreted by administrative or judiciary bodies. Indeed, a lot of concepts under Article 3 were new concepts. The IGC was treading on new ground. It welcomed a discussion of concrete experiences on such issues as what was considered secret in the traditional context, what was considered sacred, what happened under national law if TK was widely known but the ILC had not intended for that TK to be widely known, what happened if the TK was shared by several communities, how would those approaches interact with the IP system, and how would those approaches relate to the public domain. Moreover, it had concerns about disclosure and was not convinced of its benefits and specifically with regard to Article 3.2(d) which included a reference to a disclosure mechanism. The Delegation asked to those implementing that measure how was disclosure concretely applied to applications for patents and other rights. Concrete information on the experiences of Member States implementing the measures contemplated in Article 3 was essential to informing the discussion, to basing it on facts and to moving the discussion forward.

143. The Delegation of Australia supported the appropriate legal protection of TK and said that the tiered approach was a useful way to achieve that. Australian courts had developed case law on confidential information that had been used to prevent the disclosure of secret and sacred information. In relation to Article 3.1, it invited Member States to elaborate on the inclusion of “otherwise known”, keeping in mind that “secret” and “sacred” were not further defined in the text and could leave open for national law to further define this. The tiers of Articles 3.2 and 3.3 narrowed protection to knowledge that, even where available to the public, was strongly connected to the culture of beneficiaries. That could be considered akin to patent or copyright protection, where, despite that the subject matter of protection was to be viewed or accessible by the general public, it maintained a level of ownership or control identifiable as belonging to the right holder. It highlighted that in Article 3.2 the use of “publicly available” was contradicted by the definition of knowledge that had lost its distinctive association with any indigenous community.

144. The Delegation of the Republic of Korea said that the scope of protection had to be discussed in a consistent way with the definition of TK and other core issues. Previously it had proposed excluding publicly available TK for the scope of the instrument because it could increase the uncertainty in the IP system. In the same context, the terms of “public domain” and “widely known” were interpreted to have the same meaning as widely spread TK. Therefore, publicly available TK in Article 3.3 and other parts of the article which provided “publicly available,” “widely known TK” and “TK in the public domain” should be deleted. It supported the alternative of Article 3.3.

145. The representative of Tulalip Tribes asked a question to the Delegation of the USA and other delegations on the database issue. Article 3bis(2)(g) suggested that there should be widespread documentation of TK. He wondered whether there had been consultations within the USA with the tribes on their positions on the compilations of databases of their TK and whether that was acceptable. Tribes did not universally want their knowledge compiled and codified because there were customary laws and sensitive issues about such compilations. Recalling the negotiations under GRs, when the initial submission was made on the creation of databases, the proponents had said that those were to be kept private and much like the TKDL would only be available to patent offices. He had made a statement saying that he was not against the databases, but there were certain conditions that would have to be met. One of his concerns was that there was only a policy protection and the technical protections did not matter. If the policy changed and those private databases were made public, he wondered what security was. That had been theoretical until IGC 30 when the Delegation of the USA had

proposed those databases be made publicly available. The other position that the Delegation of the USA had taken was that the information in those databases was in the public domain. If there was published information on TK, it was uncertain under which conditions that knowledge had been exchanged and it was uncertainty of full FPIC over an understanding of what the consequences of exchanging knowledge would be. There was a lot to discuss on those issues of whether they were acceptable or not.

146. The Delegation of China said that Article 3 was an important article. It supported the statements made by the Delegations of India and Indonesia on a protection at various levels, because TK was diverse and, therefore, protection measures had to be provided at various levels. In Article 3.1, there was “protected” and “secret” knowledge. Some people used secret knowledge with the aim of protecting it; however, in order to protect the interests of holders of TK, sometimes those rights had not been respected. The holders of that TK had trusted researchers. They had told the researchers about their TK, but they had not thought to protect their rights, to keep their TK secret. In that case, it was uncertain that Article 3.1 provided such protection. Moreover, using the word “secret” or “public” to define the scope of protection of TK was not a very good criterion. It had the same concerns as the Delegation of Indonesia. Moral rights were very important and really needed to be considered.

147. The Delegation of India said that complementary measures should not be made mandatory and the development of databases was only a supplementary measure for providing defensive protection. It suggested deleting Article 3bis.

148. The Delegation of the Plurinational State of Bolivia said that it was important to recognize that the scope of protection needed to consider the various levels of TK, namely sacred knowledge, knowledge in the public domain and the intermediary level between those two levels. The IGC had to consider the very nature of TK. At previous IGC sessions, it had reiterated the importance of considering the nature of the TK expressed in its indivisibility. Those elements needed to be taken into consideration by the facilitators.

149. The representative of CEM-Aymara said that it was difficult to distinguish secret, sacred and publicly available TK. Indigenous people were not of the opinion that publicly available was the same as in the public domain. IP laws allowed for the attribution of works in the public domain, even when economic rights were exhausted. He was deeply concerned that that mistake might be made again with regard to TK in the public domain. TK that was publicly available should have moral rights and should be in the control of indigenous people. There was an interest in protecting the rights of indigenous people, as it existed for protecting their customary laws.

150. The Chair opened the floor for comments on the work-in-progress materials provided by the facilitators earlier.

151. The Delegation of India supported Option 1 of objectives, especially paragraphs 1(a) to (d). It proposed bracketing the new additions after Option 2. On Article 1, it proposed that TK as defined under “Use of Terms” be shifted under Article 1 in place of all three options. That would give more clarity and consistency in understanding the subject matter of the instrument. It wanted to add the words “created” and “maintained” “in the collective context”. “Protected” and “directly” had to be deleted. On Article 2.1, it supported Option 1 with the addition of the following sentence: “Member States may also designate competent bodies to act as custodians on behalf of the beneficiaries in accordance with national law.”

152. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to bracket the word “peoples” in its entirety instead of only the letter “s”.

153. The Delegation of the USA wished, in Policy Objectives, in Option 1 paragraph 1(a), to bracket the words “misappropriation”, “misuse” and “unauthorized use” and to replace them with “unlawful appropriation”. In Option 2, it wished to bracket the word “misuse” and replace it with “unlawful appropriation”. It suggested a definition for “unlawful appropriation”.

154. The Delegation of the Islamic Republic of Iran supported Option 1 and wished to bracket Option 2. Regarding the proposed definition of TK, the word “created” had to be added before “maintained” and it supported the deletion of the word “protected” and “directly” which were also in brackets. In Article 1, the same wording could be used as that for TK under “Use of Terms”. The word “traditional” had to be added before “knowledge”. It preferred Option 1 of Article 2, with the last sentence of paragraph 2.1 of Option 2, i.e. “Member States may also designate competent bodies to act as custodians on behalf of the beneficiaries in accordance with national law”.

155. The Delegation of Chile said that, with regard to Objectives, Option 1(a) did not separate out the ideas of misappropriation, misuse and unauthorized use. It wished to have those words work together, since those words indicated a greater permissibility in the definition. Under Option 1(b), it expressed its concerns and wondered how it would work in specific circumstances. Beyond the hypothesis of undue misappropriation and misuse, it wondered how the beneficiaries controlled that, particularly with regards to authorized use. Perhaps that provision was already covered by paragraph (a) and was therefore redundant. Paragraph (c) was not necessarily an objective as such. Under paragraph (d), the option of promoting or fostering creation had been removed. It might have an undesirable effect on creation, on patents or IP. It liked the simplicity of Option 2. However, it lacked a few elements, which were required in an instrument. It would rescue paragraph (a) under Option 1 which was important, because it was very important to decide what would be protected from. With regard to Option 3, it supported some of the comments that had been expressed insofar that the word “control” should be removed. Regarding beneficiaries, it welcomed the simplicity of Option 2, as it covered a custodian agency for the beneficiaries.

156. The Delegation of the USA said it had previously suggested the insertion of the term “unlawful appropriation” in Policy Objectives in Options 1 and 2. It wished to provide a definition of unlawful appropriation: “Unlawful appropriation is the use of protected traditional knowledge that has been acquired by a user from a traditional knowledge holder through improper means or a breach of confidence which results in a violation of national law in the traditional knowledge holder’s country. Use of protected traditional knowledge that has been acquired by lawful means such as independent discovery or creation, reading publications, reverse engineering, and inadvertent or deliberate disclosure resulting from the traditional knowledge holders failure to take reasonable protective measures, is not unlawful appropriation”. It wished to retain the paragraph on the criteria for eligibility of the original Article 1 in its current placement. The criteria for eligibility in Article 3 were conditions for protection. The Delegation was looking at it from a different perspective, so it wished to retain that language in Article 1.

157. The Delegation of Indonesia stated that, regarding the Policy Objectives, there were at least two general ideas which were the need to protect and prevent misrepresentation, misappropriation and misuse of TK as well as the idea to encourage tradition-based creation and innovation under the spirit of sharing of ideas and knowledge. With that background, it proposed two options: either adding the word “encourage” in paragraph 1(d) under Option 1 or including the principle of equitable benefit-sharing under Option 2. That would provide a good balance between the idea of protecting TK and encouraging innovation and creativity. On “Subject Matter”, Option 2 was a good basis for the discussion. It proposed that the use of words “linked and/or associated” to be replaced with “which is an integral part to the social identity and/or cultural heritage of indigenous and local communities”. Regarding beneficiaries, Option 1 was a good basis for discussions. It suggested adding the elements from Option 2 about competent bodies to Option 1.

158. The Delegation of Argentina said that Article 2 was going in the right direction, particularly with regard to the reference to national legislation in Option 1. With regard to beneficiaries, in the cases where it was not possible to identify beneficiaries, the State had to act as a custodian. It would be useful to have a provision like Article 2.2 of document WIPO/GRTKF/IC/31/4.

159. The representative of Tupaj Amaru said that, on Article 1, Option 1 could be discarded. In Option 2, the vital concept of the instrument had been removed, namely the word “traditional”. There was no reference to TK. The words “intellectual” and “intangible” had to be included because TK was not tangible, as mentioned in the UNESCO Convention on the Protection of the Intangible Cultural Heritage. On Option 3, the word “traditional knowledge” had been removed throughout the document. It was hard to understand why an essential word was suddenly removed. He referred to the intervention made by the Delegation of the USA on the criteria of eligibility. The concept of eligibility should be deleted. With regards to subparagraphs (a) and (b), he proposed that they be transferred to the end of Option 3 which was clearer. With regard to Article 2, he noted that in addition to IPLCs nations had been included. He did not agree. Nations were third parties, so were multi-national enterprises. He had the following proposal for beneficiaries: “For the purposes of this international binding instrument, whether it be binding or not, the beneficiaries of legal protection of traditional knowledge which are of national and universal dimensions as defined in Article 1 are the indigenous peoples and local communities and their descendants: (a) who are custodians and responsible for the care and safeguarding of traditional knowledge in conformity with customary law; (b) those who use, develop, and transmit traditional knowledge from generation to generation as authentic and genuine representations of their cultural and social identity and their cultural heritage. The beneficiaries or owners have a right to enjoying the just and equitable benefits of the dissemination of their traditional knowledge innovations and related practices for the conservation of biodiversity and the sustainable use of their components.”

160. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tupaj Amaru.

161. The Delegation of Nigeria, speaking on behalf of the African Group, supported Option 1 of “Policy Objectives”. For Article 1, the title “Subject Matter of Protection” had been changed to “Subject Matter of the Instrument” and it was flexible to accept that change in the text. It had a preference for Option 2 under Article 1, but wished to make a few changes to line 3 “transmitted from generation to generation”. It wished to add “transmitted between or from generation to generation” in Option 2. It was flexible to working with Option 1, providing that the definition of TK in “Use of Terms” included “created” in the first line and in the fourth line “between or from generation to generation”. It wished to delete the second paragraph of the definition of TK. The first paragraph adequately captured a minimum threshold for stakeholders. For Article 2, it had language to propose that could provide a soft landing zone, which would be “the beneficiaries of this instrument include, where applicable, States, indigenous peoples and local communities, and other beneficiaries as may be determined under national law. States may establish competent national authorities to determine beneficiaries of traditional knowledge in consultation with the indigenous peoples and local communities and stakeholders that produce, maintain, develop and otherwise exercise rights over TK in accordance with customary law and practices.” That language could provide a middle ground among delegations that saw beneficiaries as only IPLCs and those that had a preference for States and also acknowledge competent authorities.

162. The Delegation of Ghana echoed the view expressed by the Delegation of Nigeria, on behalf of the African Group. Regarding Article 1, it preferred Option 2. During IGC 29, a delegation had proposed a definition of “misappropriation”. Misappropriation had not been defined specifically in the TK text. It drew attention to well-established definitions of misappropriation, which tended to be simpler and incorporated in the current definition. It

referred to a definition that was found in 36 CFR 2.30 of the United States Code of Federal Regulations (CFR) of the USA. It provided the definition of “misappropriation of property and services” as follows: “(1) Obtaining or exercising unlawful possession over the property of another with the purpose to deprive the owner of the property. (2) Obtaining property or services offered for sale or compensation without making payment or offering to pay. (3) Obtaining property or services offered for sale or compensation by means of deception or a statement of past, present or future fact that is instrumental in causing the wrongful transfer of property or services, or using stolen, forged, expired revoked or fraudulently obtained credit cards or paying with negotiable paper on which payment is refused. (4) Concealing unpurchased merchandise on or about the person without the knowledge or consent of the seller or paying less than purchase price by deception. (5) Acquiring or possessing the property of another, with knowledge or reason to believe that the property is stolen.” The reference was not to suggest that the IGC should incorporate what was found in the American legislation, but the IGC could use it as very helpful guidelines to define misappropriation to include any access or use of TK of the beneficiaries in violation of customary laws and established practices governing the access or use of such TK. It was simpler and cut straight to the point and addressed the prime concern that the plenary had on misappropriation of TK. It wished to propose that as a separate option.

163. The representative of INBRAPI favored Option 1 of “Policy Objectives”, precisely because it included PIC and ABS. On Article 3, Option 3 was more complete. Furthermore, the expression “created” was not there however TK was created by IPLCs. Under IP, creators had their creativity protected. In Option 3, if there was a State that wanted to support the word “created” before “maintained”, that would be a good thing. Under Article 1, Option 3 seemed quite complete but before the expression “maintain” she suggested that States support the inclusion of the word “created”. Under the IP system, creators should have their works protected. In Article 2, it was important to stress the fact that the beneficiaries should be IPLCs who were within States. Option 2.1 was a good one. She knew that States were interested in protecting TK within their States and could appoint national authorities, but those roles were different. Those States did not create knowledge. The IGC had to clarify the different roles played by various parties under the instrument.

164. The Delegation of the USA supported the suggestion of the representative of INBRAPI to insert the word “created” before “maintained” in the first line of Option 3 in Article 1. It further responded to the comments made by the Delegation of Ghana on the definition of misappropriation under the American law. The term that it had proposed defining was not misappropriation. Rather it was “unlawful appropriation” which was not defined under the American law. It was a new concept that the Delegation was introducing.

165. The Delegation of China reiterated that the texts should be inclusive and should reflect the claims from all sides, and take into account different countries and the different methods of protecting their TK. On “Use of Terms”, in the second paragraph after “local communities”, it proposed adding “nations”. On Article 1, it preferred Option 2. It also wished to add in that paragraph the word “nations”. On Article 2, it preferred Option 1 and in paragraph 1 it wished to add the word “nations”.

166. The Delegation of Switzerland stated that, on “Policy Objectives”, everyone had to keep in mind that there were other international instruments which were addressing TK. For instance, in paragraph (c) of Option 1, equitable sharing of benefits had to be based on PIC or approval or involvement. In the CBD, benefit-sharing had to be based on MAT. So in developing those objectives, it was important to keep in mind the approaches in all the relevant instruments. With regards to the beneficiaries, it preferred Option 2. However, on the designation of competent bodies to act as custodians, it was important that those were actually designated with the direct involvement on approval of indigenous peoples and that was missing in those options.



167. The representative of HEP referred to the statement made by the Delegation of China to the effect that countries had different ways of understanding TK and IPLCs. Many peoples in Africa claimed that they were indigenous peoples. Everyone was indigenous in her own village. She was indigenous when she was in her own village. In order not to exclude or discriminate against them, the term “nation” had to be introduced because indigenous peoples were not stateless. She was defending the interests of all the people of Cameroon including other Africans. She supported Option 2 in Article 1. On Article 2, she supported Option 2. She suggested that in paragraph 2.1 the wording be as follows: “Beneficiaries of this instrument are holders of knowledge as defined in the national legislation”. She said that the “Use of Terms” included was not satisfactory at several levels because there were inconsistencies between knowledge and TK. And the word “traditional” had been taken out almost everywhere.

168. The Delegation of China supported the intervention made by the representative of HEP on Option 2 of Article 1.

169. The Chair noted that there was no support from a Member State for the textual proposal made by the representative of HEP on Article 2.

170. The Delegation of Egypt supported the statement made by the Delegation of Nigeria, on behalf of the African Group. As to Policy Objectives, in Option 1, it could not accept “unlawful appropriation” because that implied that there was a law in place. If there was a law in place, TK holders would not need to discuss in the IGC for 17 years in order to come up with an instrument. It preferred “illicit” to “unlawful”. It also rallied around the proposal made by the Delegation of Nigeria, on behalf of the African Group, on “Subject Matter”. It preferred to add the word “traditional” before “knowledge” because that was a term that gave a very specific meaning to knowledge. That was very important for the beneficiaries. It insisted upon the importance of the role of the State and institutions created by the State because a State was one of the beneficiaries.

171. The Delegation of Thailand stated that the reference to State or nation in Article 2 was very important, but in the spirit of trying to narrow the gap it supported the language suggested by the Delegation of Nigeria, on behalf of the African Group.

172. The Delegation of Colombia supported Option 1 of “Policy Objectives”, particularly paragraphs (a), (b) and (c), which covered the issue of TK protection and was the result being sought by the instrument. It supported Option 2 of Article 1 and Option 2 of Article 2.

173. The Delegation of Namibia stated that, concerning the rightful owners of knowledge, the IGC had to find a solution that would allow the national distinctiveness of situations to be resolved and to stop being an obstacle to progress. The proposal made by the Delegation of China about the rightful holders of knowledge could be a useful way forward. There was also the consideration of exactly what kind of TK would be covered under the instrument, because there was already an instrument on GRs that dealt with TK associated with GRs and the IGC was working on a separate instrument for TCEs. If it was not clear what would uniquely regulated by the TK instrument, the IGC ran the risk of regulating certain kinds of knowledge through three different instruments that were currently not necessarily heading in exactly the same direction. That issue was very pertinent to the discussions around “Subject Matter”, because it was not clear where the borders between those three different kinds of TK were. In general, it was a bad outcome if one item was to be regulated by three separate instruments.

174. The Delegation of Algeria supported the statement made by the Delegation of Nigeria, on behalf of the African Group. Regarding “Policy Objectives”, Option 1 was the most appropriate. As to the title of Article 1, it could be kept as it stood. It supported Option 2 of Article 1. The term “traditional” had to appear before “knowledge”. As to beneficiaries, it was necessary for the national authorities to play a role.

175. The Chair invited the Delegation of the USA to introduce document WIPO/GRTKF/IC/31/5.

176. The Delegation of the USA had previously introduced that document at IGC 30 as document WIPO/GRTKF/IC/30/6. That joint recommendation envisioned the appropriate use of legal, policy or administrative measures to prevent patents from being granted erroneously where prior disclosed GRs or TK would defeat the novelty or inventive step of claimed inventions. It also envisioned the use of opposition measures and the encouragement of voluntary codes of conduct and the creation and exchange of databases for determining novelty and inventive step. Regarding databases, it welcomed further discussions on national experiences and was willing to work with others on best practices. It emphasized that the joint recommendation could be used as a confidence-building measure to help the IGC move forward on key issues concerning TK. The proposed joint recommendation could be negotiated, finalized and adopted without affecting the work of the IGC and other working documents. It invited other delegations to express their comments on and support for this proposal and welcomed additional cosponsors. It looked forward to continuing discussions on that proposed joint recommendation.

177. The Delegation of Namibia was surprised by the timing of the document. It said that the mandate stated that IGC 31 would focus on TK and not on patents on GRs and associated TK. Having said that, it understood that trying to delineate the borders between TK in general and TK associated with GRs was an important part of clarifying the scope of the three instruments. The IGC was in the hands of the Chair as to whether that discussion should take place or not. There were already measures in place within the IP system to prevent the erroneous grant of patents. The African Group was not opposed to the approval of databases for patent examiners. It was not a substitute for a *sui generis* system that would protect TK. It would lead to fanning the system and it was not a substitute for a mandatory disclosure requirement in patent applications. It was happy to further discuss with the sponsors of that document.

178. The Delegation of the Islamic Republic of Iran said that the mandate required the IGC to engage in text-based negotiations of an international instrument to ensure the effective protection of TK. The joint recommendation could not fulfill the mandate of the IGC and could not be considered as a solution to the existing problem that the IGC was seeking to address. At that stage of the negotiations, there was no need to undertake a study or to pursue the establishment of a database, as those initiatives would not help the IGC's negotiation process. For the establishment of a database, there was a need to identify a series of requirements for their safeguarding as well as to determine liabilities for their inappropriate use. It was concerned that those initiatives would hinder the IGC from realizing its main objective, which was to finalize an international legally binding instrument.

179. The Delegation of the Russian Federation supported the joint recommendation on GRs and associated TK. The document contained the following sections: definitions, objectives and principles, prevention of erroneous granting of patents, the measures for the filing of objections, the additional measures concerning the development of guidelines on the protection and use of GRs, creation of databases that needed to be taken into account by patent offices when developing guidelines and, if necessary, additional regulatory documents that should be followed during the examination of applications based on the use of GRs and TK associated with GRs for quality execution of their work and the prevention of the erroneous grant of patents. This document was a good basis for the Committee's work on this issue on the agenda and in the future might be adopted by the Committee as guidelines for the protection of TK.

180. The Delegation of the Republic of Korea supported the joint recommendation. It hoped that the databases would be instrumental in preventing the erroneous grant of patents. The misappropriation or misuse of TK could be avoided by efficient prior art search. In general, prior

art search was done based on patent literature. Only little patent literature related to TK existed. Due to the nature of TK, it was difficult to search non-patent literature, which could be transmitted in non-recognizable languages or orally. In order to compensate the limitation of protecting TK in the current IP system, databases and other information system should be used in protecting TK from misappropriation or misuse.

181. The Delegation of Egypt asked a question with regard to the method of work. It recalled that it had said at the previous session that TK was the common denominator between GRs and TCEs. At that point, it had requested to have just two instruments: one on TCEs and on their link with TK, and one on GRs and on the link between GRs and TK. But since the situation was quite different, it wondered why the IGC had to consider those studies. It recognized their value, but wondered whether the time was right for discussion. With regard to databases, there was Article 3bis which mentioned other measures of protection, including databases. When TK was put into databases, the text had to reflect that putting that information into the database did not mean that protection was granted. The non-inclusion of TK in those databases did not mean that there were no rights holders or that the TK was in the public domain. That was merely a question of recording TK in databases. There was also a need for standards. There also had to be actions taken to punish acts of piracy and illegal use of TK. It encouraged the Member States who had made that proposal to withdraw that document. There was also the issue of the public domain.

182. The Chair opened discussions on document WIPO/GRTKF/IC/31/6.

183. The Delegation of Japan, on behalf of the Delegations of Canada, Republic of Korea and the USA, offered a brief explanation of document WIPO/GRTKF/IC/31/6. It understood that most of the Member States shared a common recognition in terms of the importance of establishing measures to prevent the erroneous granting of patents for inventions dealing with TK and TK associated with GRs. Based on that recognition, it had been contributing to the discussions at the IGC and other fora, proposing the creation of a database of non-secret TK. In order to achieve that, it would be more appropriate to establish databases storing non-secret TK, which provided information required for examiners to judge novelty and inventive steps of patent applications, rather than introducing a mandatory disclosure requirement. Such databases enabled patent examiners to efficiently find relevant prior art among thousands of patent documents and non-patent literature. Utilizing the proposed databases during the patent examination process would improve the quality of patent examination in the area related to TK and enhance the appropriate protection of TK. Since most of the Member States shared a common recognition of the importance of such a database, it hoped that WIPO would work on it first.

184. The Delegation of the USA supported the statement made by the Delegation of Japan on document WIPO/GRTKF/IC/31/6. As a cosponsor, it viewed that proposal as a valuable component of the IGC's work to negotiate an international legal instrument(s) for the effective protection of TK. It helped to address concerns relating to the erroneous granting of patents. It was essential that the IGC continued to engage on that proposal and continued to provide constructive, substantive comments in order to address questions and concerns raised in past sessions on the draft proposal. It looked forward to discussing the proposed database system including the issues raised in an effort to improve it. It invited other delegations to express their support for the proposal and welcomed any additional questions or improvements upon the recommendation that other Member States might have.

185. The Delegation of Namibia said that the document was properly part of the mandate of IGC 31 that was supposed to look at TK. While it recognized the value of such databases, there would never be a substitute for a mandatory disclosure requirement in patent applications. It was particularly worried that those proposals for establishing databases were being made by the same Member States who were continuously stressing not only the value of the public

domain but the extension of the doctrine of public domain as it applied in patent law to the concept of TK, which was an inalienable cultural good that belonged to particular groups. It said that insisting at the same time on enlarging the public domain and on the establishment of databases was not a good way of building a higher level of trust among Member States.

186. The Delegation of the Russian Federation supported the creation of a comprehensive searchable database system through the WIPO Portal which would allow experts to more effectively search for prior art or look for other material with regard to GRs and non-secret TK associated with GRs and therefore reduce the likelihood of erroneous granting of patents.

187. The Delegation of the Plurinational State of Bolivia did not support that joint recommendation. Instead, it supported the statements made by the Delegations of Egypt and Namibia, focusing on the need to establish a mandatory disclosure requirement in patent applications and supported the idea of non-inclusion of TK in databases as proposed by the Delegation of Japan and the countries co-sponsoring.

188. The Delegation of the Islamic Republic of Iran said that the mandate of the IGC was to focus on text-based negotiations to reach some kind of agreement or narrow the gaps. That document could not help the process of the negotiation.

189. The Delegation of Ghana supported the intervention made by the Delegation of Namibia that the two documents that had been introduced did not fit in the mandate of IGC 31.

190. The Delegation of the Republic of Korea, as cosponsor, expressed support for the use of databases as a defensive measure for TK and GRs and wished to share a case in the Republic of Korea. The Korean Intellectual Property Office (KIPO) had established GRs and TK associated with GRs databases. They were made accessible online through the Korean TK Portal to the general public. Patent examiners at KIPO were obligated to search the databases for prior art and this method had been used to successfully and efficiently in the protection of TK and GRs associated with TK. That was a practical and feasible method for reducing the number of erroneously granted patents.

191. The representative of Tupaj Amaru supported the intervention made by the Delegations of Namibia, the Plurinational State of Bolivia and the Islamic Republic of Iran. The IGC should not stray from the TK topic.

192. The representative of HEP was very pleased to have recommendations from developed countries. Researchers had to do research on the data available and without those databases they could not do it. She had requested those developed countries to help with technical assistance to make their knowledge available on the WIPO Portal. TK had to be taken out of its secrecy because there was a great deal of education to be undertaken among the people who held TK. There was a need to convince people that oral tradition could be put in a database.

193. The Delegation of Japan, in response to the statements made by several delegations, noted that the decision of the GA stated that the IGC would use all working documents as well as any other contributions of Member States. It believed that discussions on that proposal was very relevant and within the mandate.

194. The Delegation of the USA supported the comment made by the Delegation of Japan on recognizing that the IGC mandate called for the use of all working documents as well as other contributions of Member States. Additionally, those joint recommendations were available for continued negotiation. It responded to the point made by the Delegation of Namibia that the proponents of the databases were incongruent for the support for the public domain. The database envisioned under the joint recommendations would comprise only publicly available

TK and were not intended to include secret TK. Thus those databases were not intended to increase the scope of the public domain.

195. The Chair opened discussions on document WIPO/GRTKF/IC/31/7.

196. The Delegation of Canada reintroduced the proposal for a study contained in document WIPO/GRTKF/IC/31/7. The proposal for terms of reference for a study raised a number of questions relating to the disclosure requirement, the answers to which would inform and advance the work of the IGC. Answers to those and other questions outlined in the document were of the essence for the matter at hand, as TK associate with GRs was a subset of TK in general. The proposed study, which would update the one conducted in 2004, would provide up-to-date practical and in-depth and evidence-based information on existing national laws, practices and experience. This would be consistent with and support the IGC's mandate, which called for an evidence-based approach and to reach a common understanding on the core issues. It appreciated the efforts of the WIPO Secretariat to gather and diffuse readily accessible and up-to-date information about existing laws, measures and protocols, including the table of disclosure requirements and case studies. The WIPO TK website contained a very complete record of documents relevant to the negotiations. What was missing was a detailed and comparative analysis about how the existing systems functioned in practice and how key terms and approaches had been applied and interpreted in the national or regional level under existing laws. Given the uncertainty arising from the lack of clarity in the terms and proposed approaches, which had not been subject to significant state practice, nor judicial or tribunal interpretation, and not subject of significant experience under other international instruments, it believed that a further study as outlined in the proposal was necessary in order to make an informed decision at the IGC. The information gathered from the study combined with the information shared during the meetings and compiled by the WIPO Secretariat and maintained on the WIPO website would provide the evidentiary base to reach mutual understanding on the core issue of disclosure requirements and make progress by informing the work. The intervention of the Delegation of the EU, on behalf of the EU and its Member States, at a past session, expressing interest in the proposed study, was appreciated. It welcomed further support and cosponsors and would be pleased to meet with others to discuss their views. The new study on TK would complement a study on GRs and associated TK.

197. The Delegation of the USA supported the comments made by the Delegation of Canada regarding document WIPO/GRTKF/IC/31/7. It was proud to be one of the cosponsors of the proposal. In accordance with the 2016/2017 mandate of the IGC, the IGC would use all WIPO working documents, including contributions of Member States, using an evidence-based approach, including studies and examples of national experiences, including domestic legislation and examples of protectable subject matter and subject matter that was not intended to be protected. In past sessions, the IGC had had constructive discussions about national laws and how disclosure requirements in ABS systems functioned. Those discussions had helped to advance the IGC's work on the text. The study was intended to carry forward that work without slowing down the work of the IGC. It invited other delegations to express their support for the proposal. It welcomed questions or suggestions from other delegations to improve the proposal.

198. The Delegation of the Russian Federation supported the proposal as one of the sponsors. The Delegation had previously expressed its concern on disclosure of source of GR in the application for a patent and the interest in further consideration of this issue, particularly in defining the mechanisms of disclosure. The questions formulated and set out in this document had addressed to patent offices which practiced the process of disclosure. As the issue of disclosure of source of GR in the application for a patent was of interest, but this document still was not supported by Member States, Rospatent had addressed some issues to a number of national patent offices and had already begun to receive responses and analyze them. It would help to Rospatent in the decision on disclosure. It would be good to have centralized work done

by WIPO in order to respond to the issues mentioned in that document and other questions as well. It would be more rational to do this within WIPO.

199. The Delegation of the Czech Republic supported the study and terms of reference. The questions in the document were very important. That study could be one small stone of the whole mosaic that was contemplated concerning the very complex issue of TK.

200. The Chair opened discussions on documents WIPO/GRTKF/IC/31/8.

201. The Delegation of Switzerland introduced document WIPO/GRTKF/IC/31/8. It did not intend to discuss the document in detail during IGC 31, as it was dealing with TK in a broader sense. Nevertheless, it wished to provide a few comments. It had prepared that document in response to document WIPO/GRTKF/IC/30/9, which had been submitted to IGC 30. Document WIPO/GRTKF/IC/30/9 sought a better understanding of two Swiss laws, namely the “Federal Act on the Protection of Nature and Cultural Heritage”, and the “Federal Act on Patents for Inventions”. Document WIPO/GRTKF/IC/30/9 contained a number of shortcomings and errors concerning the Swiss legislation related to GRs. In its view, documents containing misleading interpretations of the legislation of countries did not support fact-based discussions, and should therefore not form the basis of the IGC’s work. To present the relevant Swiss legislation in a correct manner, the Delegation had summarized the relevant regulations on GRs and associated TK in document WIPO/GRTKF/IC/31/8. Its submission included the following: (1) There was a section that described in detail the disclosure of source requirement in the Swiss Patent Act as well as its rationale; (2) it explained the relationship of the disclosure requirement with other relevant regulations, in particular with the Swiss provisions to implement the Nagoya Protocol as well as the International Treaty on Plant Genetic Resources for Food and Agriculture of the FAO; and (3) the last section contained conclusions and described a possible way forward with regard to an internationally agreed disclosure requirement. Moreover, the document had two appendices. The first one contained links to the relevant acts and related regulatory documents, and the second one contained detailed comments on the erroneous sections in document WIPO/GRTKF/IC/30/9. The Delegation believed that there were several advantages in elaborating an internationally agreed disclosure requirement under WIPO: (1) It would foster the harmonization of national disclosure requirements within the patent system across regions. That would increase legal certainty for users and providers of GRs and associated TK; (2) An international disclosure requirement would build mutual trust among users and providers (of GRs and associated TK), and thus support ABS, which was an important objective of the CBD and of other international agreements; and (3) It would increase WIPO’s role and credibility in governing IP issues in the context of GRs and associated TK. This could benefit the patent system in the long term. However, an international disclosure requirement should be balanced, and take into account the interests of both providers and users of GRs and associated TK. In its submission, it provided further ideas on how such a balance could be achieved. Concluding, the Delegation hoped that its submission would not only contribute to a better understanding of its national approach, but also facilitate an evidence-based discussion on disclosure requirements, whether during IGC 34, when the IGC would address GRs again, or during the intersessional period up to then. It encouraged other Member States to also share information about their own national legislations related to GRs, TK or TCEs. Each Member State was best in the position to present its own legislation and approaches related to GRs and TK in a correct and comprehensive manner.

202. The Delegation of the USA thanked the Delegation of Switzerland for the introduction of document WIPO/GRTKF/IC/31/8. Document WIPO/GRTKF/IC/30/9 had been submitted at IGC 31 to as part of an evidence-based approach to support the IGC’s work, which included domestic legislation as called for in the mandate. An important goal in submitting that document had been to gain a better understanding of the national laws and practices through the eyes of an inventor in addition to the definitions of objectives and other texts in the Consolidated Document on GRs. Document WIPO/GRTKF/IC/31/8 helped gain a better understanding of the

Swiss patent system, including the Swiss Federal Act on Patents for Inventions. It had piqued its interest in the due diligence system recently introduced in Switzerland. It welcomed additional information on that system. It would have additional questions about the Swiss ABS and patent systems as well as potentially other nations' laws, which it would raise during the next discussion on GRs. It looked forward to continuing the discussion.

203. The Chair opened discussion on document WIPO/GRTKF/IC/31/9.

204. The Delegation of the EU, speaking on behalf of the EU and its Member States, firmly believed that the IGC's work had to be guided by solid evidence on the implications and feasibility in social, economic and legal terms. Therefore it supported studies in general as an appropriate methodology for its work. Its proposal was to request the Secretariat to undertake a study of national experiences and domestic legislation and initiatives in relation to protection of TK. The study should in particular cover the period of the last five to ten years. The study should help to inform the discussions on TK, following the evidence-based approach in compliance with paragraph (d) of the IGC's mandate. The study should build on existing material and other studies already conducted by the Secretariat in relation to TK. It noted that the Gap Analysis conducted in 2008 had sought to identify gaps, whereas its aim was to provide an overview of recently adopted regimes designed to protect TK and therefore complemented the work of the Gap Analysis, with a view to anchoring the work in an evidence-based approach. The main focus of the study should be to analyze existing domestic/national legislation and initiatives on TK applied in the Member States of WIPO or regional areas, some of which could be measures-based, while others could be rights-based. The study should also include concrete examples of protected subject matter. On the one hand, the study should review recently adopted national and regional IP regimes such as IP laws, regulations, measures and procedures, by which TK could be protected. It would be useful to know what the role of trademark, design, copyright, trade secrets or GI legislation in connection with TK was. On the other hand, other alternative recently adopted IP rights or other regimes should be considered. It would be interesting to know how key definitions such as TK, "traditional", "misappropriation", scope and beneficiaries had been defined; whether those alternative regimes were sufficient to ensure adequate protection for TK and proved to be useful in the protection of TK. The question of legal certainty for all stakeholders under those regimes should be examined. The study should address the issue of existing databases, such as those created for the purpose of keeping TK for other generations. The shared experience with the databases provided in the study could shed some light on their practical impact on patent procedures.

205. The Delegation of the USA supported the proposal by the Delegation of the EU, on behalf of the EU and its Member States, for an evidence-based study on national experiences and domestic legislation and initiatives in relation to the protection of TK. It was pleased that the study envisioned analyzing domestic legislation and its application to concrete examples of what was protectable TK and what was in the public domain. It supported the study's focus on the use of TK databases and their practical impact on patent applications and revocation procedures, in particular assessing the criteria of novelty and inventive step. The results of the study could help the IGC to understand how some TK could be protected in certain jurisdictions as well as how TK in the public domain could be used and shared freely.

206. The Delegation of Canada thanked the Delegation of the EU, on behalf of the EU and its Member States, for the proposal and supported such initiatives. The study aimed at enriching the factual basis on which the work depended, was mutually acceptable and beneficial and had a broad basis of support.

207. The Delegation of Latvia, speaking on behalf of the CEBS Group, supported the study proposed by the Delegation of the EU, on behalf of the EU and its Member States. It was interested in recently adopted legislation and that study would help its understanding of the core

issues and challenges faced by the IGC. It would help the IGC to narrow the existing gaps and bring more evidence to the discussions.

208. The representative of Tulalip Tribes found the proposal by the Delegation of the EU, on behalf of the EU and its Member States, quite interesting, yet the terms of reference had to be amended. He agreed that it was critical to look at the social and cultural impacts. Most of the proposals for an evidenced-base study were looking for the evidence within the existing IP system. It was really important to understand what were the impacts of such databases and other kinds of systems for compiling TK on the holders themselves. Any kind of cost-benefit analysis always required looking at risks and opportunities. For a full analysis of those impacts, one needed to understand how the holders themselves viewed those databases, what was their experience with those databases, and other problems that the holders might have. He would support the proposal if it included as part of the terms of reference a full analysis of the cultural and social impacts, including submissions and information from the TK holders themselves.

209. The Delegation of Japan thanked the Delegation of the EU, on behalf of the EU and its Member States, and said that an evidence-based approach would deeply advance the discussions at the IGC. The proposed study together with the proposal contained in document WIPO/GRTKF/IC/31/7 would foster the discussions.

210. The Delegation of Nigeria was unable to support such a study. There was a wealth of data available on the impact of the patent system on traditional innovation systems, which was an important focus for any kind of evidence-based inquiry. It was not seeking evidence about the patent system. It was looking for evidence about the role, viability and importance of TK systems to the maintenance of lifestyles of innovation and the sustainability of IPLCs. It was also seeking, in the context of the IGC's work, a better appreciation for the intersection between IP and TK systems that had informally co-existed but to the detriment of the latter. Those efforts were to both continue to provide incentives for traditional innovations and knowledge systems to become as vibrant as they had historically been, and to ensure that there was not the unregulated and indiscriminate use and access that essentially free rode on TK and innovation. It would be interested in a better-designed study. Evidence and studies were useful, but given the principles at stake in the IGC's work, as mentioned by the representative of Tulalip Tribes, a study really needed to look at the impact on the owners of TK and GRs, to evaluate the economic loss associated with misappropriation and with the lack of adequate protection within the IP system for the interest and rights of TK holders, and to look at sustainability. It had to look at the consequences for TK holders and the externalities imposed whenever there was misappropriation or misuse. Those were the sorts of things it did not have evidence about. There was a growing body of evidence, given the number of countries that had disclosure requirements, given the Nagoya Protocol and the variety of models of implementation. There was lots of room to gather evidence with the interplay. It was open to talking about the design of a study that would give the kind of evidence that was necessary for certain delegations, so that the real impact, the real cost, the real innovation loss that occurred as a result of the lack of protection and misappropriation of GRs and TK could be well documented. That was something that WIPO could do and it welcomed an opportunity to discuss with the Delegation of the USA and other sponsors of that proposal about designing a more robust and more effective study.

211. [Note from the Secretariat: This part of the session took place after the informals and the distribution of Rev. 1 of "The Protection of Traditional Knowledge: Draft Articles" dated September 21, 2016 ("Rev. 1") prepared by the facilitators.] The Chair explained that he would invite the facilitators to introduce Rev. 1 and to explain the context and rationale underlying the changes they had made. He would then open the floor for technical questions and clarifications from delegations. He would encourage delegations to further consider Rev. 1 before reconvening in plenary at a later stage. He recalled that the facilitators were impartial and worked in good faith, in a professional and balanced way, in accordance with the agreed drafting rules. Rev. 1 clearly attempted to give greater clarity to the different alternative



approaches and to identify potential areas where gaps could be narrowed. He asked delegations to listen and reflect on what the facilitators would say rather than to dive straight into their own interventions.

212. Mr. Uzcategui Jimenez, speaking on behalf of the facilitators, stated that it had been a complex endeavor, but they hoped the result would be the best for all. The first changes done were in the Preamble. Under “Promote awareness and respect”, they had kept the alternative that was in the previous text. Under “Promote innovation”, they had added an alternative text as proposed by the Delegation of Colombia which read: “Innovation based on traditional knowledge may contribute to the transfer and dissemination of knowledge for the benefit of the holders and legitimate users of traditional knowledge, as long as it contributes to the facilitation of social and economic welfare and the balance of rights and obligations remain the same. The protection of the innovation derived from traditional knowledge empowers communities to manage and control the commercial exploitation of owned intellectual property, as well as collectively benefit from it.” In Policy Objectives, they had made further changes, the first of which corresponded to a request by the Delegations of China, India and the Islamic Republic of Iran, among others, to include both nations and beneficiaries. They had kept paragraph (b) in keeping with the proposal by the Delegation of Colombia. As for paragraph (c), they had kept the word “achieve” as requested by the Delegation of Egypt. In paragraph (d), they had added “encourage” as requested by the Delegation of Indonesia. In the last part of the sentence, they had inserted “whether or not commercialized” as suggested by the Delegation of Nigeria. They had added an alternative, Alt 1, which contained a bit of the suggestions by the Delegations of the USA, the EU, on behalf of the EU and its Member States, and Egypt. It read: “This instrument should aim to prevent the [misuse]/[unlawful/illicit appropriation] of traditional knowledge and encourage [tradition-based] creation and innovation.” Alt 2 came from a text proposed by the Delegation of the USA: “The objective of this instrument is to benefit mankind by preserving to the holder of traditional knowledge certain limited in scope and duration rights in a manner conducive to social and economic welfare, balances rights and obligations, and that is mutually advantageous to holders and users of traditional knowledge. This instrument recognizes the value of a vibrant public domain, the body of knowledge available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.” Under “Use of Terms”, they had managed different options for the term “misappropriation”. They had kept Option 1 as: “any access or use of the [subject matter]/[traditional knowledge] without prior informed consent or approval and involvement and, where applicable, without mutual agreed terms, for whatever purpose (commercial, research, academic and technology transfer).” Option 2 was: “is the use of protected traditional knowledge of another where the [subject matter]/[traditional knowledge] has been acquired by the user from the holder through improper means or a breach of confidence and which results in a violation of national law in the provider country, recognizing that acquisition of traditional knowledge through lawful means such as independent discovery or creation, reading books, receiving from sources outside of intact traditional communities, reverse engineering, and inadvertent disclosure resulting from the holders’ failure to take reasonable protection measures is not [misappropriation/misuse/unauthorized use/unfair and inequitable uses].” Option 3, as proposed by the Delegation of Ghana, read: “Any access or use of traditional knowledge of the beneficiaries in violation of customary law and established practices governing the access or use of such traditional knowledge.” In the definition of TK, they had added a couple of observations made by the Delegation of Nigeria, on behalf of the African Group, as well as by the Delegation of Indonesia. The latter was the addition of the sentence “or is an integral part of”, which they had moved from its original place under “Subject Matter of the Instrument” to “Use of Terms”. The article read as follows: “for the purposes of this instrument, is knowledge that is created, maintained, and developed by indigenous peoples and local communities and that is linked with, or is an integral part of, the social identity and/or cultural heritage of indigenous peoples and local communities; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations,

practices, teachings or learnings.” In order to facilitate the text, they had made an additional alternative, Alt 1, which was a facilitator’s text, read: “Traditional knowledge is the collective knowledge of indigenous peoples and local communities, which includes methods, experiences, skills, signs and symbols, and which is part of their cultural heritage and has been developed, [updated] and transmitted from generation to generation.” Alt 2, proposed by the Delegation of India, read: “Traditional knowledge for the purposes of this instrument, is knowledge that is created, maintained, controlled, protected and developed by indigenous people[s], local communities, [and nations] and that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings. Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.” Those were the options for the definition of TK. They had added four definitions, namely secret TK, sacred TK, narrowly diffused TK and widely diffused TK. They had done that in order to facilitate the scope of application of the instrument, as most of the delegations had asked for better definitions and clearer lines to differentiate the different levels of protection that each TK would have. So they were proposing those four definitions that were further linked with the text under Scope of Protection. The definitions were as follows: “Secret Traditional Knowledge is traditional knowledge that is held by beneficiaries under certain measures of secrecy, in accordance with customary law, and under the common understanding that the traditional knowledge is to be used and known only within the specific group.” “Sacred Traditional Knowledge is traditional knowledge that in spite of being secret, narrowly diffused, or widely diffused, constitutes part of the spiritual identity of the beneficiaries.” “Narrowly Diffused Traditional Knowledge is traditional knowledge that is shared by beneficiaries amongst whom measures to keep it secret are not taken, but is not easily accessible to non-group members.” “Widely Diffused Traditional Knowledge is traditional knowledge which is easily accessible by the public but is still culturally connected to its beneficiaries’ social identity.” The idea was to draw lines and differentiate the possible different levels of protection offered in the instrument. They had added the definition of “Unlawful Appropriation” as proposed by the Delegation of the USA: “Unlawful Appropriation is the use of protected traditional knowledge that has been acquired by a user from a traditional knowledge holder through improper means or a breach of confidence which results in a violation of national law in the traditional knowledge holder’s country. Use of protected traditional knowledge that has been acquired by lawful means such as independent discovery or creation, reading publications, reverse engineering, and inadvertent or deliberate disclosure resulting from the traditional knowledge holders failure to take reasonable protective measures, is not unlawful appropriation.” Those were all the changes made under “Use of Terms”.

213. Ms. Bagley, speaking on behalf of the facilitators, said that the next change was to “Subject matter of Instrument”. There was one article and three alternatives. In an effort to clarify and delineate the different positions of Member States, they had deleted the bracketed term “protection” from the title in order to focus the article on subject matter. There was a primary article based on Option 2 but modified by the Delegation of Nigeria, on behalf of the African Group, the Delegation of China and others to delete “directly” among other things, and to insert “transmitted between generations”. It was slightly different than what the African Group had introduced in “Use of Terms”. They had inserted “nations” at the request of the Delegations of China and Thailand. The Delegations of the Islamic Republic of Iran and of Egypt had requested the reinsertion of the word “traditional” before “knowledge”. The primary Article read: “The subject matter of this instrument is traditional knowledge, which is knowledge that is created and maintained in a collective context, that is linked with the social identity and/or cultural heritage of indigenous people[s] and local communities [and nations]; that is transmitted between generations or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms.” Alt 1 was a streamlined provision based on Option 1

that was quite similar to one of the options on subject matter in the GR text and that moved the definition of TK from “Subject Matter” to “Use of Terms”. Alt 1 was very short and read: “This instrument applies to traditional knowledge.” They had also drafted Alt 2 based on Option 3, which had been introduced the day before, but modified by the Delegation of the USA and others to insert “created” as initially proposed by the representative of INBRAPI, to remove the brackets from “directly” as proposed by the Delegation of Switzerland and others, and to incorporate the request by the Delegation of the USA to retain criteria for eligibility from the original text. It also reinserted “traditional” before “knowledge” as requested by the Delegations of the Islamic Republic of Iran and of Egypt. Alt 2 read: “The subject matter of this instrument is traditional knowledge, which is knowledge that is created, maintained, controlled, protected and developed by indigenous people[s] and local communities [and nations] and that is directly linked with the social identity and/or cultural heritage of indigenous people[s] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving. [Criteria for Eligibility. Protected traditional knowledge is traditional knowledge that is [distinctively] associated with the cultural heritage of beneficiaries as defined in Article 2, that is generated, [maintained], shared and transmitted in a collective context, is intergenerational and has been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years].]” There was also Alt 3 based on an intervention by the Delegation of India which included a broad definition of TK. Alt 3 read: “The subject matter of this instrument is traditional knowledge, which is knowledge that is created, maintained, and developed by indigenous people[s] and local communities, whether it is widely spread or not, and that is linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and may take the form of know-how, skills, innovations, practices, teachings or learnings. Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.” Some of that language would have sounded familiar because it was in the original document under “Use of Terms” in the definition of TK. Additional information had been added to that. The next article for revision was Article 2 “Beneficiaries of Protection”. To enhance clarity and delineate positions, the facilitators had included one article and two alternatives, based on several Member States’ interventions. The primary article was based on Option 1 proposed by the Delegation of Ghana and modified by the Delegations of India and Islamic Republic of Iran. It identified beneficiaries as IPLCs plus competent agencies in accordance with national law. It also incorporated a possibility for Member States to designate competent bodies to act as custodians for the beneficiaries in accordance with national law. The first primary article read: “2.1 Beneficiaries of this instrument are indigenous people[s], local communities, and agencies authorized or competent to oversee the use or exploitation of traditional knowledge in accordance with national law”, which was a change based on an option proposed the day before and “2.2 Member states may also designate competent bodies to act as custodians on behalf of beneficiaries in accordance with national law.” That had previously been in Article 2.1 and had been moved to Article 2.2 to flow smoothly with the second sentence: “The identity of any competent agency shall be communicated to the International Bureau of the World Intellectual Property Organization.” That sentence would refer to the competent bodies in Article 2.2 as well as the agencies authorized or competent in Article 2.1. Alt 1 was a modification of Option 2, which identified beneficiaries as IPLCs or holders of knowledge as defined in national laws, based on an addition by the representative of HEP supported by the Delegation of China. Article 2.2 read as follows: “Member states may also designate competent bodies to act as custodians on behalf of beneficiaries, with the consent of the beneficiaries when applicable, in accordance with national law. The identity of any competent agency shall be communicated to the International Bureau of the World Intellectual Property Organization.” There was a footnote to explain that “when applicable” was intended to accommodate situations in which beneficiaries could not be located or identified and possible

other situations which might necessitate the appointment of a competent body or custodian without the consent of the beneficiaries. The footnote read: “Explanatory note: This language is intended to accommodate situations in which beneficiaries cannot be located or identified, and possible other situations that may necessitate the appointment of a competent body or custodian without the consent of the beneficiaries.” Alt 2 had been introduced by the African Group and allowed a State to be a beneficiary along with IPLCs and other beneficiaries. It also allowed States to establish competent national authorities to different beneficiaries in consultation with IPLCs and stakeholders in accordance with customary laws. She said it should not be in brackets and that was a formatting error. Alt 2 read: “2.1 The beneficiaries of this instrument include, where applicable, indigenous peoples, local communities, states, and other beneficiaries as may be determined under national law. 2.2 States may establish competent national authorities to determine beneficiaries of traditional knowledge in consultation with indigenous peoples, local communities, and stakeholders that produce, maintain, develop, and exercise rights of traditional knowledge in accordance with customary law and practices.” The final revised article was Article 3 “Scope of Protection”. Article 3 was a rather complex article. The title had been modified to delete “criteria for” and to simply focus on the scope of protection. Rev 1 included one article and alternatives. The primary article was based on the original text, with modifications by several Member States, including the African Group and the Delegations of Egypt and India. It allowed a category of TK such as secret TK to be defined by national laws, an insertion introduced by the Delegation of Indonesia and it included the right to produce TK, an insertion added by the African Group. It also added the ability to revoke access for good cause, such as use in violation of an access agreement. It added “free” before “prior informed consent.” The Delegation of Egypt had introduced those last two changes. Insertion of the clause “for good cause” was a facilitators’ addition and was italicized. Rev 1, in the primary article, also provided in Article 3.3 that where TK was not protected under Articles 3.1 or 3.2, for example, because it was widely known, it would be protected under Article 3.3, which provided moral rights and possible benefit-sharing. That was a formulation that introduced by the Delegation of India. It was a long provision, and was largely the same as the original text except for the changes mentioned, therefore she did not read through it in its entirety. Alt 1 was a measures-based approach and had been introduced by the Delegation of the EU, on behalf of the EU and its Member States. It was taken from the draft TCE text and stated: “Member States should/shall safeguard the economic and moral interests of the beneficiaries concerning protected traditional knowledge as defined in this instrument, as appropriate and in accordance with national law, in a reasonable and balanced manner.” There was finally Alt 2, which had been developed by the facilitators and was italicized. It provided a streamlined, tiered approach for protection of several categories of TK with Article 3.1, identifying the scope of protection for secret TK and providing it with the broadest range of economic and moral rights. Article 3.2 provided protection for narrowly dispersed TK, providing some rights such as benefit-sharing and attribution but not the right to say no. Article 3.3 related to widely diffused but sacred TK. Because these were brand new provisions, she read them in their entirety: “Alt 2. Where the traditional knowledge is secret, whether or not it is sacred, Member states shall ensure that: (a) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use. (b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge. 3.2 Where the traditional knowledge is narrowly diffused, whether or not it is sacred, Member states shall ensure that: (a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and (b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge. 3.3 Member states should use best endeavors to protect the integrity of traditional knowledge that is widely diffused and sacred.” She added that they had not been able to complete the insertions to Article 3bis on complementary measures. They had made the initial

insertions of “publicly accessible” as introduced by the Delegation of the USA, but they had not been able to introduce all of the changes to that article.

214. [Note from the Secretariat: all speakers thanked the facilitators for their work]. The Delegation of Nigeria, speaking on behalf of the African Group, stated that this was incredibly qualitative work. It wished to clarify whether the phrase “which may be dynamic and evolving” was in Article 1 or not, because it did not appear in the text. However, the facilitator had read it out.

215. Ms. Bagley, speaking on behalf of the facilitator, said that there had been a back and forth among the facilitators because there had been quite a bit of discussion about “dynamic and evolving”. She apologized that it was not reflected. She had not made the change in the document. The decision by the facilitators was to remove it, but if there were Member States who wanted it back in, it was easy to put it back in.

216. [Note from the Secretariat: This part of the session took place after a break.] The Chair recalled that Rev. 1 was an interim document which contained ideas, concepts and views put forward both by Member States and the facilitators. Member States would now have the opportunity to comment and to propose modifications, deletions, corrections and insertions. Reflecting on Rev. 1, it was very clear that while there was some clarity around different positions, there was still some way to go to narrow gaps and make some significant progress on substantive core issues. The Chair first invited the facilitators to comment on an omission.

217. Ms. Bagley, speaking on behalf of the facilitators, said that due to the time constraints, it was possible and actually a fact that there were omissions in including some items or changes requested by Member States. The Delegation of the EU, on behalf of the EU and its Member States, had requested that, throughout the document, the word “peoples” be bracketed, as opposed to just the letter “s” at the end. The facilitators had not completed that throughout. That correction would be made.

218. The representative of Tupaj Amaru said that the request to maintain the “s” of “peoples” in brackets was an insult. He said that the recognition of indigenous peoples was in the Vienna a declaration of 1993, and also in the UNDRIP. Nobody could deny the historical existence of indigenous peoples.

219. The Delegation of Chile, speaking on behalf of GRULAC, had had a very interesting discussion and was preparing group’s position on the alternatives put forward. For the time being, the delegations could express themselves in their national capacity.

220. The Delegation of India, speaking on behalf of the Asia-Pacific Group, said it was not easy to come up with a formulation, which was taking care of different extreme views and trying to find a landing zone. It was too early to give a concrete group’s position, but it had certain specific comments on various articles. There were a lot of desirable elements, as far as most of the members of the Group were concerned. It said that individual delegations would make their statements, if there were some specific issues they wanted to bring to the notice of the plenary. On the Preamble, it was flexible with the addition of the new paragraph (vii). It could go along with the consensus. In “Policy Objectives”, it supported the original text with a few of the members requesting to bracket paragraph (c). Under “Use of Terms”, regarding “misappropriation”, most of the members supported Option 1. However, there were some members who supported Option 2, and they would make that clear in their national statements. For the definition of TK, it supported the original text with the following addition: “nation/states” after IPLCs and “directly” before “linked”, and both in square brackets. For the new text and definitions of secret, sacred, narrowly diffused and widely diffused TK, it wished to bracket them for the time being. It wanted “unlawful appropriation” to be removed from the text. There was a consensus on that. In Article 1, the majority of the members supported all three, without

paragraph 2, with the following changes: to add “nations/states” after IPLCs, add “or integral part of” after “linked with”. However, some members supported Alt 2. On Article 2, it supported Alt 2 with an addition of “as appropriate” after “national authorities” in Article 2.2 to provide an extra layer of safeguards and strengthen the policy space available to Member States. On Article 3, the majority of the members expressed support to the new Alt 3, with the removal of Article 3.3. There were some members who had different views on some of the specific articles, and they would make their statements.

221. The Delegation of Thailand stated that Rev. 1 provided a good basis on some key issues for further review and hopefully for moving towards a common understanding in the near future. It generally supported the position agreed upon by most countries in the Asia-Pacific Group as presented by the Delegation of India. On “Use of Terms”, it was not in a position to accept them as proposed. As those terms were crucially related to the rest of the articles, it needed time to consult more widely with the experts on TK in capital. However, it supported to bracket the paragraph concerning “unlawful appropriation”, as it was unclear and ambiguous and could lead to unfair interpretation of the text as a whole. On Article 1, it supported Alt 3, but wished to have the term “nation” added after the term “local communities” and delete the second paragraph. On Article 2, it supported both Articles 2.1 and 2.2. Regarding Article 3, it preferred Alt 2, but it wished to strengthen Article 3.3 by bringing in some of the language from Article 3.3 from the original text.

222. The representative of HEP said that Cameroon was part of the Economic Community of Central African States. The definition of local communities in the text was problematic because societies were evolving. It was better to take care of that at the national level. The term “traditional” had to be put back in front of “knowledge”. All complementary measures in article were in brackets on this article, but that provision was very important to her.

223. The Chair said that Rev 1 had not addressed Article 3bis. He did not wish to open up that article. He noted that there was no support from a Member State for the proposal made by the representative of HEP.

224. The Delegation of Nigeria, speaking on behalf of the African Group, did not have any comments on the Preamble, as the Group was still consulting. On “Policy Objectives”, it preferred the chapeau language, not Alt 1 or Alt 2. On “Use of terms”, it had only looked at the definition of TK and was still consulting on all the other elements. In the subject matter of the instrument, “the” was missing there. It preferred Alt 1, with an insertion of “national” before “identity”. Regarding Article 2, it supported Alt 2, which was its own proposal, but it wanted to make a minor change, to substitute the term “produce” in Article 2.2 with “create”. However, it was flexible on “produce” but wished to see “create” there to be consistent with the definition of TK. Regarding Article 3, it preferred the facilitators’ texts of Alt 2. It was a good approach to the tiered approach that it supported. In Article 3.3, it wished to delete “and sacred”.

225. The representative of CISA said that indigenous peoples were a people and a nation.

226. The Delegation of the Republic of Korea thanked the statement made by the Delegation of India, on behalf of the Asia-Pacific Group. It would state its opinion on the issues during the informals. Regarding “unlawful appropriation”, it was not in consensus with its removal because the agreement could embrace the specific situation of all Member States.

227. The Delegation of the EU, speaking on behalf of the EU and its Member States, wished to raise a clarification issue to be tackled ahead of Rev 2. The IGC needed to have a coherent system of either using options or alternatives throughout the document. That applied regarding different articles and sometimes it was difficult to know whether they were complementary or real alternatives. Another general remark related to “Preamble” and “Use of Terms”, where it had some questions in relation to the methodology. The IGC had not discussed those, and

therefore the new Alt insertion in “Preamble” and all insertions in “Use of Terms” had to be bracketed. Further, the IGC had agreed to focus on the core issues of the mandate. On “Policy Objectives”, it supported Alt 1 as the basis, and supported a reference to “misuse”. It was important not to duplicate matters, such as those that had been dealt with in other instruments such as the CBD and the Nagoya Protocol, and therefore it did not support “achieve” in paragraph (c). It supported the concepts mentioned in Alt 2, especially the reference to the value of the public domain. On “Use of Terms”, in relation to the definition of TK, it was better to keep the eligibility criteria in an article. Paragraph 2 of Alt 2 was too descriptive and it also contained references to the subject matter discussed in the meetings on GRs. In relation to secret, sacred, narrowly diffused and widely diffused TK, it welcomed a discussion that brought clarity to the tiered approach and the categories as provided by the facilitators. It was interested to hear how those definitions would work out in practice. On Article 1, the link between the ILCs and the subject matter was extremely important. It therefore wished to include “directly” before “linked”. It wished to delete the word “or” so the text would thus read “social identity and cultural heritage”. Paragraph 2 of Alt 3 was too descriptive and it also contained references to the subject matter, which had been discussed in previous IGC meeting. On Article 2, it supported that ILCs were a beneficiary. It could not support other formulations that included nations as a beneficiary, such as “the agencies” mentioned in Article 2.1. It wished to bracket “when applicable” in Article 2.2 of Alt 1. It also requested to delete the related footnote. The TK as described in the footnote did not fulfill the necessary criteria that it supported in Article 1. On Article 3, it supported Alt 1, and preferably it wished to see that option at the start of the article as it was general and provided a framework which would provide adequate flexibility. It did not support a disclosure mechanism in Article 3, nor PIC and MAT. It reserved its position on the rest of the article.

228. The Chair noted the procedural question on options and alternative, which would be dealt with if it had created confusion.

229. The Delegation of the Islamic Republic of Iran, on “Policy Objectives”, supported the original text, not Alt 1 or Alt 2. On “Use of Terms”, it supported Option 1 of the definition of misappropriation. On the definition of TK, it supported the original text, plus the term “nations”. For the new proposal of the facilitators concerning the different kinds of TK, at the moment it was not in a position to have a clear position on that issue, and it preferred to keep that new paragraph in brackets in order to have consultations with the capital. Concerning “unlawful appropriation”, the paragraph should be deleted. For the subject matter, it supported the statement made by the Delegation of India, on behalf of the Asia-Pacific Group, concerning Alt 3 with some modification as proposed. Regarding Article 2, it supported the original text and also supported the last sentence of Article 2.2, concerning the identity of any competent agency to be communicated to the International Bureau, to be in brackets.

230. The Delegation of India, on Policy Objectives, supported the original text with some amendments. In paragraph (a), it wished to retain “unfair and inequitable uses” after “unauthorized use”. In paragraph (c), it wished to add “and fair and equitable benefit sharing” after “involvement”. It wished to put Alt 1 and Alt 2 in square brackets. Under “Use of Terms”, it supported Option 1 of misappropriation, but it reserved its right to come back on that. In the definition of TK, it supported the definition from the original text, along with the second paragraph from Alt 2. It wished to retain the term “nations/states” after ILCs. It was not comfortable with, and wanted to square brackets all the four definitions on the different TK, as the way they would be defined would have a direct impact on Article 3. In Article 1, it supported Alt 3 with the addition of “nation/state” after ILCs, and addition of “or an integral part of” after “linked”. In Article 2, it aligned itself with the Delegation of India, on behalf of the Asia-Pacific Group, and the Delegation of Nigeria, on behalf of the African Groups, by supporting Alt 2. In Article 3, it supported the original text. In the first line of Article 3.3, it corrected that it should read: “where the traditional knowledge is not protected under paragraphs 3.1 and 3.2”. In Alt 2, it wanted to replace Article 3.3 by the original text.

231. The Delegation of the Russian Federation stated that the older version of “promotion of innovation” in the preamble was better with the word “should” which was more convincing than the word “may”. In the section “Policy Objectives” which stated “This document should be aimed at ensuring the beneficiaries and the [nations] ...”, this expressions followed that nations were not the beneficiaries. However, the next line referred to “preventing the misappropriation of their traditional knowledge”, which suggested that nations had TK and, consequently, they might be beneficiaries. In other words, the first sentence contradicted with the second one. It was necessary to adjust.

232. The Delegation of Egypt supported the statement made by the Delegation of Nigeria, on behalf of the African Group. It said that the facilitators had fully respected all the proposals it had made, including a reference to the word “achieve” among other proposals. However, there was one essential point, which had been omitted. It did not accept the use of the word “unlawful appropriation” and had asked to replace it by “illegal appropriation”. The text used “illicit appropriation”. It wished the text to be amended. Regarding Article 1, it supported Alt 3 with the deletion of the second paragraph. On Article 2, it supported Alt 2, and wished to replace the word “authorities” with “bodies” or “entities”. Regarding Alt 1 of Article 3, it should be “rights”, not “interests”, because in IP, one spoke of economic and moral rights, but not interests.

233. The representative of Tulalip Tribes said that more discussions were needed. On “preamble”, he noted that there were relevant international agreements and processes other than those contained in the IP system, for example, the International Covenant on Economic, Social and Cultural Rights, the ILO 169 Convention, and the UNDRIP. He wished to retain the brackets around “promote knowledge” and “safeguard to the public domain”. That was not necessary. He was not aware that the public domain was in any danger and in need of safeguarding. The IGC had to focus on the issue of TK. “Document and conserve TK” needed a lot of work, and might not be supported at the end because the issue of documentation and conservation, especially when it came to access to TK by outsiders, should be under control of IPLCs and subject to their FPIC. He also rejected the issue of “promote innovation” in either alternative. He could imagine another “promote innovation” framework, which did not focus on the benefits to non IPLCs, and was subject to their FPIC. On “Policy Objectives”, he wished to strike nations. He did not have a problem with nations in the administration of rights in Article 5. However, that had to be subject to the FPIC of the TK holders as to how that administration occurred. Nations should not be part of “Policy Objectives” as beneficiaries. He had a textual amendment to paragraph (c): “Achieve the equitable sharing of benefits arising from the use of their traditional knowledge with the free, prior and informed consent of indigenous peoples and local communities, and taking into account customary law as appropriate”. “Approval and involvement” had to be left out because that was a language from the CBD, which was under negotiation and would be discussed at the next COP meeting.

234. The Chair noted that there was no support from a Member State for the proposal made by the representative of Tulalip Tribes.

235. The representative of Tulalip Tribes added that he did not support Alt 2. He also had a textual recommendation for the definition of “misappropriation”. He did not support Option 2, but he saw elements of Options 1 and 3 as being useful. So the new definition would be a combination of those two, and read “3bis. Misappropriation means any access or use of traditional knowledge of the [beneficiaries], indigenous peoples and local communities, without their free prior and informed consent and mutually-agreed terms, in violation of customary law and established practices governing the access or use of such traditional knowledge.” The reason for the brackets was that it depended on the definition of beneficiaries.

236. The Delegation of Colombia supported that suggestion.



237. The representative of Tulalip Tribes indicated that in “Use of Terms”, he supported the first definition of TK. He reserved the discussion on the definition of secret, sacred, narrowly diffused and widely diffused TK, because that would depend on the tiered approach, which had not been discussed. He rejected “unlawful appropriation”. He had some questions about “with the permission of the right holder” that had to be bracketed, because that would depend on who exactly the right holders were. On Article 1, he supported Alt 1. There was no need for the first part of the chapeau because it was just a restatement of the definition of TK. Thus it was just a choice of whether to define TK under subject matter or just refer to the definition under “Use of Terms”. That should be open to further discussion. Under Article 2, he supported Alt 1. However, he wished to bracket “as defined in national law”. Article 2.2 under Alt 1 belonged to the administration of rights, because it was not defining the beneficiaries, but talking about how those rights were administered.

238. The Chair noted that there was no Member State support for bracketing “as defined by national law”.

239. The Delegation of the USA had suggested that regarding Article 3.1, as a preliminary matter, “protected” be placed before TK. It identified some places where that had been omitted. It also pointed out at least one occasion where some language, such as a “should” formulation, had been removed without agreement. In Article 3.1(a)(iv), “protected” should be placed before TK. In Article 3.1(b)(ii), the same “protected” should be placed before TK. In Article 3.1(b) Alt (ii), “protected” should be placed before TK. In Article 3.2 Alt (d), “protected” should be added before TK. In Article 3.3, the words “publicly available”, “widely known” and “in the public domain” had been removed, but those were the wordings that it had previously supported. It preferred to retain that in the text. If others had objected to it, it could be in brackets. In Article 3.3, the word “encourage” had been removed. It wished to retain that language. It also wished to retain the word “should” and have a “should/shall” formulation. In Article 3.3(c), it wished to insert “protected” before TK. In Alt 2 of Article 3.1(a), it wished to insert “protected” before TK. In Alt 2 of Article 3.1(b), it proposed to insert “protected” before TK in three occasions. In Article 3.2(f), “protected” should be inserted before TK. The Delegation said that the facilitators had inserted the italicized text, but, in the spirit of consistency with its suggestion to include “protected” before TK, it wished to retain or include “protected”, even though it might be placed in brackets. With respect to “Policy Objectives”, paragraph 1 of Alt 2 was the language that it had proposed the day before, and in revisiting that paragraph it wanted to provide a clearer formulation: “The objective of this instrument is to contribute towards the protection of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.” The Delegation clarified that it wanted to modify its own proposal in order to clarify its language. It also proposed a few amendments on the criteria for eligibility that had been included by the Delegation in Articles 1 and 3. In Alt 1 of Article 1, under “This instrument applies to traditional knowledge”, it wished to insert new language on criteria for eligibility that read: “In order to be eligible for protection under this instrument, traditional knowledge must be distinctively associated with the cultural heritage of the beneficiaries, as defined in Article 2, and be created, generated, developed, maintained and shared collectively as well as transmitted from generation to generation for a term as has been determined by each Member State but not less than 50 years.” The Delegation said it would be fine to include them in brackets, as the plenary had not discussed and agreed all of those interventions. It also wished to insert a definition of protected TK into the definitions, as follows: “Protected traditional knowledge is traditional knowledge that satisfies the criteria for eligibility under Article 1, and the scope and conditions for protection under Article 3.” On the title of Article 3 “Scope of Protection”, it wished to insert “and Conditions.” In Alt 1 of Article 2.1, it asked to replace “holders of knowledge as defined in national law” with “who hold protected traditional knowledge”. It asked to bracket Article 2.2. It proposed to add a new paragraph to the preamble, which it would address during informals.

240. The Delegation of Japan sought clarification from the facilitators regarding Article 3.3 in the original text, and Articles 3.1 and 3.2 in Alt 2 on the reason for which the word “should” had been deleted. It reiterated that it preferred the word “should” because “shall” prejudged the nature of the legal instrument. The word “shall” had to be bracketed.

241. The Delegation of China wished to mention the essential points and reserved its right to submit other comments. On “Policy Objectives”, it did not want to use neither Alt 1 nor Alt 2. Regarding “misappropriation”, it preferred Option 1. However, in Option 2, “independent creation” could be eliminated. Regarding the rights holders of TK, it noted that they had not taken essential measures to preserve the knowledge. Indeed those rights holders were not aware of that protection, and did not know how to preserve their rights, which meant that TK had been published and that compromised the legitimate rights of TK holders. The Delegation could accept Alt 2, but with adding “nations” after IPLCs. Regarding sacred and secret TK, and their diffusion, it was necessary to provide a definition, which could be placed in Article 3. On Article 1, it preferred Alt 3 as proposed by the Delegation of India. The term “nations” also had to be added. On Article 2, it preferred Alt 2. It supported the request by the Delegation of Nigeria, on behalf the African Group, to add “create” after “produce”.

242. The representative of CISA endorsed the word “nation” because indigenous peoples considered themselves a nation.

243. The Delegation of Switzerland believed that the interventions and proposals were well reflected in Rev. 1. It limited its intervention to a few points. On Article 2, it preferred Alt 1. However, it did not understand the need to appoint a competent body if there were no beneficiaries that could be located or identified in a specific country. It therefore suggested the deletion or bracketing of the footnote in paragraph 2. Moreover, such competent bodies or authorities should not only be established with the consent of ILCs, but also be allowed to be involved in the work of those bodies. It proposed to use the term “direct involvement and approval by indigenous peoples and local communities” instead of “consent of the beneficiaries” in paragraph 2 of Alt 1. Yet that paragraph might better be dealt with under the administration of rights. On Article 3, it appreciated the efforts by the facilitators to further clarify the different levels of protection and the potential measures. That concept clearly needed further discussions and clarifications before it could support it as an alternative. Many terms used to categorize the levels remained unclear. The IGC should have much more discussions at a conceptual level rather than on specific text proposals. That would allow better understanding of the concepts and text proposals put forward by some delegations. It was hoping to move into informals to hear more about the different concepts, including the tiered approach. That would also facilitate the task to put forward outstanding issues to be addressed at IGC 32.

244. The Delegation of South Africa supported the comments made by the Delegation of Nigeria, on behalf of the African Group. It asked to bracket the inclusions made by the Delegation of the USA in Alt 2 of “Policy Objectives” and in Article 3.

245. The Delegation of Canada stated that the facilitators were playing an important role for the IGC because all of them had to try to reflect the diverse wishes of Member States and put them into a text, which was not an easy task. The IGC had spent most of the time revising the working document and text proposals. It recognized that it was part of the mandate, but the IGC mainly had to endeavor to reach a common understanding on core issues. Several options envisaged in the text, and notably the tiered approach, brought the IGC onto unfamiliar ground, which was not based on in-depth national experiences and raised several questions on the central issues. It was quite clear that in order to make headway beyond an exchange of national points of view, the IGC had to answer those questions based on the specific experiences of Member States implementing those options. It hoped that exchanges in plenary or in informals would enable to deepen the discussions and that those who had specific experience in the implementation of protection measures of TK envisaged in Article 3 would

share that with the IGC so as to make the work move ahead. It also had specific, preliminary, non-detailed comments of the Facilitators' text. On Policy Objectives, it had certain queries about certain concepts and terms, particularly, in paragraph (b), how countries defined the traditional and customary contexts and what differences there were between those terms; and in paragraph (c), what "as appropriate" referred to. In paragraph (d), the Delegation reiterated the fact that the instrument should encourage and protect creativity and innovation generally, and not only those which were "tradition-based". Option 3 of the definitions of "misappropriation" did not give much clarity certainty for the non-beneficiaries. On the TK definition, it overlapped with the text in Article 1, therefore it would be useful to discuss that more in detail, especially "dynamic and evolving". It welcomed the efforts of the facilitators to define secret, sacred, narrowly diffused and widely diffused TK, and it needed more time to see how those terms and concepts would be part of the tiered approach under Article 3, noting that the new terms, such as narrowly diffused TK, were not clear. On Article 2, it was concerned about national authorities as beneficiaries. It was wondering how to reconcile those proposals with the functioning of approaches envisaged particularly in Article 3. On Article 3, it reiterated its interest to hear and study specific and practical experiences of Member States who had implemented those approaches, and that would enable it to participate in a clear manner in the discussions. On Article 3.1(a)(iii), it had some concerns with the use of "for good cause". On Article 3bis, the options had been submitted, which were usefully linked to the issue of the scope of protection, but not all States viewed those as complementary measures. Therefore, Article 3bis could be dealt with at the same time as Article 3.

246. The representative of INBRAPI supported the statement made by the representative of Tulalip Tribes and thanked the Delegation of Colombia for having supported the text proposal on the term "misappropriation". Paragraph 5 of the preamble, dealing with the safeguard of the public domain, would contravene the mandate of the IGC, which was to protect TK and not to protect the public domain. On "Policy Objectives", she preferred the initial text, but "and nations" would be better placed in Article 5. Alt 1 and Alt 2 had to be bracketed. On "Use of Terms", since those terms relating to the different TK were important for indigenous peoples, she needed time to consult with the communities to be able to define central concepts in the instrument. She could not accept the inclusion of the word "nations" within the concept of TK. In Alt 2, the word "protected" had to be clarified. She preferred Alt 1 of Article 2, and referred to the statement made by the Delegation of Switzerland that the beneficiaries were IPLCs. The phrase "as defined in national law" would be in contradiction with the national law in Brazil, because national law did not define indigenous peoples. In the Brazilian context, that would be unacceptable so she asked to bracket it. According to the UNDRIP and the Brazilian law, indigenous peoples were defined as who were indigenous. She said she would make more contributions in the informals on Article 3.

247. The Chair noted that there was no support from a Member State for the proposal made by the representative of INBRAPI.

248. The representative of Tupaj Amaru said that, having heard the statements, there was no clarity on the interpretation of TK. He referred to his own proposal for a definition of TK, which he had already submitted.

249. The Chair recalled that there had been no support from a Member State for the proposal made by the representative of Tupaj Amaru.

250. The Delegation of Nigeria, speaking on behalf of the African Group, did not support bracketing any of the facilitators' proposals. Member States should have the opportunity to discuss them in the informals, before any brackets or new ideas were reflected in the text.

251. The Delegation of the Plurinational State of Bolivia noted that there was no longer the part on preventing the granting of IP rights to TK associated with GRs in "Policy Objectives". It was

important to have that paragraph in the text, so as to be able to define a basic objective, which was the protection of TK against misappropriation. It asked the facilitators to restore that paragraph. On Article 1, the second part of the paragraph should not be on eligibility criteria. The Delegation of the USA had introduced the criteria, and it was not appropriate to confine that to the time terms because that meant that any TK that did not fall under that would be left out of the scope of protection. On Article 3, it did not support the term “protected” used before TK, because that would in the future lead to a confusion as to whether that TK, protected or not, came within the scope of the instrument.

252. The Delegation of Indonesia supported the statement made by the Delegation of India, on behalf of the Asia-Pacific Group. It sought clarification of the term of “narrowly diffused” TK and the difference with “closely held” TK. It wondered why that had been changed.

253. The representative of HEP, on Article 3bis, saw that the facilitators had added “publicly accessible”. She wished to delete the square brackets or to add “not publicly accessible”, so as to have two options. On Article 2, beneficiaries should be all those recognized under national legislation. She supported Alt 2. She needed to better understand “unlawful appropriation”.

254. The Chair noted that there was no support from a Member State for the proposal made by the representative of HEP.

255. The Delegation of Brazil seconded the statement made by the Delegation of Nigeria, on behalf of the African Group, not to have any additions or any new text included before the informals. That would allow a more direct exchange of views. Alt 2 of Article 2 was a way to find some flexibility for Member States. Mentioning that some beneficiaries should be determined under national law would not imply directly indigenous peoples, but local communities. There was a need for flexibility to accommodate the different realities of the Member States of WIPO.

256. The Delegation of Colombia supported the comments made by the Delegation of the Plurinational State of Bolivia on Article 1, regarding the time element. It was unacceptable. On Article 3, the comments made by the Delegation of the USA on the insertion of “protected” before TK needed to be discussed further in the informals.

257. The Chair concluded the discussion on Rev. 1 in the plenary and moved to the informals.

258. [Note from the Secretariat: this part of the session took place on the last day of the session and after the distribution of Rev.2.] The Chair thanked the facilitators for their hard work and invited them to introduce Rev. 2.

259. Mr. Uzcategui Jimenez, on behalf of the facilitators, stated that in “Preamble/Introduction”, the first change was on “Consistency with relevant international agreements and processes”. They had decided to add at the end of paragraph (iv) a reference to the UNDRIP. The paragraph read as follows: “Take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that relate to intellectual property and access to and benefit sharing from genetic resources which are associated with that traditional knowledge, [as well as the U.N. Declaration on the Rights of Indigenous Peoples].” The paragraph was bracketed. They had also bracketed paragraph (vi) “Document and conserve traditional knowledge.” They had added a proposal by the Delegation of the USA, which read as follows: [Promote human rights. (vii) Recognize and protect that everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and that this right may not be subject to distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person

belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.]” Then, they had made changes in the alternative text of “Promote innovation”, which read: “[Innovation based on traditional knowledge may contribute to the transfer and dissemination of knowledge for the benefit of the holders and legitimate users of traditional knowledge, as long as it contributes to the facilitation of social and economic welfare and a balance of rights and obligations. The protection of the innovation derived from traditional knowledge empowers communities to manage and control the commercial exploitation of owned intellectual property, as well as collectively benefit from it.]” The whole alternative was bracketed. They had changed “the” for “a” and erased “remains the same” after “balance of rights and obligations” as proposed by the Delegation of Chile, on behalf of GRULAC. They had also changed the numbers in all that part. On “Policy Objectives”, in Alt 1, they had added the heading “This instrument should aim to:” and the paragraphs were as follows: “1. Provide beneficiaries with the means to: (a) prevent the [misappropriation/illegal appropriation, misuse, and unauthorized use], of their traditional knowledge; (b) [control ways in which their traditional knowledge is used beyond the traditional and customary context;] (c) achieve the fair and equitable sharing of benefits arising from the use of their traditional knowledge, with prior informed consent or approval and involvement and taking customary law into consideration as appropriate; and (d) encourage and protect tradition-based creation and innovation, whether or not commercialized. [2. Aid in the prevention of the grant of erroneous intellectual property/[patent rights] over [traditional knowledge and [[traditional knowledge] associated [with] genetic resources].]]” They had removed “nations” based on a discussion held in the informals. They had added in paragraph (a) “illegal appropriation” as proposed by the Delegation of Egypt. They had bracketed paragraph (b). In paragraph (c), they had added “fair and equitable sharing of benefits” based on a discussion in the informals led by the Delegation of India. They had added “and taking customary law in consideration” as proposed by indigenous representatives and supported by Member States. Paragraph (d) was unchanged, except for the numbering. Paragraph 2 was a reinsertion from the original text as solicited by the Delegation of the Plurinational State of Bolivia. Alt 2 read: “This instrument should aim to prevent the [misuse]/[unlawful appropriation] of protected traditional knowledge and encourage [tradition-based] creation and innovation.” They had added “protected” before TK, as requested by the Delegation of the USA. Alt 3 was the text originally proposed and then modified by the Delegation of the USA. The final text read: “The objective of this instrument is to contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations. Recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.”

260. Ms. Hao’uli, on behalf of the facilitators, commented on “Use of Terms”, starting with “misappropriation”. They had changed the options to alternatives to respond to concerns raised by the Delegation of the EU, on behalf of the EU and its Member States, on having different systems within the document. In Alt 2, they had bracketed “independent discovery and creation” as requested by the Delegation of China. Alt 3, which was an addition to Rev. 1, read: “Any access or use of traditional knowledge of the beneficiaries in violation of customary law and established practices governing the access or use of such traditional knowledge.” They had not heard any particular support for that option, and in the future, it would be good to have some discussion about whether it was needed, particularly as the ideas were also captured in the new Alt 4, which had been proposed by the representative of Tulalip Tribes, as follows: “Any access or use of traditional knowledge of the [beneficiaries] indigenous [peoples] or local communities, without their free prior and informed consent and mutually agreed terms, in violation of customary law and established practices governing the access or use of such traditional knowledge.” The definition of protected TK was a new term and a definition proposed by the Delegation of the USA read: “Protected traditional knowledge is traditional knowledge that satisfies the criteria for eligibility under Article 1 and the scope and conditions for protection

under Article 3.” Moving to the definitions for TK, there were two alternatives. They had removed the facilitators’ text, Alt 1 in Rev. 1, as it had had no support from Member States. In Alt 1 of Rev. 2, they had added “and nations/states” as requested by the Asia-Pacific Group. They had added “national and/or” which lead on to social identity and/or cultural heritage based on a proposal by the Delegation of Nigeria, on behalf the African Group. Turning to Alt 2, they had removed paragraph 2, as some Member States had requested, but the Delegation of India had wished to retain paragraph 2, and it had chosen to retain that particular paragraph in Article 1 only, so as to avoid repetition within the text. As many Member States had requested, they had bracketed the new definitions of terms that had been introduced: secret, sacred, narrowly diffused and widely diffused TK, and unlawful appropriation. All those definitions were bracketed but remained in the text.

261. Ms. Bagley, speaking on behalf of the facilitators, presented Articles 1, 2 and 3. As far as possible, they had endeavored to maintain the integrity and the clarity of each proposal by not cluttering them with provisions proffered by opponents. Instead of a primary article and alternatives, they had chosen in Rev. 2 to present all options as alternatives for clarification and ease of reference, and all alternatives were bracketed. For Article 1, they had added “the” in the title so that it read: “Subject matter of the Instrument”, as proposed by the Delegation of Nigeria, on behalf of the African Group. Alt 1 remained a streamlined provision that relied on a definition of TK in “Use of Terms”. It simply read: “This instrument applies to traditional knowledge.” Alt 2 as the primary or original article introduced in Rev. 1 had been modified by interventions by the Delegation of the EU, on behalf of the EU and its Member States, that had introduced “directly” before “linked” and bracketed “peoples” and “and/or”. It read: “The subject matter of this instrument is traditional knowledge, which is knowledge that is created and maintained in a collective context, that is directly linked with the social identity and/or cultural heritage of indigenous [peoples] and local communities [and nations]; that is transmitted between generations or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms.” The former Alt 1 from Rev. 1 was deleted as cumulative to other options and “Use of Terms”. Alt 3 from Rev. 1 had been modified to bracket “peoples” and to bracket “nation/states” as well as the language “or is an integral part of”. It read: “The subject matter of this instrument is traditional knowledge, which is knowledge that is created, maintained, and developed by indigenous [peoples], local communities, and [nations/states], whether it is widely spread or not, and that is linked with, or is an integral part of, the social identity and/or cultural heritage of indigenous [peoples], local communities; that is transmitted from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and may take the form of know-how, skills, innovations, practices, teachings or learnings.” The phrase that Ms. Hao’uli had referred to as being deleted in “Use of Terms” was retained in Alt 3: “[Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]” Alt 4 was a new provision inserted by the Delegation of USA that combined elements of Alt 2 and Alt 3 from Rev. 1. It read: “This instrument applies to traditional knowledge. Criteria for Eligibility. In order to be eligible for protection under this instrument, traditional knowledge must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 2, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years.” Regarding Article 2, in order to enhance clarity and delineate positions, the facilitators had transitioned to using alternatives for the three options in the article. Alt 1 from Rev. 1 had been modified by the Delegation of the USA to replace “holders of knowledge” with “who hold protected knowledge” in Article 2.1 and in Article 2.2, to add “direct involvement and approval” as requested by the Delegation of Switzerland. She hoped that formulation echoed the concerns raised by the Delegation of Chile, on behalf of GRULAC regarding that language. They had deleted “when applicable” and the associated footnote as requested by the Delegation of the EU, on behalf of the EU and its Member States, and the Delegation of Switzerland. It

read: “2.1 Beneficiaries of this instrument are indigenous [peoples] and local communities who hold protected traditional knowledge. [2.2 Member States may also designate competent bodies to act as custodians on behalf of beneficiaries, with the [consent]/[direct involvement, and approval] of the beneficiaries, in accordance with national law. The identity of any competent agency [should/shall] be communicated to the International Bureau of the World Intellectual Property Organization.].” The Delegation of Japan had made a request for the global insertion of “should/shall” in brackets instead of “shall” alone, in order to avoid prejudging the nature of the instrument. Alt 2 from Rev. 1 was modified by the insertion of “nations” in brackets in Articles 2.1 and in 2.2, by inserting “as appropriate” as requested by the Asia-Pacific Group and replacing “produce” with “create” as requested by the Delegation of Nigeria, on behalf of the African Group, and the Delegations of China and Egypt. It read: “2.1 The beneficiaries of this instrument include, where applicable, indigenous peoples, local communities, states, [nations], and other beneficiaries as may be determined under national law. 2.2 States may establish competent national authorities, as appropriate, to determine beneficiaries of traditional knowledge in consultation with indigenous peoples, local communities, and stakeholders that create, maintain, develop, and exercise rights of traditional knowledge in accordance with customary law and practices.].” “Peoples” should be bracketed. Alt 3 was formerly the primary article in Rev. 1 but was modified by the Delegation of the Islamic Republic of Iran to replacing in Article 2.1 the language relating to agencies with “other beneficiaries as may be determined under national law” and under Article 2.2, to allow Member States to designate competent bodies as custodians in accordance with national law, and to delete the requirement that the identity of any competent agency be communicated to WIPO. It read: “2.1 The beneficiaries of this instrument include, where applicable, indigenous [peoples], local communities, and other beneficiaries as may be determined under national law. 2.2 Member States may also designate, as deemed appropriate, competent bodies to act as custodians on behalf of the beneficiaries in accordance with national law.].” Regarding Article 3, the title had been changed to “Scope of and Conditions of Protection” as requested by the Delegation of the USA. There were three alternatives. The primary article in Rev. 1 had been deleted, as no delegation supported its retention in the text. Alt 1 was virtually unchanged from Rev. 1, and all that was added was brackets around “should/shall” as requested by the Delegation of Japan. Alt 1 was a measures-based approach introduced by the Delegation of the EU, on behalf of the EU and its Member States, and brackets were inserted around “protected as part of their original invention”. Alt 2 was carried over from Rev. 1 and had been originally introduced by the facilitators and supported by several Member States. It provided a streamlined, tiered approach for protection of several categories of TK, with Article 3.1 identifying the scope of protection for secret TK and providing it with the broadest range of economic and moral rights and successively lesser rights in Articles 3.2 and 3.3 for other categories of TK. Articles 3.1 to 3.3 included the bracketed term “protected” before TK as requested by the Delegation of the USA. Other Member States had also expressed an interest in the phrase “protected” TK, and the facilitators believed that concept had merit. However, they believed it might be helpful to craft an alternative definition of protected TK, but had lacked the time to engage in that exercise. It should be undertaken at IGC 32. Article 3.3 related to widely diffused TK. Again, “shall” had been changed to bracketed “should/shall” in Articles 3.1 and 3.2 and in 3.3 “in consultation with indigenous and local communities” had been inserted and “sacred” had been bracketed as requested by the Delegation of Nigeria, on behalf of the African Group. The final alternative as Alt 3 was a new provision requested by the Delegation of Indonesia, on behalf of the LMCs, and the Delegation of India. That was a combination of Article 3.3 from the primary or original article in Rev. 1, along with Articles 3.1 and 3.2 from the facilitators’ proposed Alt 2 in Rev. 1. As such, it provided a tiered approach for protection of several categories of TK. A primary difference to Alt 2 was in Article 3.3. The TK was not protected under Article 3.1 or 3.2, for example, because it was widely diffused, would be protected under Article 3.3, which provided moral and economic rights, as introduced by the Delegation of India. It read: “3.1 Where the traditional knowledge is secret, whether or not it is sacred, Member States [should/shall] ensure that: (a) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and

use/utilization of their traditional knowledge; and receive a fair and equitable share of benefits arising from its use. (b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge. 3.2 Where the traditional knowledge is narrowly diffused, whether or not it is sacred, Member States [should/shall] ensure that: (a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and (b) Users attribute said traditional knowledge to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge. 3.3 Where the traditional knowledge is not protected under Paragraphs 3.1 or 3.2, Member States [should/shall] ensure that users of said traditional knowledge: (a) Attribute said traditional knowledge to the beneficiaries; (b) Use the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the traditional knowledge; and (c) Where applicable, deposit any user fee into the fund constituted by such Member state, except in cases where the use is for research or development leading to new and useful products or processes, and in such cases, provide the beneficiaries with a fair and equitable share of benefits realized from the use of said traditional knowledge, based on prior and informed consent and on mutually agreed terms.]” She hoped the proposals had been correctly reflected, noting that omissions errors were unintentional, and was looking forward to continuing the discussions.

262. [Note from the Secretariat: this part of the session took place after a break.] The Chair, after consulting with Member States, had agreed on a modification to Article 3, which was to revert to the original version without the word “protected” and with “sacred” removed. He asked the facilitators to point out the errors and omissions that had been raised in the intervening period.

263. Ms. Bagley, speaking on behalf of the facilitators, said the facilitators had been approached regarding the definition of TK. In Alt 1, they would delete “and/” that was not supposed to be inserted there, and they would bracket “peoples.” In Alt 2 of Article 2.1 and Article 2.2, they would also bracket “peoples”.

264. The Chair opened the floor for comment on Rev 2. In accordance with the agreed methodology, he would only ask for errors and omissions. Comments or textual changes would be placed on the record.

265. [Note from the Secretariat: Many of the delegations and observers which took the floor expressed appreciation for the facilitators’ work.] The Delegation of Indonesia, speaking on behalf of the LMCs, said that Rev. 2 could be used as a basis for discussions in the IGC. It had strong reservations regarding the new concepts and elements introduced during IGC 31 in Rev. 2. More clarifications and discussions on those concepts would be pursued. Regarding Article 3.2, both in Alt 2 and Alt 3, under paragraph (a) there was no reference to “the right to maintain, control, use and develop”. It wanted that language to be integrated. It wished to add reference to PIC and MAT in Articles 3.1 and 3.2 after “and equitable sharing of benefits arising from its use.” It would read: “Beneficiaries have the right to maintain control, use, develop their traditional knowledge and receive fair and equitable share of benefits arising from its use with prior informed consent and mutually agreed terms.”

266. The Delegation of Thailand supported the statement by the Delegation of Indonesia, on behalf of the LMCs. The text, though still full of options, brackets and pending issues, represented the progress made during the limited time available at IGC 31. Rev. 2 should be accepted as one of the working documents for further consideration at IGC 32. However, it had reservations on a number of new terms and concepts that had been introduced. Those new terms and concepts were not sufficiently clarified, were out of the context of TK protection and



could lead to complicated issues outside of the realm of TK protection. It could not accept those new terms and concepts included in Rev. 2. On Article 3, it supported Alt 3 in Rev. 2, but wished to add to Article 3.1 “based on prior informed consent and mutually agreed terms” at the end, to add to Article 3.2(a) the same exclusive and collective right clause as appeared in Article 3.1(a), and also to add a reference to PIC and MAT at the end. As for Article 3.3, it supported paragraphs (a) and (b) but preferred not to have paragraph (c), which could be discussed at a later stage.

267. The Delegation of Chile, speaking on behalf of GRULAC, agreed, generally speaking, on a rights-based approach and a tiered approach to the future instrument(s). Regarding “Preamble”, two references had been added, which had not been discussed. The first in subparagraph (iv) was a reference to the UNDRIP. The second inclusion was a partial combination of what the Universal Declaration of Human Rights stated and the text. That was more complex to deal with because it did not understand the reason behind. Furthermore, in that context or even a contrary, it would seem rather not to be protecting the rights of indigenous peoples. That would cause concern if it was to be included. It preferred not to see it included in the text. Turning to “Policy Objectives”, it did not agree with making a distinction between protected and not protected TK. It was more reasonable to work with a definition of TK and with a tiered approach without incorporating anything additional which added more confusion than clarity. That had already been included in various alternatives in spite of objections from GRULAC and others. It asked the brackets to be put around it in all the alternatives throughout the text. On “Use of Terms”, it did not agree to include any definition of protected TK for the reasons already given. It was favorably disposed towards sacred, secret, widely or narrowly diffused TK. That went hand in hand with the tiered approach, which might give more certainty and clarity to the text. Turning to subject matter, it was still examining the alternatives. However, both Alt 1 and 2 had a final phrase in the initial versions “which may be dynamic or evolving”. There was a proposal from GRULAC to re-include that in Alt 2, if possible. It did not mean that it would prefer it, but it wished to include it in the new Alt 2 that was not making a distinction between protected and not protected content. It could not agree on criteria for eligibility. On Article 3, it noted the changes and was grateful for them. It was working on and assessing the proposals, but noted that progress could be made on that text. Within GRULAC, members had different preferences, so it would give the floor to individual members on those later. GRULAC could not agree to the inclusion of additional conditions. It did not have any special preferences.

268. The Delegation of Nigeria, speaking on behalf of the African Group, stated that the introduction made under “Promote human rights” needed further discussion. It did not have a position on that at that point. On “Policy Objectives”, it supported Alt 1. There had been some inclusions in the text, but it was still a good basis for further discussion. On “Use of Terms”, it supported Alt 1 and thanked for the correction that had been made for the definition of TK. On Article 1, it supported Alt 1 in conjunction with the definition of TK in “Use of Terms”. On Article 2, it supported Alt 2. It also noted changes that had been made, which was to substitute the term the word “produce” with “create”, and it welcomed that. On Article 3, it did not support the inclusion of “and conditions of protection”. It should read “Scope of Protection”. It supported Alt 2 under Article 3. Some changes had been included such as “should/shall”, but the Chair had clarified at the beginning that the term “protected” had been or would be removed from Alt 2 and it welcomed that. In general terms, Rev. 2 reflected the progress made and it was a very good basis for discussion at IGC 32.

269. The Delegation of India, speaking on behalf of the Asia-Pacific Group, stated that Rev. 2 was acceptable to be taken forward to IGC 32. However, there were many new elements, which could lead to confusion. Delegations had to be very careful while discussing those new elements. Otherwise the whole discussion could get derailed and could get into an impasse, which would have to be resolved.

270. The Delegation of the Islamic Republic of Iran stated that Rev. 2 contained some positive points that could be a basis for consideration at IGC 32. But at the same time, there were some new elements and concepts in the draft, which were explicitly contra to the objective of the instrument. Furthermore, some new proposed paragraphs, instead of narrowing the gaps, would lead to fragmentation of the whole instrument. Putting on the table such proposals was not in accordance with the mandate of the IGC to focus on text-based negotiations in order to establish an international legally binding instrument for the effective protection of TK. Concerning “Preamble”, the new proposed paragraph on the promotion of human rights was fully out of context of the IP-related issues and had to be removed from the text. With regard to “Policy Objectives”, it welcomed Alt 1. It could provide a suitable basis for consensus in the future. On “Use of Terms”, it supported the term “appropriation” and preferred Option 1. Concerning the new defined terms on different kinds of TK, in principle it considered them positive, although more time was needed for further consideration. Regarding the term “unlawful appropriation”, it shared the position of other delegations to delete it. On the definition of TK, its preference was Alt 1 with bracketing the term “nations”. On “public domain”, introducing the concept in the discussion might not be compatible with the nature of TK. Alternative concepts to bring balance between private rights and the public interest could be discussed at IGC 32. On Article 1, it preferred Alt 2, minus paragraph 2, and the term nation/state to be in brackets. On “Criteria of Eligibility”, it supported its deletion. On Article 2, beneficiaries had to be decided at the national level, according to the national considerations of each country. The main beneficiaries of TK protection ought to be IPLCs but not exclusively. The States had a role as custodians of the rights. It supported Alt 3. Under Article 3, it supported Alt 3 with the new proposed wording by the Delegation of Indonesia, on behalf of the LMCs.

271. The representative of Tupaj Amaru noted that the text was being undermined and its legal contents diminished, both in format and substance. As regards the terms, sometimes TK appeared in square brackets, other times it was not in square brackets. He requested clarification. The concept of the public domain had not been dealt with in the plenary. TK could not expire because as long as IPLCs were alive, so was their TK. It was difficult to interpret that in an international document. On the word “nation”, lots of delegations had expressed doubts on that term. On “Use of Terms”, in plenary there had been no discussion of the terms “whether commercial or not” so it could not be in the text. On Article 1, he said that his proposals were not in the text. As regards Policy Objectives, he proposed: “This binding international instrument would have as its main objective the legal protection of traditional knowledge of indigenous peoples, preventing the misappropriation and biopiracy in relationships with intellectual property.” On Alt 4 of Article 1, many delegations in plenary had proposed deleting the eligibility criteria. He wondered who had the authority to decide whether something was TK or not. He suggested deleting the criteria for eligibility, in particular “for 50 years” at the end. He added, as far as the beneficiaries were concerned, the way the article was drafted did not correspond to a legal norm. In Alt 2 under Article 2, nations and states were appearing as subjects of international law and owners of TK. That was inconceivable. States could not be beneficiaries.

272. The Delegation of India aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs, and the statement by the Delegation of India, on behalf of the Asia-Pacific Group. Under “Policy Objectives”, it supported Alt 1 as it highlighted the comprehensive aims on which the text needed to be further developed. Regarding “misappropriation”, it supported Alt 1. For the definition of TK, it supported Alt 1 with the inclusion of the formulation “whether it is widely spread or not” after “nations/states”. It was important to retain that type of TK. It wished to bracket the new definitions inserted by the facilitators. In Article 1, it supported Alt 3 along with the second paragraph, but it had requested the first paragraph to be same as Alt 1 under “Use of Terms”. To clarify, two things were missing in the first paragraph of Alt 3, which were: the mention of nation/states after ILCs and “which may be dynamic and evolving” after “other forms”. That was being suggested in order to

bring coherence in the definition provided under “Use of Terms” and under Article 1 in Alt 3. In Article 2, it preferred Alt 2, but could go with Alt 3 with the addition of “nations/states” after ILCs in paragraph 2.1. On Article 3, it aligned itself with the statement made by the Delegation of Indonesia, on behalf of the LMCs. The facilitators had said that Article 3.2 took away only the right to deny. It had observed that “the right to maintain control, use, develop” was also missing. Therefore, it wished to retain it in Article 3.2(1) after “beneficiaries”. It also wished to insert “based on prior informed consent and mutually agreed terms” in Articles 3.1 and 3.2, and “fair and equitable sharing of benefits arising from its use” so that the policy objectives mentioned in paragraph 1(c) were duly incorporated.

273. The Delegation of Canada thought, under Alt 1 of the Policy Objectives, paragraph (d), the objectives of protecting overall creation as an important stand-alone goal. It requested that “tradition-based” be bracketed, in line with the practice used, for example, in Alt 2 where that term was bracketed. That was not to say that it opposed the practice of encouraging tradition-based innovation but that more discussions were needed on that issue. In addition, while it appreciated the attempts at ensuring the integrity of the various options, it was important to reflect flexibility as much as possible, which the bracketing allowed to do. It reiterated that the measures contemplated under Article 3bis should be considered as an integral part of Article 3. It welcomed and appreciated the exchange on national experiences. That sort of conversation contemplated in the mandate was crucial to shed more light on the meaning of the various options. It was key to the IGC’s work and to moving forward. It was committed to the IGC and looked forward to discussing those and other issues by the ongoing dialogue on core issues and achieving progress.

274. The Delegation of the Plurinational State of Bolivia supported the statement made by the Delegation of Chile, on behalf of GRULAC, to the effect that the notion of “protected TK” had to be eliminated because that was not in line with the aims sought in the IGC. Similarly, in Article 1, it reiterated its position concerning the eligibility criteria throughout the text. That was in direct line with the comment on protected TK. The text could not be confined to certain eligibility criteria for TK. That was simply unacceptable. In Article 2, it was important not to consider the word “nations” and instead to try and bring those concepts in line with the CBD and its terminology. In Article 3, it supported the elimination of the words “and conditions” in the title, because that was not in the spirit of the document. It was important to be able to come up with a document where the terms could reflect the nature of TK: imprescriptibility, inalienability, and indivisibility of TK. That would give rise to an acknowledgment of the nature of the subject matter under discussion.

275. The Delegation of Latvia, speaking on behalf of the CEBS Group, said that all its views were correctly reflected in Rev. 2. It appreciated the evidence-based discussions and said that more evidence should be brought to the discussions. It encouraged Member States to consider in a positive manner the study proposed by the Delegation of the EU, on behalf of the EU and its Member States.

276. The Delegation of Ghana aligned itself with the position provided by the Delegation of Nigeria, on behalf of the African Group. It supported Alt 2 of Article 3, subject to the removal of words such as “protected” which the Chair had acknowledged. It also wished to note that in Alt 3 of Article 3, specifically Article 3.3, it had identified certain useful elements, which reflected current national legislative practices and which deserved further consideration at IGC 32.

277. The representative of INBRAPI believed the text was improved and cleaned up. There were very important elements that were encouraging continued discussion in the IGC. In the Preamble, the UNDRIP was consistent with the principle of not reducing the rights of indigenous peoples over their TK, considering that Article 31 was the most complete provision in terms of giving a non-exhaustive list of TK. The IGC had the mandate of discussing a future instrument to protect that. The reference to the UNDRIP was a good initiative and should remain there.

On “Policy Objectives”, she opted for Alt 1 because some of her concerns, such as fair and equitable sharing of benefits, PIC or FPIC, and customary law, had been addressed. As to “Use of Terms”, Alt 4 included her concerns about important elements for the protection of TK in a future legally binding instrument with the spirit of FPIC and MAT and in line with customary law. She was worried that “peoples” was still in brackets. In Article 1, as stated by the Delegation of the Plurinational State of Bolivia, she was concerned about the notion of eligibility criteria that could exclude certain matters, particularly in terms of the timeframe. There were different types of TK in different parts of the world. As far as the beneficiaries were concerned, she believed that the instrument should have IPLCs as beneficiaries. States did have a role to play, but that could be mentioned in another part of the text and could be discussed further in the future. In Article 3, she was pleased to see that the focus on different levels and the tiered approach included moral rights inter alia over TK and that Alt 2 in Article 3 included respect for cultural norms and practices of indigenous peoples as well as the inclusion of fair and equitable benefit sharing. There had to be further discussion on the term “protected” because a lot of knowledge was not currently protected.

278. The Delegation of China stated that the text fully reflected a balance of interventions in the informals or in the plenary. There were some new concepts and elements that appeared in the document that needed further consideration and further study. It reserved its right to come back to some of the issues. It should be reconsidered whether UNDRIP should be mentioned specifically in the Preamble, even though it was very important and meaningful for indigenous people. On “Policy Objectives”, it preferred Alt 1. On “misappropriation”, it preferred Alt 1, and for “traditional Knowledge”, it also preferred Alt 1. It supported the intervention made by the Delegation of India on protected TK. It was unsure about that definition. It asked whether it was necessary to categorize “protected” or “not protected” TK. The text was about TK protection, so it wondered whether it was necessary to have the word “protected”. It was redundant and the issue needed further consideration. On Article 1, it preferred Alt 3. It was important to have consistency with the definitions of terms. On Article 2, it preferred Alt 2. On Article 3, it preferred Alt 3. It supported the intervention by the Delegation of India about PIC and MAT.

279. The Chair said that the Delegation of China had raised an important procedural issue. The introduction of UNDRIP in the preamble had been done by the facilitators. The Chair said that introduction needed support from a Member State.

280. The Delegation of the Plurinational State of Bolivia supported the inclusion of the UNDRIP in the preamble.

281. The Delegation of Egypt supported the position of the Delegation of Nigeria, on behalf of the African Group. It was pleased with what had been obtained during the meeting. It was a sound foundation to continue the negotiations at IGC 32. However, it had reservations about the new elements added. The new additions had to be handled very carefully because the new elements could in fact bring the discussion back to square one after 17 years. It urged delegations to be optimistic and constructive and to do everything in their power to be sure that the IGC’s work be crowned with success.

282. The Delegation of Kenya supported the views made by the Delegation of Nigeria, on behalf of the African Group. It supported the removal of the word “protected” throughout the document. Rev 2 would be a good basis for discussion at IGC 32.

283. The Delegation of the Republic of Korea wished to focus on Rev. 2 as the working document for IGC 32. It supported the proposal made by the Delegation of the EU, on behalf of the EU and its Member States. The study-based, evidence-based approach would be very helpful to better understand core issues and to narrow gaps in future sessions.

284. The representative of Tulalip Tribes said he could move forward based on the text. In order to move forward on the tiered approach, which was interested in exploring, it would be good to have some discussions on what the content of moral rights might be, because depending on the nature of the moral rights granted or recognized, that could make a difference on how a rights-based approach might move forward. He had seen the draft note. There might be something to add to keep the terminology, definitions and explanations of the moral rights and other rights.

285. The Delegation of Indonesia felt comfortable with two terms, “protected TK” and “unlawful appropriation”, on the basis that it would include the fair use doctrine, in which there was a loophole to welcome biopiracy. It suggested that Alt 2 of Article 3.3 include moral and economic rights instead of only protecting the integrity of TK.

286. The Delegation of Chile stated that regarding “Policy Objectives”, it recognized the concerns expressed by other delegations. Under paragraph (d) in Alt 1, it wished to have “tradition-based” in square brackets, in order to be consistent with Alt 2. For consistency, Alt 1 had put once again square brackets on the leading verbs, i.e., “misappropriation”, “unauthorized use”, etc. It wished to have the possibility of choice reflected consistently in Alt 2, including “misappropriation” among the alternatives.

287. The representative of HEP supported the reference to the UNDRIP. In Article 2, she supported Alt 3. In Article 3, she supported Article 3.2.

288. The Delegation of Costa Rica referred to the statement made by the Delegation of the Plurinational State of Bolivia and said it was important to include in the reference to the UNDRIP because it was closely connected to the subject matter of the discussions. It also supported the statement made by the Delegation of Chile, on behalf of GRULAC.

289. The Delegation of Colombia said it could further work on the text. Regarding the text itself, it supported the statement made by the Delegation of Chile, on behalf of GRULAC. It supported the statement by the Delegation of the Plurinational State of Bolivia on “protected TK” and the criteria of eligibility. It did not wish those to be included. It did not agree to have “and conditions” in the title of Article 3. It referred to a comment made in the informals but that had not been included. Paragraph (iv) “to promote access to knowledge and to safeguard the public domain” of the preamble had to be in square brackets.

290. The Delegation of South Africa thanked the Member States for the constructive engagement throughout the session. It aligned itself with the position made by the Delegation of Nigeria, on behalf of the African Group. It joined the Delegation of Kenya in moving forward the removal of “protected TK” throughout the document. It raised concerns on the introduction of new terms, especially “unlawful appropriation” and “protected TK”.

291. The Delegation of Japan wanted to continue to study the text in detail and contribute to the future discussion. Through the informals, it had reaffirmed the importance of an evidence-based approach. It supported the proposal made by the Delegation of the EU, on behalf of the EU and its Member States. Such a study would facilitate discussions.

292. The Delegation of Algeria supported the statement made by the Delegation of Nigeria, on behalf of the African Group. In Rev. 2, the positions that it had expressed had been taken into account as well as the position of the African Group. That gave grounds for great optimism, so as to achieve a binding instrument that would satisfy its expectations.

293. The Delegation of Ecuador was grateful for having had the opportunity to share its experiences. It supported the statement made by the Delegation of Chile, on behalf of

GRULAC. It supported the tiered approach, which was useful to achieve integral protection for TK. It welcomed Rev. 2 as the basis of the work at IGC 32.

294. The Delegation of the Russian Federation stated that its comments had been taken into account. It supported the statement made by the Delegation of Egypt. When reading through Rev. 2, it had a slight feeling of *déjà-vu*. For instance, some phrases had been reintroduced in the text. It hoped that IGC 32 would be able to successfully continue the work Rev. 2 in the right direction.

295. The Delegation of Brazil associated itself with the statement made by the Delegation of Chile, on behalf of GRULAC, supported also by the Delegations of the Plurinational State of Bolivia, Costa Rica, Colombia and Ecuador. It aligned itself with the statement delivered by the Delegation of Indonesia, on behalf of the LMCs. It shared the concerns and was eager to continue the discussion on the issues that had been raised at IGC 32.

296. The Delegation of the EU, speaking on behalf of the EU and its Member States, supported an approach which ensured the integrity of all the proposals voiced during the present session and previous sessions. A common understanding of the objectives and principles was necessary. Without a common understanding, it was difficult to achieve progress. The IGC should not duplicate other instruments and, therefore, it did not support Alt 1 paragraph (c) of the Objectives. Further, it supported Alt 2 of the Objectives and preferred “misuse”, which would cater for a measure-based approach. It supported a reference to the value of the public domain as mentioned in Alt 3. In relation to Article 1, the subject matter needed to have a strong link with ILCs. Therefore, it supported “directly linked”. In relation to Article 2, it supported that ILCs were a beneficiary and, therefore, it supported Alt 1. It was not in a position to support formulations that included nations as a beneficiary. It supported Alt 1 in Article 3. That could give Member States the flexibility needed in addressing those issues. In relation to Alt 2 and Alt 3, the dividing lines between the different levels of TK were still unclear and open to interpretation. It appreciated the information provided by some Member States that had recently enacted legislation or were in the process of developing legislation with regard to TK. It was interesting to hear that some were based on rights while others highlighted the use of databases. Those examples helped inform the debates in a way that discussions based on theory alone could not. It looked forward to more detailed and informative discussions based on how those systems related to the core issues in the document. That would be of particular relevance when it came to the different levels of diffusion as currently contained in the list of terms and Article 3. It needed to understand better how those definitions work out in practice, taking into account all the interests of all stakeholders. The study proposal by the EU and its Member States contained in document WIPO/GRTKF/IC/31/9 was intended to inform the discussions. Without concrete evidence and examples, the IGC would not be able to move forward in a meaningful way. That approach would also be in line with the mandate, which provided for a multi-track approach to the work without prejudging the nature of the outcome. It wished to thank the Delegation of Latvia, on behalf of the CEBS Group, the Delegations of the USA, Canada, Japan and the Republic of Korea, and the representative of Tulalip Tribes for their support. It had listened with great interest to the proposal made by the representative of Tulalip Tribes and looked forward to continuing discussions on that and other proposals that could enrich the terms of reference of the study taking into account its current scope.

297. The representative of the France Freedoms - Danielle Mitterrand Foundation said it had been supporting for many years indigenous peoples, who fought for the right to protect their cultural heritage, particularly against misappropriation and biopiracy. TK was by its very nature outside of the usual IP system. Most legislation on TK confined it to the public domain. Most of the time TK did not meet the criteria for protection of IP. The concept of public domain disregarded the customary laws that already existed. He wondered if they were not mutually exclusive on that point. The draft instrument under discussion, as supported by the Indigenous Caucus, had to give central place to the customary laws governing TK, in conformity with the

fundamental rights recognized by the UNDRIP. The purpose of the instrument should consist of States granting real legal status to the TK of indigenous peoples in their domestic legislation on the basis of customary laws. That would contribute to creating a bridge between IP and TK. He referred to Article 12 of the Nagoya Protocol, which called on States to take into account indigenous peoples' customary laws when accessing TK. Rev. 2 integrated customary laws and protocols in its Preamble, the objectives and "Use of Terms". However, to be legally important, customary laws had to be included in the body of the text. Otherwise those provisions would only be symbolic.

298. The Delegation of Nigeria supported the statements made by the Delegation of Nigeria, on behalf of the African Group, and reaffirmed its support for Rev. 2, which needed to be adjusted with further discussion. Nevertheless, there appeared to be an important sense both of the significance of the work and the possibility of that work to improve the lives and to sustain the livelihood of IPLCs. It recalled not only the mandate but also the nature of the tasks, which despite how long the road had been, remained an important objective to assure that all forms of knowledge and that all people's knowledge was accorded some legal protection, both to encourage and to stimulate ongoing innovation and production of knowledge. It also recognized that there had been incremental narrowing of gaps. It celebrated that and hoped that that kind of attitude and spirit of cooperation would continue and that IGC 32 would be filled with a renewed sense of determination with vigor and with greater clarity to move forward.

299. The Chair closed the discussion on Rev. 2, and introduced the indicative list of outstanding/pending issues to be tackled at the next session. He opened the floor for comments.

300. The Delegation of Nigeria, speaking on behalf of the African Group, said that "Use and meaning of certain terms and concepts" seemed to capture all the elements where agreement had not been reached. There was however a widening of gaps instead of a narrowing of gaps. The list was for note taking and it did not mean that all elements would be discussed at IGC 32. It wished to focus on some elements in particular.

301. The representative of the Tulalip Tribes pointed out that, in point 1. "Use and meanings of certain terms and concepts", it would be helpful to have "moral rights" explained; and in point 4. "Scope of protection", after "economic and/or moral rights", "and other relevant rights" could be added, to capture all rights that could be needed to make the tiered approach go forward.

302. The Delegation of Chile, speaking on behalf of GRULAC, said that there should be no brackets around "indigenous peoples". On subject matter, there was a difference between the two proposals. One included criteria for eligibility without an adequate reflection of what had been said in the informals or in the plenary concerning a questioning process of the eligibility criteria. It suggested replacing "where and how to include" with "whether to include". During the informals, the exchanges of views had been very interesting; they had helped understand what was going on in practice and what was behind those various concepts. It said that there was a clear link between TK and TCEs. It suggested adding an element for consideration as follows: "Consider the overlap between TK and TCEs".

303. The Delegation of Brazil supported the statement delivered by the Delegation of Chile, on behalf of GRULAC.

304. The Delegation of Colombia supported the statement made by the Delegation of Chile, on behalf of GRULAC. It was quite bothered with the brackets under "Use and meanings of certain terms and concepts". It had a lengthy discussion and it was surprising to see such an important notion still in brackets.

305. The Delegation of Ecuador supported the statement by the Delegation of Chile, on behalf of GRULAC.

306. The Chair closed the agenda item.

*Decision on Agenda Item 6:*

307. *The Committee developed, on the basis of document WIPO/GRTKF/IC/31/4, a further text, “The Protection of Traditional Knowledge: Draft Articles Rev. 2”. The Committee decided that this text, as at the close of this agenda item on September 23, 2016, be transmitted to the Thirty-Second session of the Committee, in accordance with the Committee’s mandate for 2016-2017 and the work program for 2017, as contained in document WO/GA/47/19.*

308. *The Committee also decided to transmit to the next session of the Committee an “Indicative List of Outstanding/Pending Issues to be Tackled/Solved at the Next Session”, copy annexed.*

309. *The Committee took note of and held discussions on documents WIPO/GRTKF/IC/31/5, WIPO/GRTKF/IC/31/6, WIPO/GRTKF/IC/31/7, WIPO/GRTKF/IC/31/8, WIPO/GRTKF/IC/31/9, WIPO/GRTKF/IC/31/INF/7, WIPO/GRTKF/IC/31/INF/8 and WIPO/GRTKF/IC/31/INF/9.*

**AGENDA ITEM 7: 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**

310. Further to the 2010 WIPO General Assembly decision “to instruct the relevant WIPO Bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations”, the Chair invited delegations and observers to discuss the contribution of the IGC to the implementation of the Development Agenda (DA) Recommendations.

311. The Delegation of Nigeria, speaking on behalf of the African Group, acknowledged the various technical assistance and capacity-building activities undertaken by the Traditional Knowledge Division and WIPO in general, to provide regulatory advice and other development-oriented assistance to developing and least developed countries. It emphasized Development



Agenda Recommendation 18, which, when adopted in 2007, urged the IGC to “accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to the outcome, including the possible development of an international instrument or instruments.” In that context, a resounding and unassailable contribution of the IGC to the implementation of the Development Agenda recommendations was a conclusion of the three-subject IGC negotiations with an outcome of a minimum standard, functional international legally binding instrument that enhanced the transparency and efficacy of the international IP system, promoted and protected tradition-based knowledge, creation and innovation in the modern IP framework (whether commercialized or not), and ensured equitable economic benefits, and as appropriate, moral rights, for the owners of such knowledge. The assistance provided by WIPO in the sphere of IGC-related topics had to be demand driven, development oriented, transparent, and respond to the specific priorities and/or development needs of the demanding country. It was also crucial that such engagements take into account the existing flexibilities in the international IP system. The African Group remained committed to achieving the Group’s objective desire within the IGC and would continue to engage constructively.

312. The Delegation of Brazil recalled that the IGC had resumed its activities after a hiatus of more than one year. The existence of the IGC was a condition for the implementation of at least one of the Development Agenda recommendations, Recommendation 18. Other recommendations were also involved in the IGC’s work, namely Recommendations 15, 16, 17, 19 and 22. In 2016, there had been two IGC sessions: IGC 29 and IGC 30, dealing with the relationship between GRs and the IP system, which had contributed to accelerating the IGC process towards a legally-binding instrument. The Delegation was hopeful that the current and future sessions would continue to follow Recommendation 18, as well as continue to implement other relevant recommendations.

313. The Delegation of China appreciated the contributions of the IGC to the implementation of the Development Agenda and aligned itself with the statements made by the Delegation of Nigeria, on behalf of the African Group, and by the Delegation of Brazil. The protection of GRs, TK and TCEs reflected diversified aspirations of all countries, and the balance between creativity and tradition. It hoped to continue to pursue the work so as to realize the aspirations of developing countries, particularly least developed countries, in that area.

314. The Representative of the Tulalip Tribes, speaking on behalf of the Indigenous Caucus, said that the previous year, the United Nations General Assembly had adopted the Sustainable Development Goals (SDGs), which aimed to eliminate extreme poverty by 2030, and to leave no-one behind in achieving sustainable development. He drew attention to the SDG target under the goal to end extreme poverty, which required States to ensure that all men and women, in particular the poor and the vulnerable, had equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property. For indigenous peoples, ownership over “other forms of property” included ownership of TK, TCEs and other community intellectual creations. He recommended that Member States of the IGC take cognizance of that SDG target in the course of the negotiations. In order to comply with the Outcome Document of the World Conference on Indigenous Peoples, the United Nations had adopted the System-Wide Action Plan for ensuring a coherent approach to achieving the ends of the Declaration on the Rights of Indigenous Peoples (the SWAP). The SWAP ultimately aimed at contributing to the realization of indigenous peoples’ rights at the country level through reinforced support by the UN system to Member States in that regard. He urged Member States of the IGC to ensure coherence between the instruments being negotiated and other international legal instruments on the rights of indigenous peoples. Any instrument developed by the IGC should not diminish the rights of Indigenous peoples under other international legal instruments.

315. The Delegation of India aligned itself with the statements made by the Delegation of Nigeria, on behalf of the African Group, and by the Delegations of Brazil and China. The

Delegation had been a major demandeur for addressing the misappropriation of GRs, TK and TCEs. It expected that the work of IGC would result in a legally binding instrument(s) to protect and promote GRs, TK and TCEs, thereby addressing various Development Agenda recommendations. The Delegation appreciated and encouraged the work of WIPO in the mainstreaming of the Development Agenda in its work.

*Decision on Agenda Item 7:*

*316. 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 also be transmitted to the WIPO General Assembly taking place from October 3 to 11, 2016, in line with the decision taken by the 2010 WIPO General Assembly related to the Development Agenda Coordination Mechanism.*

**AGENDA ITEM 8: ANY OTHER BUSINESS**

*Decision on Agenda Item 8:*

*317. There was no discussion under this item.*

**AGENDA ITEM 9: CLOSING OF THE SESSION**

318. The Chair thanked the Vice-Chairs, Ambassador Tene and Mr. Liedes. He thanked the facilitators. He also thanked the Secretariat who made sure that the meeting had run smoothly and did all the background work and supported the facilitators and the Vice-Chairs. The Chair, the Vice-Chairs and the Secretariat operated as a team. They met regularly to discuss progress and took feedback and commentary from everybody, then made judgments on those. He thanked the Regional Coordinators who played a critical role in keeping him informed and working between him and Member States to ensure that the IGC could move forward and make the meeting successful. He indicated his strong support for the Indigenous Caucus and the work they did. Noting the fact that the Voluntary Fund was devoid of funds, he thanked the Delegation of the USA for the funds provided to enable more indigenous representatives to come to the meeting. The indigenous representatives were critical in contributing to the discussions, and it was very important that they were represented. He pleaded for contributions to the Voluntary Fund between IGC 31 and IGC 32. Industry representatives and civil society were also key stakeholders in the discussions. Their views and comments needed to be carefully considered because any outcome needed to balance all interests. Lastly, he thanked Member States as the most important group that made IGC 31 successful. The meeting had been productive and had been held in a very good atmosphere. Some of the discussions had been very good, particularly some of the discussions on practical examples. The IGC had to continue in that vein. He asked Member States, between IGC 31 and 32, to take a serious look at the material in Rev 2 and start to consider that material and analyze it. The Seminar on Intellectual Property and Genetic Resources had been very successful. He hoped there would be a similar one on TK, which could also help to unpick some of the core issues and narrow some gaps. He would start to think about the Chair's Information Note, which, once again, had

no status and was clearly his views only and not prejudicial to Member States' views. He thanked the interpreters.

319. The Chair closed the session.

*Decision on Agenda Item 9:*

*320. The Committee adopted its decisions on agenda items 2, 3, 4, 5, 6 and 7 on September 23, 2016. It agreed that a draft written report, containing the agreed text of these decisions and all interventions made to the Committee, would be prepared and circulated by October 28, 2016. 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 is 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)

**AFRIQUE DU SUD/SOUTH AFRICA**

Velaphi SKOSANA (Ms.), Senior Manager, Indigenous Cultural Expression and Knowledge, Department of Trade and Industry, Companies and Intellectual Property Commission (CIPC), Pretoria  
[vskosana@cipc.co.za](mailto:vskosana@cipc.co.za)

Tom SUCHANANDAN, Expert, Policy Development, Department of Science and Technology (DST), Pretoria

Shumi PANGO (Ms.), Expert, Department of Science and Technology (DST), Minister of Science and Technology, Pretoria

**ALGÉRIE/ALGERIA**

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

Fayssal ALLEK, premier secrétaire, Mission permanente, Genève  
[allek@mission-algeria.ch](mailto:allek@mission-algeria.ch)

**ALLEMAGNE/GERMANY**

Pamela WILLE (Ms.), Counsellor, Economic Division, Permanent Mission, Geneva  
[wi-2-io@genf.diplo.de](mailto:wi-2-io@genf.diplo.de)

Arne WEGNER, Intern, Economic Division, Permanent Mission, Geneva  
[wi-s1-io@genf.diplo.de](mailto:wi-s1-io@genf.diplo.de)

**ARABIE SAOUDITE/SAUDI ARABIA**

Abdulmunsen ALJEED, Director, Examination Department, Saudi Patents Office (SPO), King Abdulaziz City for Science and Technology (KACST), Riyadh  
[aljeed@kacst.edu.sa](mailto:aljeed@kacst.edu.sa)

**ARGENTINE/ARGENTINA**

María Inés RODRÍGUEZ (Sra.), Consejera, Misión Permanente, Ginebra

AUSTRALIE/AUSTRALIA

Ian GOSS, General Manager, Continuous Improvement Projects, IP Australia, Canberra

Aideen FITZGERALD (Ms.), Assistant Director, International Policy and Cooperation Section,  
IP Australia, Canberra  
[aideen.fitzgerald@ipaaustralia.gov.au](mailto:aideen.fitzgerald@ipaaustralia.gov.au)

Felicity HAMMOND (Ms.), First Secretary, Permanent Mission to the World Trade Organization  
(WTO), Geneva  
[felicity.hammond@dfat.gov.au](mailto:felicity.hammond@dfat.gov.au)

AUTRICHE/AUSTRIA

Charline VAN DER BEEK (Ms.), Attaché, Permanent Mission, Geneva

Pia HAUBENWALLNER (Ms.), Intern, Permanent Mission, Geneva

AZERBAÏDJAN/AZERBAIJAN

Zahir HAJIYEV, Head, Examining and Legal Enforcement Department, State Committee for  
Standardization, Metrology and Patents, Center of Examination on Industrial Property Objects,  
Baku

Rustam AGHAYEV, Deputy Head, Department of Finance and Economy, Copyright Agency,  
Baku  
[mha@copaq.gov.az](mailto:mha@copaq.gov.az)

BAHAMAS

Bernadette BUTLER (Ms.), Minister-Counsellor, Permanent Mission, Geneva  
[bbutler@bahamasmission.ch](mailto:bbutler@bahamasmission.ch)

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

Horacio Gabriel USQUIANO VARGAS, Director General de Integración y Cooperación  
Económica, Viceministerio de Comercio Exterior e Integración, La Paz

Luis Fernando ROSALES LOZADA, Primer Secretario, Misión Permanente, Ginebra  
[fernando.rosales@mission-bolivia.ch](mailto:fernando.rosales@mission-bolivia.ch)

BRÉSIL/BRAZIL

Rodrigo MENDES ARAUJO, First Secretary, Permanent Mission to the World Trade  
Organization (WTO), Geneva

CAMBODGE/CAMBODIA

OP Rady, Director, Intellectual Property Department, Ministry of Commerce, Phnom Penh  
[oprady@yahoo.com](mailto:oprady@yahoo.com)

CAMEROUN/CAMEROON

Célestin SIETCHOUA DJUITCHOKO, chef, Division des affaires juridiques, Ministère des arts et de la culture, Yaoundé  
[sietchouacelestin@yahoo.fr](mailto:sietchouacelestin@yahoo.fr)

Boubakar LIKIBY, secrétaire permanent, Comité national de développement des technologies (CNDT), Ministère de la recherche scientifique et de l'innovation (MINRESI), Yaoundé  
[likibyboubakar@gmail.com](mailto:likibyboubakar@gmail.com)

Edwige Christelle NAAMBOW ANABA (Mme), experte, Comité national de développement des technologies (CNDT), Ministère de la recherche scientifique et de l'innovation (MINRESI), Yaoundé

CANADA

Nicolas LESIEUR, Senior Trade Policy Officer, Intellectual Property Policy Division, Global Affairs Canada, Ottawa

Shelley ROWE (Ms.), Senior Leader, Copyright and Trade-mark Policy Directorate, Intellectual Property, Ottawa

Frédérique DELAPRÉE (Ms.), Second Secretary, Permanent Mission, Geneva

CHILI/CHILE

Nelson CAMPOS, Asesor Legal, Departamento de Propiedad Intelectual, Dirección General de Relaciones Económicas Internacionales (DIRECON), Ministerio de Relaciones Exteriores, Santiago  
[ncampos@direcon.gob.cl](mailto:ncampos@direcon.gob.cl)

Marcela PAIVA (Sra.), Consejera, Misión Permanente ante la Organización Mundial del Comercio (OMC), Ginebra  
[mpaiva@minrel.gob.cl](mailto:mpaiva@minrel.gob.cl)

CHINE/CHINA

YAO Xin, Deputy Director of Division 3, Legal Affairs Department, State Intellectual Property Office (SIPO), Beijing

WANG Wei, Project Administrator, International Cooperation Department, State Intellectual Property Office (SIPO), Beijing

SHI Yuefeng, Attaché, Permanent Mission, Geneva

COLOMBIE/COLOMBIA

Daniela RODRÍGUEZ URIBE (Sra.), Asesora de Patrimonio Inmaterial, Dirección de Patrimonio, Ministerio de Cultura, Bogotá D.C.

Manuel CHACÓN, Consejero Comercial, Misión Permanente ante la Organización Mundial del Comercio (OMC), Ginebra  
[mchacon@mincit.gov.co](mailto:mchacon@mincit.gov.co)

Juan Camilo SARETZKI FORERO, Consejero, Misión Permanente, Ginebra

Luis Carlos SACHICA, Pasante, Misión Permanente, Ginebra

CONGO

Edwige Julienne PEA (Mme), chef, Bureau de la documentation, Ministère de l'économie, du développement industriel et de la promotion du secteur privé, Antenne nationale de la propriété industrielle (ANPI), Brazzaville

COSTA RICA

Maribel ÁLVAREZ MORA (Sra.), Asesora Legal, Comisión Nacional para la Gestión de la Biodiversidad (CONAGEBIO), Ministerio de Ambiente y Energía, San José  
[malvarezminae@yahoo.es](mailto:malvarezminae@yahoo.es)

CÔTE D'IVOIRE

Kumou MANKONGA, premier secrétaire, Mission permanente, Genève

CUBA

Madelyn RODRÍGUEZ LARA (Sra.), Primer Secretario, Misión Permanente, Ginebra  
[m\\_rodriguez@missioncuba.ch](mailto:m_rodriguez@missioncuba.ch)

DANEMARK/DENMARK

Mette Wiuff KORSHOLM (Ms.), Legal Adviser, Danish Patent and Trademark Office, Ministry of Business and Growth, Taastrup

ÉGYPTE/EGYPT

Hassan ELBADRAWY, Vice President, Court of Cassation, Cairo

ÉMIRATS ARABES UNIS/UNITED ARAB EMIRATES

Shaima AL-AKEL (Ms.), International Organizations Executive, Permanent Mission to the World Trade Organization (WTO), Geneva

## ÉQUATEUR/ECUADOR

Emilio Fernando UZCATEGUI JIMÉNEZ, Asesor, Subsecretaría General de Ciencia, Tecnología e Innovación, Secretaría de Educación Superior, Ciencia, Tecnología e Innovación, Quito  
[euzcategui@senescyt.gob.ec](mailto:euzcategui@senescyt.gob.ec)

Ñusta MALDONADO (Sra.), Tercer Secretario, Misión Permanente, Ginebra  
[nmaldonado@cancilleria.gob.ec](mailto:nmaldonado@cancilleria.gob.ec)

## ESPAGNE/SPAIN

Ana María URRECHA ESPULGA (Sra.), Consejera Técnica, Departamento de Coordinación Jurídica y Relaciones Internacionales, Oficina Española de Patentes y Marcas (OEPM), Ministerio de Industria, Energía y Turismo, Madrid  
[ana.urrecha@oepm.es](mailto:ana.urrecha@oepm.es)

Oriol ESCALAS NOLLA, Consejero, Misión Permanente, Ginebra

## ESTONIE/ESTONIA

Gea LEPIK (Ms.), Adviser, Legislative Policy Department, Private Law Division, Ministry of Justice, Tallinn  
[gea.lepik@ut.ee](mailto:gea.lepik@ut.ee)

Veikko MONTONEN, Second Secretary, Permanent Mission, Geneva  
[veikko.montonen@mfa.ee](mailto:veikko.montonen@mfa.ee)

## ÉTATS-UNIS D'AMÉRIQUE/USA

Dominic KEATING, Director, Intellectual Property Attaché Program, Office of Policy and International Affairs, United States Patent and Trademark Office (USPTO), Alexandria

Aurelia SCHULTZ (Ms.), Counsellor, Policy and International Affairs, Copyright Office, Washington D.C.  
[aschu@loc.gov](mailto:aschu@loc.gov)

Peter MEHRAVARI, Patent Attorney, United States Patent and Trademark Office (USPTO), Alexandria

Deborah LASHLEY-JOHNSON (Ms.), Intellectual Property Attaché, Permanent Mission to the World Trade Organization (WTO), Geneva

Kristine SCHLEGELMILCH (Ms.), Intellectual Property Attaché, Permanent Mission, Geneva

Yasmine FULENA (Ms.), Intellectual Property Assistant, Permanent Mission, Geneva



### ÉTHIOPIE/ETHIOPIA

Negash Kebret BOTORA, Ambassador, Permanent Representative, Permanent Mission, Geneva

Yoseph Kassaye YOSEPH, Minister Counsellor, Permanent Mission, Geneva  
Frew Hailu WONDIMNEH, Head, Legal Department, Ethiopian Intellectual Property Office (EIPO), Addis Ababa

Yanit Abera HABTEMARIAM (Ms.), Second Secretary, Permanent Mission, Geneva

### FÉDÉRATION DE RUSSIE/RUSSIAN FEDERATION

Oleg NERETIN, Advisor, Federal Institute of Industrial Property, Federal Service for Intellectual Property (ROSPATENT), Moscow

Larisa SIMONOVA (Ms.), Researcher, Law Division, Federal Service for Intellectual Property (ROSPATENT), Moscow

Andrei KALININ, Counsellor, Permanent Mission, Geneva

### FIDJI/FIJI

Lyanne VANURASI (Ms.), Deputy Chief Law Draftsperson, Legislative Drafting, Office of the Attorney-General, Suva  
[lyanne.vaurasi@govnet.gov.fj](mailto:lyanne.vaurasi@govnet.gov.fj)

Timaima VAKADEWABUKA (Ms.), Principal Legal Officer, Legislative Drafting, Office of the Attorney-General, Suva  
[timaima.vakadewabuka@govnet.gov.fj](mailto:timaima.vakadewabuka@govnet.gov.fj)

Ajendra Adarsh PRATAP, First Secretary, Permanent Mission, Geneva

### FINLANDE/FINLAND

Jukka LIEDES, Special Adviser to the Government, Helsinki

Heli HONKAPÄÄ (Ms.), Senior Government Secretary, Ministry for Economic Affairs and Employment, Helsinki

Anna VUOPALA (Ms.), Government Counsellor, Copyright and Economy of Culture Department, Ministry of Education and Culture, Helsinki  
[anna.vuopala@minedu.fi](mailto:anna.vuopala@minedu.fi)

Soile KAURANEN (Ms.), Counsellor, Permanent Mission, Geneva

### FRANCE

Olivier MARTIN, conseiller, Mission permanente, Genève

## GHANA

Kwame Ntim DONKOH, Minister, Commercial Affairs, Permanent Mission, Geneva

Sarah Norkor ANKU (Ms.), State Attorney, Registrar General Department, Ministry of Justice, Accra

Paul KURUK, Professor of Law, Institute for African Development (INADEV), Accra

Joseph OWUSU-ANSAH, First Secretary, Permanent Mission, Geneva

## GRÈCE/GREECE

Paraskevi NAKIOU (Ms.), Attaché, Permanent Mission, Geneva

## GUATEMALA

Flor de María GARCÍA DÍAZ (Sra.), Consejera, Misión Permanente ante la Organización Mundial del Comercio (OMC), Ginebra  
[flor.garcia@wtoqueatemala.ch](mailto:flor.garcia@wtoqueatemala.ch)

## HONDURAS

Franklin Omar LÓPEZ SANTOS, Registrador Adjunto, Dirección General de Propiedad Intelectual (DIGEPIH), Instituto de la Propiedad, Tegucigalpa  
[fols@yahoo.com](mailto:fols@yahoo.com)

## HONGRIE/HUNGARY

Krisztina KOVÁCS (Ms.), Head, Industrial Property Law Section, Hungarian Intellectual Property Office (HIPO), Budapest

## ÎLES SALOMON/SOLOMON ISLANDS

Andrew Eéwa HOULIA, Deputy Director, Department of Culture, Ministry of Culture and Tourism, Honiara

Christina G. WINI (Ms.), Administrative Officer, Permanent Mission, Geneva  
[ck@solomonislandsmission.ch](mailto:ck@solomonislandsmission.ch)

## INDE/INDIA

Ghazala JAVED (Ms.), Scientist-IV, International Cooperation, Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH), New Delhi  
[javed\\_ghazal@yahoo.com](mailto:javed_ghazal@yahoo.com)

Sumit SETH, First Secretary, Permanent Mission, Geneva

INDONÉSIE/INDONESIA

Robert Matheus Michael TENE, Ambassador, Deputy Permanent Representative, Permanent Mission, Geneva

Miranda Risang AYU (Ms.), Lecturer, Faculty of Law, Padjadjaran University, Bandung

Erry Wahyu PRASETYO, Third Secretary, Permanent Mission, Geneva  
[erry.prasetyo@mission-indonesia.org](mailto:erry.prasetyo@mission-indonesia.org)

IRAN (RÉPUBLIQUE ISLAMIQUE D')/IRAN (ISLAMIC REPUBLIC OF)

Yousef NOURIKIA, Legal Expert, Legal Department, Ministry of Foreign Affairs, Tehran

Reza DEHGHANI, First Secretary, Permanent Mission, Geneva

IRAQ

Baqir RASHEED, Second Secretary, Permanent Mission, Geneva  
[brnjar@gmail.com](mailto:brnjar@gmail.com)

ISRAËL/ISRAEL

Judith GALILEE-METZER (Ms.), Counselor, Permanent Mission, Geneva  
[reporter3@geneva.mfa.gov.il](mailto:reporter3@geneva.mfa.gov.il)

Dan ZAFRIR, Adviser, Permanent Mission, Geneva  
[reporter3@geneva.mfa.gov.il](mailto:reporter3@geneva.mfa.gov.il)

ITALIE/ITALY

Vittorio RAGONESI, Legal Adviser, Ministry of Foreign Affairs, Rome

Maria-Chiara MALAGUTI (Ms.), Consultant, Ministry of Foreign Affairs, Rome

Matteo EVANGELISTA, First Secretary, Permanent Mission, Geneva  
[matteo.evangelista@esteri.it](mailto:matteo.evangelista@esteri.it)

Alessandro MANDANICI, First Secretary, Permanent Mission, Geneva  
[alessandro.mandanici@esteri.it](mailto:alessandro.mandanici@esteri.it)

Carlo FAVARETTO, Intern, Permanent Mission, Geneva  
[wipostage.ginevra@esteri.it](mailto:wipostage.ginevra@esteri.it)

JAMAÏQUE/JAMAICA

Simara HOWELL (Ms.), First Secretary, Permanent Mission, Geneva

JAPON/JAPAN

Yoshihito KOBAYASHI, Deputy Director, International Affairs Division, Agency for Cultural Affairs, Tokyo

Hirohisa OHSE, Deputy Director, Intellectual Property Affairs Division, Japan Patent Office (JPO), Tokyo

Hiroki UEJIMA, Deputy Director, International Policy Division, General Affairs Department, Japan Patent Office (JPO), Tokyo

Ryo KASAHARA, Assistant Director, International Policy Division, General Affairs Department, Japan Patent Office (JPO), Tokyo

Kenji SAITO, First Secretary, Permanent Mission, Geneva

KAZAKHSTAN

Zhasulan DZHIENBEKOV (Ms.), Head, Department of Intellectual Property Rights, Ministry of Justice of the Republic of Kazakhstan, Astana  
[zh.jiyenbekov@adilet.gov.kz](mailto:zh.jiyenbekov@adilet.gov.kz)

Madina SMANKULOVA (Ms.), Second Secretary, Permanent Mission, Geneva

KENYA

Catherine BUNYASSI KAHURIA (Ms.), Senior Principal State Counsel, International Law Division, Office of Attorney General and Department of Justice, Nairobi  
[kahurianyassi@yahoo.com](mailto:kahurianyassi@yahoo.com)

LETTONIE/LATVIA

Janis KARKLINS, Ambassador, Permanent Representative, Permanent Mission, Geneva

Liene GRIKE (Ms.), Advisor, Permanent Mission, Geneva

Rémy DARGHOUT, Intern, Permanent Mission, Geneva

LITUANIE/LITHUANIA

Renata RINHAUSKIENE (Ms.), Counsellor, Permanent Mission, Geneva

MALAISIE/MALAYSIA

Kamal BIN KORMIN, Senior Director of Patent, Patent Division, Intellectual Property Corporation of Malaysia (MyIPO), Ministry of Domestic Trade, Cooperatives and Consumerism, Kuala Lumpur  
[kamal@myipo.gov.my](mailto:kamal@myipo.gov.my)

MEXIQUE/MEXICO

Jorge LOMÓNACO, Embajador, Representante Permanente, Misión Permanente, Ginebra

Raúl HEREDIA ACOSTA, Embajador, Representante Permanente Adjunto, Misión Permanente, Ginebra

Emelia HERNÁNDEZ PRIEGO (Sra.), Subdirectora Divisional, Subdirección Divisional de Examen de Fondo de Patentes, Áreas Biotecnológica, Farmacéutica y Química, Dirección Divisional de Patentes, Instituto Mexicano de la Propiedad Industrial (IMPI), Ciudad de México  
[emelia.hernandez@impi.gob.mx](mailto:emelia.hernandez@impi.gob.mx)

Juan Carlos MORALES VARGAS, Subdirector Divisional, Subdirección Divisional de Asuntos Multilaterales y Cooperación Técnica Internacional, Instituto Mexicano de la Propiedad Industrial (IMPI), Ciudad de México  
[juancarlos.morales@impi.gob.mx](mailto:juancarlos.morales@impi.gob.mx)

María del Pilar ESCOBAR BAUTISTA (Sra.), Consejera, Misión Permanente, Ginebra

Sara MANZANO MERINO (Sra.), Asesora, Misión Permanente, Ginebra

MONTÉNÉGRO /MONTENEGRO

Duška PEROVIĆ (Ms.), Assistant Director, Intellectual Property Office of Montenegro, Podgorica

Tamara BRAJOVIC (Ms.), First Counsellor, Permanent Mission, Geneva

MOZAMBIQUE

Margo BAGLEY (Ms.), Professor of Law, Emory University, Atlanta  
[margo.bagley@gmail.com](mailto:margo.bagley@gmail.com)

NAMIBIE/NAMIBIA

Pierre DU PLESSIS, Senior Consultant, Centre for Research Information Action in Africa-Southern Africa Development and Consulting, Windhoek  
[pierre.sadc@gmail.com](mailto:pierre.sadc@gmail.com)

NICARAGUA

Hernán ESTRADA ROMÁN, Embajador, Representante Permanente, Misión Permanente, Ginebra

Jenny ARANA VIZCAYA (Sra.), Primer Secretario, Misión Permanente, Ginebra

NIGER

Amadou TANKOANO, professeur de droit de propriété industrielle, Faculté des sciences économiques et juridiques, Université Abdou Moumouni de Niamey, Niamey

NIGÉRIA/NIGERIA

Peters EMUZE, Minister, Deputy Permanent Representative, Permanent Mission, Geneva

Chidi OGUAMANAM, Professor of Law, University of Ottawa, Ottawa

Ruth OKEDJI (Ms.), Professor of Law, University of Minnesota, Minneapolis

Chichi UMESI (Ms.), First Secretary, Permanent Mission, Geneva

NORVÈGE/NORWAY

Jostein SANDVIK, Director, Legal and International Affairs, Norwegian Industrial Property Office (NIPO), Oslo  
[isa@patentstyret.no](mailto:isa@patentstyret.no)

Jon Petter GINTAL, Head of Section, Sámi Parliament of Norway, Karasjok  
[jon.petter.gintal@samediggi.no](mailto:jon.petter.gintal@samediggi.no)

NOUVELLE-ZÉLANDE/NEW ZEALAND

Ema HAO'ULI (Ms.), Policy Advisor, Business Law Department, Ministry of Business, Innovation and Employment, Wellington  
[ema.haouli@mbie.govt.nz](mailto:ema.haouli@mbie.govt.nz)

Kate Lin SWAN (Ms.), Second Secretary, Permanent Mission, Geneva

OUZBÉKISTAN/UZBEKISTAN

Muyassar UMIROVA (Ms.), Chief State Patent Examiner, Agency on Intellectual Property of the Republic of Uzbekistan, Tashkent  
[m.umirova@ima.uz](mailto:m.umirova@ima.uz)

PAKISTAN

Muhammad ISHAQ, Director, Commerce Division, Intellectual Property Organization (IPO), Islamabad  
[muhammad.ishaq@ipo.gov.pk](mailto:muhammad.ishaq@ipo.gov.pk)

Fareha BUGTI (Ms.), First Secretary, Permanent Mission, Geneva

PARAGUAY

Raquel PEREIRA FARINA (Sra.), Agregado, Misión Permanente, Ginebra  
[rpereira@misionparaguay.ch](mailto:rpereira@misionparaguay.ch)

Marcial ESPÍNOLA, Primer Secretario, Misión Permanente, Ginebra

Roberto RECALDE, Segundo Secretario, Misión Permanente, Ginebra  
[rrecalde@misionparaguay.ch](mailto:rrecalde@misionparaguay.ch)

PÉROU/PERU

Sara QUINTEROS MALPARTIDA (Sra.), Coordinadora de Conocimientos Colectivos y Variedades Vegetales, Dirección de Invenciones y Nuevas Tecnologías, Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPÍ), Lima  
[squinteros@indecopi.gob.pe](mailto:squinteros@indecopi.gob.pe)

Luis MAYAUTE, Ministro Consejero, Misión Permanente, Ginebra

PHILIPPINES

Jeanette FLORITA (Ms.), Director IV, National Commission on Indigenous Peoples (NCIP), Office of the President, Quezon City

Cecilia PICACHE (Ms.), Head, Intangible Cultural Heritage Unit, National Commission for Culture and the Arts, Manila  
[cvpicache@yahoo.com](mailto:cvpicache@yahoo.com)

Arthur HERMAN, Chief, Litigation and Adjudication Division, Legal Affairs Office, National Commission on Indigenous Peoples, Office of the President, Quezon City  
[akherman1965@yahoo.com](mailto:akherman1965@yahoo.com)

Theresa TENAZAS (Ms.), Legal Officer, Biodiversity Management Bureau, Department of Environment and Natural Resources, Quezon City  
[t\\_tenazas@yahoo.com](mailto:t_tenazas@yahoo.com)

Arnel TALISAYON, First Secretary, Permanent Mission, Geneva  
[agtalisayon@gmail.com](mailto:agtalisayon@gmail.com)

Jayroma BAYOTAS (Ms.), Attaché, Permanent Mission, Geneva  
[jheng0503bayotas@gmail.com](mailto:jheng0503bayotas@gmail.com)

POLOGNE/POLAND

Wojciech PIATKOWSKI, Minister Counsellor, Permanent Mission, Geneva

Anna MLEKO (Ms.), Intern, Permanent Mission, Geneva  
[annazmleko@gmail.com](mailto:annazmleko@gmail.com)

RÉPUBLIQUE DE CORÉE/REPUBLIC OF KOREA

YOON Soon Duck (Ms.), Senior Researcher, Traditional Knowledge Department, Rural Development Administration (RDA), Wanju-Gun  
[rdaysd@korea.kr](mailto:rdaysd@korea.kr)

JEONG Myeong Cheol, Researcher, Rural Environment and Resources Division, Department of Agricultural Environment, National Academy of Agricultural Science, Wanju-Gun  
[jmc6807@korea.kr](mailto:jmc6807@korea.kr)

KWAK Choong Mok, Research Specialist, Korea Institute of Intellectual Property (KIIP), Seoul  
[cmkwak@kiip.re.kr](mailto:cmkwak@kiip.re.kr)

YUN Kyuseon (Ms.), Expert, Korean Intellectual Property Office (KIPO), Daejeon

RÉPUBLIQUE DE MOLDOVA/REPUBLIC OF MOLDOVA

Maria ROJNEVSCHI (Ms.), Head, Promotion and External Relations Department, State Agency on Intellectual Property (AGEPI), Chisinau  
[maria.rojnevschi@agepi.gov.md](mailto:maria.rojnevschi@agepi.gov.md)

RÉPUBLIQUE TCHÈQUE/CZECH REPUBLIC

Evžen MARTÍNEK, Lawyer, International Department, Industrial Property Office, Prague  
[emartinek@upv.cz](mailto:emartinek@upv.cz)

ROUMANIE/ROMANIA

Mirela GEORGESCU (Ms.), Head, Chemistry and Pharmaceutical Division, State Office for Inventions and Trademarks (OSIM), Bucharest

Constanta MORARU (Ms.), Head, Legal and International Cooperation Service, Legal Department, State Office for Inventions and Trademarks (OSIM), Bucharest

ROYAUME-UNI/UNITED KINGDOM

Ian GREENE, Senior Policy Advisor, International Policy Directorate, Intellectual Property Office (IPO), London

Andrew SADLER, Adviser, Copyright and Enforcement Directorate, Intellectual Property Office (IPO), Cwmbran  
[andrew.sadler@ipo.gov.uk](mailto:andrew.sadler@ipo.gov.uk)

SÉNÉGAL/SENEGAL

Iamine Ka MBAYE, premier secrétaire, Mission permanente, Genève



SLOVAQUIE/SLOVAKIA

Radka LIČKOVÁ (Ms.), Expert, Legal and International Affairs Department, Industrial Property Office of the Slovak Republic, Banská Bystrica

SRI LANKA

Ravinatha P. ARYASINHA, Ambassador, Permanent Representative, Permanent Mission, Geneva

Kamburawalakds RANAWEERA, Director, Bandaranaike Memorial Ayurvedic Research Institute, Colombo

Dilini GUNASEKERA (Ms.), Second Secretary, Permanent Mission, Geneva

SUÈDE/SWEDEN

Johan AXHANM, Special Government Adviser, Division for Intellectual Property and Transport Law, Ministry of Justice, Stockholm

John BÄCKNÄS, First Secretary, Permanent Mission, Geneva

SUISSE/SWITZERLAND

Martin GIRSBERGER, chef, Développement durable et coopération internationale, Division droit et affaires internationales, Institut fédéral de la propriété intellectuelle (IPI), Berne

Marco D'ALESSANDRO, conseiller juridique, Division droit et affaires internationales, Institut fédéral de la propriété intellectuelle (IPI), Berne

Reynald VEILLARD, conseiller, Mission permanente, Genève

TADJIKISTAN/TAJIKISTAN

Parviz MIRALIEV, Head, Department of International Registration of Trademarks, State Institution National Center for Patent Information, Ministry of Economy Development and Trade of the Republic of Tajikistan, Dushanbe

Parviz EMOMOV, Second Secretary, Permanent Mission, Geneva

THAÏLANDE/THAILAND

Usana BERANANDA, Minister, Deputy Permanent Representative, Permanent Mission to the World Trade Organization (WTO), Geneva  
[usana@thaiwto.com](mailto:usana@thaiwto.com)

Navarat TANKAMALAS (Ms.), Minister Counsellor, Permanent Mission to the World Trade Organization (WTO), Geneva  
[navarat@thaiwto.com](mailto:navarat@thaiwto.com)

Tanit CHANGTHAVORN, Executive Director, Institute for Technology and Innovation Management, Mahidol University, Nakhonpathom  
[t.changthavorn@gmail.com](mailto:t.changthavorn@gmail.com)

Warissanee MANYAWUTH (Ms.), Provincial Public Prosecutor, Department of Intellectual Property and International Trade Litigation, Office of the Attorney General, Bangkok  
[inter.affairs@hotmail.com](mailto:inter.affairs@hotmail.com)

Veerapong MALAI, Vice President, Innovation and Creative Entrepreneurship Development, Ministry of Natural Resources and Environment, Bangkok

Savitri SUWANSATHIT (Ms.), Advisor, Office of the Permanent Secretary, Ministry of Culture, Bangkok  
[sa\\_vitri2000@yahoo.com](mailto:sa_vitri2000@yahoo.com)

Krithpaka BOONFUENG (Ms.), Director, Legal Development and Intellectual Property Management Group, Biodiversity-Based Economy Development Office (BEDO), Ministry of Natural Resource and Environment, Bangkok  
[krithpaka@bedo.or.th](mailto:krithpaka@bedo.or.th)

Treechada AUNRUEN (Ms.), Cultural Officer, Office of the Permanent Secretary, Ministry of Culture, Bangkok  
[kamthekop@yahoo.com](mailto:kamthekop@yahoo.com)

Titaporn LIMPISVASTI (Ms.), Cultural Officer, Department of Cultural Promotion, Ministry of Culture, Bangkok  
[titamod94@hotmail.com](mailto:titamod94@hotmail.com)

Sukanya YENSUK (Ms.), Cultural Officer, Professional Level, Department of Cultural Promotion, Ministry of Culture, Bangkok  
[sukanyaboom@hotmail.com](mailto:sukanyaboom@hotmail.com)

Kitiyaporn SATHUSEN (Ms.), Trade Officer, Department of Intellectual Property, Ministry of Commerce, Nonthaburi  
[sathusen\\_k@hotmail.com](mailto:sathusen_k@hotmail.com)

Sudkhet BORIBOONSRI, Counsellor, Permanent Mission to the World Trade Organization (WTO), Geneva  
[sudkhet@thaiwto.com](mailto:sudkhet@thaiwto.com)

#### TUNISIE/TUNISIA

Anis KADDOUR, chef de service, Dépôt et documentation, Organisme tunisien des droits d'auteur et des droits voisins (OTDAV), Tunis  
[kaddour.enis@gmail.com](mailto:kaddour.enis@gmail.com)

Nasreddine NAOUALI (Mme), conseillère, Mission permanente, Genève

TURQUIE/TURKEY

Osman GOKTURK, Second Secretary, Permanent Mission to the World Trade Organization (WTO), Geneva  
[osman.gokturk@mfa.gov.tr](mailto:osman.gokturk@mfa.gov.tr)

TUVALU

Losaline TEO (Ms.), Crown Counsel, Office of the Attorney General, Office of the Prime Minister, Funafuti  
[losa.teo92@gmail.com](mailto:losa.teo92@gmail.com)

YÉMEN/YEMEN

Kamal AL-KHAMERI, Director General, Trade Agreements Department, Ministry of Industry and Trade, Sana'a  
[kamal.alkhameri@gmail.com](mailto:kamal.alkhameri@gmail.com)

ZIMBABWE

Taonga MUSHAYAVANHU, Ambassador, Permanent Representative, Permanent Mission, Geneva  
[zimbabwemission@bluewin.ch](mailto:zimbabwemission@bluewin.ch)

Roda Tafadzwa NGARANDE (Ms.), Counsellor, Permanent Mission, Geneva

II. DÉLÉGATION SPÉCIALE/SPECIAL DELEGATION

UNION EUROPÉENNE (UE)/EUROPEAN UNION (EU)

Margreet GROENENBOOM (Ms.), Policy Officer, Industrial Property, European Commission, Brussels

Oliver HALL ALLEN, First Counsellor, Permanent Delegation to the United Nations, Geneva

Lucas VOLMAN, Intern, Permanent Delegation to the United Nations, Geneva

III. OBSERVATEURS/OBSERVERS

PALESTINE

Sami M.K. BATRAWI, Director General, Intellectual Property Unit, Ministry of Culture, Ramallah

IV. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/  
INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

CENTRE SUD (CS)/SOUTH CENTRE (SC)

Yujiao CAI (Ms.), Intern, Development, Innovation and Intellectual Property Programme,  
Geneva

GENERAL SECRETARIAT OF THE ANDEAN COMMUNITY

Elmer SCHIALER, Director General, Lima  
[eschialer@comunidadandina.org](mailto:eschialer@comunidadandina.org)

ORGANISATION DE COOPÉRATION ISLAMIQUE (OCI)/ORGANIZATION OF ISLAMIC  
COOPERATION (OIC)

Halim GRABUS, Counsellor, Geneva

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

Alessia VOLPE (Ms.), Coordinator, International Cooperation, Munich

ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE (OIF)

Oumou WARR (Mme), observateur, Genève

UNION AFRICAINE (UA)/AFRICAN UNION (AU)

Georges Remi NAMEKONG, Senior Economist, Geneva

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

Assembly of Armenians of Western Armenia, The  
Simon DARONIAN, conseiller, Bagneux  
Lydia MARGOSSIAN (Mme), déléguée, Bagneux  
[haybachdban@wanadoo.fr](mailto:haybachdban@wanadoo.fr)

Association européenne des étudiants en droit (ELSA International)/European Law Students'  
Association (ELSA International)  
Siri Anna ALSMAK (Ms.), Head of Delegation, Brussels  
Giacomo BENAGLIA, Delegate, Brussels  
Ilaria ERCOLE (Ms.), Delegate, Brussels  
Eleni GERASOUDI (Ms.), Delegate, Brussels  
Lia HARIZANOVA (Ms.), Delegate, Brussels

Australian Centre for Intellectual Property in Agriculture (ACIPA)

Brendan Michael TOBIN, Expert Indigenous Right, Brisbane, Queens Land

Center for Multidisciplinary Studies Aymara (CEM-Aymara)

Q'apaj CONDE CHOQUE, Legal Officer, La Paz

Centre de documentation, de recherche et d'information des peuples autochtones (DoCip)/Indigenous Peoples' Center for Documentation, Research and Information (DoCip)

Karen PFEFFERLI (Ms.), Coordinator, Geneva

[karen@docip.org](mailto:karen@docip.org)

María BAYLE RUBIO, Interpreter, Geneva

Bianca SUÁREZ PHILLIPS (Ms.), Interpreter, Geneva

[biancaphillips101@gmail.com](mailto:biancaphillips101@gmail.com)

Pascal ANGST (Ms.), Information Coordinator, Geneva

[pascal@docip.org](mailto:pascal@docip.org)

Miguel BETTI, Intern, Geneva

Centre du commerce international pour le développement (CECIDE)/International Trade Center for Development (CECIDE)

Biro DIAWARA, représentant, chef du bureau, Genève

[cecide.icde@gmail.com](mailto:cecide.icde@gmail.com)

Centre international pour le commerce et le développement durable (ICTSD)/International Center for Trade and Sustainable Development (ICTSD)

Pedro ROFFE, Senior Associate, Innovation, Technology and Intellectual Property Programme, Geneva

Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ)

Hiha KANUI ALLANA (Sra.), Delegado, Waipawa

Rosario LUQUE GIL (Sra.), Delegada, Ginebra

Comité consultatif mondial des amis (CCMA)/Friends World Committee for Consultation (FWCC)

Susan BRAGDON (Ms.), Programme Representative, Geneva

[sbragdon@quno.ch](mailto:sbragdon@quno.ch)

Nora MEIER (Ms.), Programme Assistant, Geneva

[nmeier@quno.ch](mailto:nmeier@quno.ch)

Chelsea SMITH (Ms.), Research Assistant, Geneva

[chelseasmth204@gmail.com](mailto:chelseasmth204@gmail.com)

Copyright Agency Limited

Patricia ADJEI (Ms.), Indigenous Lawyer, Sydney

[padjei@copyright.com.au](mailto:padjei@copyright.com.au)

CropLife International (CROPLIFE)

Tatjana SACHSE (Ms.), Legal Adviser, Geneva

Fédération internationale de la vidéo (IFV)/International Video Federation (IVF)

Benoît MÜLLER, Legal Advisor, Brussels

Fédération internationale de l'industrie du médicament (FIIM)/International Federation of Pharmaceutical Manufacturers Associations (IFPMA)

Guilherme CINTRA, Senior Manager, IP and Trade, Geneva  
Claus GAWEL, Legal Advisor, Geneva  
Axel BRAUN, Representative, Roche  
Andrew JENNER, Representative, Geneva

Foundation for Aboriginal and Islander Research Action (FAIRA)

Robert Leslie MALEZER, Chairperson, Board of Directors, Karalee  
[les.malezer@gmail.com](mailto:les.malezer@gmail.com)  
James Kenneth WALKER, Expert, Runcorn

France Freedoms - Danielle Mitterrand Foundation

Cyril COSTES, membre du comité scientifique sur la biopiraterie, Strasbourg  
[cyril@costes-avocat.fr](mailto:cyril@costes-avocat.fr)

Health and Environment Program (HEP)

Madeleine SCHERB (Mme), présidente, Genève  
[madeleine@health-environment-program.org](mailto:madeleine@health-environment-program.org)  
Pierre SCHERB, conseiller juridique, Genève  
[avocat@pierrescherb.ch](mailto:avocat@pierrescherb.ch)

Incomindios Switzerland

June LORENZO (Ms.), Consultant, Paguete  
[junellorenzo@aol.com](mailto:junellorenzo@aol.com)

Indian Council of South America (CISA)

Tomás CONDORI, Member, Basel  
Roch MICHALUSZKO, Secretary, Geneva

Indian Movement - Tupaj Amaru

Lázaro PARY, Coordinador, Potosi

Indigenous ICT Task Force (IITF)

Ann-Kristin HAKANSSON (Ms.), Member, Geneva  
[akigua@telia.com](mailto:akigua@telia.com)

Intellectual Property Owners Association (IPO)

Manisha DESAI (Ms.), Assistant General Patent Counsel, Eli Lilly and Company, Indianapolis

International Committee for the Indians of the Americas (Incomindios)

Herson HUINCA PIUTRIN, Researcher, Paris

International Indian Treaty Council

Estebancio CASTRO DÍAZ, Consultant, Panama

International Trademark Association (INTA)

Bruno MACHADO, Representative, Rolle  
[bruno.machado@bluewin.ch](mailto:bruno.machado@bluewin.ch)

Instituto Indígena Brasileiro da Propriedade Intelectual (InBraPi)

Lucía Fernanda INACIO BELFORT SALES (Sra.), Experto, Núcleo de Abogados Indígenas, Ronda Alta

Kanuri Development Association  
Babagana ABUBAKAR, Vice President, Maiduguri  
[babaganabubakar2002@yahoo.com](mailto:babaganabubakar2002@yahoo.com)

Korea Institute of Oriental Medicine (KIOM)  
Ui Min JERNG, Senior Researcher, Daejeon  
[breeze@kiom.re.kr](mailto:breeze@kiom.re.kr)  
Wung Seok CHA, Professor, Seoul  
Ohmin KWON, Expert, Daejeon  
[fivemink@kiom.re.kr](mailto:fivemink@kiom.re.kr)

Massai Experience  
Zohra AI KACI ALI (Mme), présidente, Genève  
Lay TSHIALA, membre, Genève

Pacific Island Museums Association (PIMA)  
Pita Kalesita NIUBALAVU, Barrister and Solicitor, Nabua

Proyecto ETNOMAT, Departamento de Antropología Social, Universidad de Barcelona (España)  
Mònica MARTÍNEZ MAURI (Sra.), Directora, Barcelona

Sámi Parliamentary Council (SPC)  
Inka Saara Inari ARTTIJEFF (Ms.), Adviser to the President, Inari  
[inka-saara.arttijeff@samediggi.fi](mailto:inka-saara.arttijeff@samediggi.fi)

Tebtebba Foundation - Indigenous Peoples' International Centre for Policy Research and Education  
Jennifer TAULI CORPUZ (Ms.), Legal Coordinator, Quenzon City

Traditions pour demain/Traditions for Tomorrow  
Diego GRADIS, président exécutif, Rolle  
[tradi@tradi.info](mailto:tradi@tradi.info)  
Christiane JOHANNOT-GRADIS (Mme), vice-présidente, Rolle  
[c.gradis@tradi.info](mailto:c.gradis@tradi.info)  
Claire LAURANT (Mme), déléguée, Rolle  
[tradi@tradi.info](mailto:tradi@tradi.info)

Tulalip Tribes of Washington Governmental Affairs Department  
Preston HARDISON, Policy Analyst, Washington D.C.

VI. GROUPE DES COMMUNAUTÉS AUTOCHTONES ET LOCALES/  
INDIGENOUS PANEL

Laila Susanne VARS (Ms.), Director, GALDU Resource Centre for the Rights of Indigenous Peoples, Kautokeino

Jennifer TAULI CORPUZ (Ms.), Legal Coordinator, Tebtebba – Indigenous Peoples' International Center for Policy Research and Education, Quezon City

Jim WALKER, Member of the Board of Directors, Murri Mura Aboriginal Corporation and the Foundation for Aboriginal and Islander Research Action, Brisbane

VII. BUREAU/OFFICERS

Président/Chair: Ian GOSS (Australie/Australia)

Vice-présidents/Vice-Chairs: Jukka LIEDES (Finlande/Finland)

Robert Matheus Michael TENE (Indonésie/Indonesia)

Secrétaire/Secretary: Wend WENDLAND (OMPI/WIPO)



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

Francis GURRY, directeur général/Director General

Minelik Alemu GETAHUN, sous-directeur général/Assistant Director General

Edward KWAKWA, directeur principal, Département des savoirs traditionnels et des défis mondiaux/Senior Director, Department for Traditional Knowledge and Global Challenges

Wend WENDLAND, directeur, Division des savoirs traditionnels/Director, Traditional Knowledge Division

Begoña VENERO AGUIRRE (Mme/Ms.), conseillère principale, Division des savoirs traditionnels/Senior Counsellor, Traditional Knowledge Division

Simon LEGRAND, conseiller, Division des savoirs traditionnels/Counsellor, Traditional Knowledge Division

Claudio CHIAROLLA, juriste, Division des savoirs traditionnels/Legal Officer, Traditional Knowledge Division

Daphne ZOGRAFOS JOHNSON (Mme/Ms.), juriste, Division des savoirs traditionnels/Legal Officer, Traditional Knowledge Division

Fei JIAO (Mlle/Ms.), administratrice adjointe de programme, Division des savoirs traditionnels/Associate Program Officer, Traditional Knowledge Division

Hai-Yuean TUALIMA (Mlle/Ms.), boursier à l'intention des peuples autochtones, Division des savoirs traditionnels/WIPO Indigenous Fellow, Traditional Knowledge Division

Alice MANERO (Mlle/Ms.), stagiaire, Division des savoirs traditionnels/Intern, Traditional Knowledge Division

Olivier TALPAIN, collaborateur SYNI, Division des savoirs traditionnels/SYNY Collaborator, Traditional Knowledge Division

[Annex II follows]

## **Indicative List of Outstanding/Pending Issues to be Tackled/Solved at the Next Session**

### **1. Use and meanings of certain terms and concepts**

References to “protection” and “protected” traditional knowledge and relationship with eligibility criteria / scope of protection.

References to “innovation” and “tradition-based creation and innovation”.

Terms to denote nature of the harm for which protection may be sought, such as “misappropriation”, “misuse”, “unauthorized use”, “unlawful appropriation” and “illicit appropriation”.

Terms describing or relevant to extent of diffusion of the traditional knowledge, such as “public domain”, “publicly available”, “secret”, “sacred”, “narrowly diffused” and “widely diffused”.

Terms relevant to beneficiaries, such as “[Indigenous [peoples]]”.

### **2. Subject matter**

Where and how to include criteria for eligibility.

Whether to include examples or “fields” of traditional knowledge and, if so, which ones.

### **3. Beneficiaries**

Whether to include “nations” and/or “States”.

Role and nature of a “competent authority” as a beneficiary, if any.

### **4. Scope of protection**

“Rights-based” and/or “measures-based” approaches.

Whether a “tiered approach” is feasible, and, if so, how it would be formulated.

Economic and/or moral rights.

Roles, nature and design of “complementary measures”, including databases, if any.

Disclosure requirement, and possible link with text on genetic resources.

### **5. Exceptions and limitations<sup>1</sup>**

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<sup>1</sup> Issues 5 to 13 were not discussed at IGC 31.

- 6. Sanctions, remedies and exercise of rights / application**
- 7. Administration of rights/interests**
- 8. Term of protection / rights**
- 9. Formalities**
- 10. Transitional measures**
- 11. Relationship with other international agreements**
- 12. National treatment**
- 13. Transboundary cooperation**

[End of Annexes and of document]